IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

COAST COMMUNITY COLLEGE DISTRICT, et al.
Plaintiffs and Appellants,

v.

COMMISSION ON STATE MANDATES,
Defendant and Respondent,

DEPARTMENT OF FINANCE,
Real Party in Interest and Respondent.

EXEMPT FROM FILING FEES (Gov. Code, § 6103)

Case No. S262663

Third District Court of Appeal, Case No. C080349
Sacramento County Superior Court, Case No. 34-2014-80001842
Honorable Christopher E. Krueger, Judge

COMMISSION ON STATE MANDATES' OPENING BRIEF ON THE MERITS

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I. INTRODUCTION

This case concerns article XIII B, section 6 of the California Constitution and whether community college districts are entitled to reimbursement from the state to comply with the statutes and regulations pled in the consolidated test claim, "*Minimum Conditions for State Aid.*" The Commission on State Mandates ("Commission") partially approved the *Minimum Conditions for State Aid* test claim filed by Los Rios, Santa Monica, and West Kern Community College Districts ("claimants"), as a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution, beginning July 1, 2001. Several community college districts eligible to claim reimbursement for the program, including claimant Santa Monica Community College District, ("Districts") filed a petition for writ of mandate in accordance with Government Code section 17559 challenging the portion of the Commission's decision that denied reimbursement. Failing in the trial court, the Districts appealed to the Court of Appeal, Third Appellate District, where they were partially successful. The decision of the appellate court contains several errors of law and on June 10, 2020, the Commission and the Department of Finance each petitioned this Court for review.

On August 12, 2020, this Court granted the petitions for review with the following order:

> The parties are ordered to brief the following issues:
>
> 1. Whether regulations that establish minimum conditions entitling California community college districts to receive state aid constitute a reimbursable state mandate within the meaning of article XIII B, section 6 of the California Constitution.
> 2. Whether a court lacks jurisdiction under article XIII B, section 6 of the California Constitution to make subvention findings on statutes that were not specifically identified in an initial test claim.

3. Whether a court lacks jurisdiction to remand a test claim based on a statute that was the subject of a prior final decision by the Commission on State Mandates.

The Commission correctly denied reimbursement for community college districts to comply with the minimum condition regulations set forth in California Code of Regulations, title 5, sections 51000 through 51027, on the ground that the regulations do not impose a state mandated program within the meaning of article XIII B, section 6 of the California Constitution. The regulations establish minimum *conditions*, satisfaction of which entitles a district maintaining community colleges to receive state aid, which may or may not be withheld by the Chancellor of the California Community Colleges if a college does not comply. Thus, the language itself does not impose strict legal compulsion forcing community college districts to comply. Moreover, no evidence was submitted during the test claim process to support a finding of practical compulsion, showing that a failure to comply with the minimum conditions results in certain and severe penalties or other draconian consequences, leaving the community college districts no choice but to comply in order to carry out their core essential functions.

In addition, and in accordance with Government Code statutes that implement article XIII B, section 6, the Commission made findings on only those statutory and regulatory provisions that were pled in the *Minimum Conditions for State Aid* test claim. The claimants did not plead Education Code sections 76300 through 76395 or Education Code section 25430.12, and thus to remand those code sections or base a mandate finding on those code sections is incorrect as a matter of law.

Finally, only those statutes and regulations that were not already subject to a final adjudication may be remanded to the Commission for consideration under article XIII B, section 6. Thus, the court lacked

jurisdiction to remand Education Code section 76300 to the Commission because that section was pled in a separate test claim and fully considered and adjudicated in a prior final decision of the Commission. Neither the court, nor the Commission, have jurisdiction to retry a question that has become final.

The Commission's decisions on these issues are correct as a matter of law and should be upheld.

II. STATEMENT OF THE CASE

A. Overview of the Mandates Process.

Article XIII B, section 6 of the California Constitution requires, in relevant part, that "[w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse the local government for the costs of the program or increased level of service…." Article XIII B, section 6 "recognizes that articles XIII A and XIII B severely restrict the taxing and spending powers of local government." (*Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 736 (*Kern High School Dist.*).) Article XIII A was added to the California Constitution in 1978 to limit the power of state and local governments to impose new taxes. In 1979, article XIII B was added to the Constitution to place annual spending limits on state and local governments. (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486.) The two provisions "work in tandem, together restricting California governments' power both to levy and to spend [taxes] for public purposes." (*Ibid.*) Thus, article XIII B, section 6 was specifically intended to prevent the state from forcing new programs on local government or increasing the level of service provided by local government which require the expenditure of limited tax revenue. (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *County of Fresno v. State of California, supra,* 53 Cal.3d 482, 487.) The

costs reimbursed by the state under article XIII B, section 6 for state-mandated programs are excluded from the local governments' annual spending limit. (Cal. Const., art. XIII B, § 8(a) and (b).)

In 1984, the Legislature enacted Government Code section 17500 et seq. and created the Commission as a quasi-judicial body with sole and exclusive jurisdiction to resolve disputes over the existence of state-mandated local programs pursuant to article XIII B, section 6. (Gov. Code, §§ 17500, 17552.) The process begins when a local agency or school district (defined to include community college districts) files a test claim with the Commission. (Gov. Code, §§ 17519, 17521, 17551, 17553.) A test claim is the "first claim filed alleging that a particular statute or executive order (defined to include regulations) imposes reimbursable costs mandated by the state." (Gov. Code, §§ 17516, 17521.) The law requires that the test claim specifically identify each section of a chaptered bill or executive order and the effective date and register number of regulations alleged to impose a mandate. (Gov. Code, § 17553(b)(1); Cal. Code Regs., tit. 2, former § 1183(d)(1).) The law also requires that the test claim be filed within the statute of limitations. (Gov. Code, § 17551.) At the time the test claims in this case were filed, Government Code section 17551 imposed a deadline of September 30, 2003, to file a test claim on any statute, regulation, or executive order enacted after January 1, 1975, and effective before January 1, 2002. (Gov. Code, § 17551, as amended by Stats. 2002, ch. 1124.)[1] The test claim process provides for the presentation of written evidence and testimony by the claimant, the Department of Finance, and any other affected department or agency, and

[1] Currently, test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later. (Gov. Code, § 17551(c).)

any other interested party or person. (Gov. Code, § 17553(a)(1); Cal. Code Regs., tit. 2, §§ 1183.1 et seq., 1187.5 et seq.) The test claim process functions similarly to a class action and has been established to expeditiously resolve disputes affecting multiple agencies. (*Kinlaw v. State of California* (1991) 54 Cal.3d 326, 332; *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1807.)

If the Commission approves the test claim and finds that the statutes or executive orders pled in the test claim impose a reimbursable state-mandated program under article XIII B, section 6, it adopts parameters and guidelines authorizing the test claimant and other similar local entities (in this case community college districts) to file reimbursement claims with the State Controller's Office for the costs incurred to comply with the state-mandated program during the period of reimbursement. (Gov. Code, §§ 17557, 17558, 17560, 17561.) The period of reimbursement is determined pursuant to Government Code section 17557(e), which provides that "[a] test claim shall be submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year." After the adoption of parameters and guidelines, the Commission adopts a statewide cost estimate and reports the estimated statewide costs of the state-mandated program to the Legislature. (Gov. Code, §§ 17553, 17600.)

Reimbursement under article XIII B, section 6 is not required simply because local government incurs increased costs to comply with a statute or executive order. (*Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.) Rather, for reimbursement to be constitutionally required all of the following legal elements must be satisfied with respect to *each* statute or executive order pled in the test claim: (1) the Legislature or any state agency mandates local government to perform an activity; (2) the mandated activity either carries out the governmental function of providing a service to the public or imposes unique requirements on local government

that do not apply generally to all residents and entities in the state; (3) the mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and increases the level of service provided to the public; and (4) the mandated activity results in the expenditure of increased costs mandated by the state within the meaning of Government Code section 17514 and none of the exceptions in Government Code section 17556 to "costs mandated by the state" apply. (*County of Los Angeles v. State of California, supra*, 43 Cal.3d 46, 56; *Lucia Mar Unified School District v. Honig, supra*, 44 Cal.3d 830, 835; *County of Fresno v. State of California, supra*, 53 Cal.3d 482, 487; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875.) The test claimant has the burden to prove that it is entitled to reimbursement under article XIII B, section 6 and has incurred increased costs mandated by the state. (Evid. Code, § 500; Gov. Code, §§ 17514, 17551(a), 17553.)

B. Overview of California Community College Districts.

Community colleges were established in California in 1907 as extensions of local high schools and were authorized to provide courses that were equivalent to the first two years of a collegiate curriculum. (Former Political Code § 1681 (Stats. 1907, ch. 69).) Community colleges became institutions of postsecondary education with the adoption of the Donahoe Higher Education Act in 1960 which defined public higher education to include all public community colleges, state colleges, and the University of California. (Ed. Code, former §§ 22500-22705 (Stats. 1960, 1st Ex. Sess., ch. 49); renumbered Ed. Code, §§ 66000-67400 (Stats. 1976,

ch. 1010).) There are currently 73 community college districts and 116 community colleges in the State of California.[2]

The long-standing mission of community colleges is set forth in Education Code section 66010.4, which provides that "[t]he California Community Colleges shall, as a primary mission, offer academic and vocational instruction at the lower division level for both younger and older students, including those persons returning to school. Public community colleges shall offer instruction through but not beyond the second year of college. These institutions may grant the associate in arts and the associate in science degree." (Ed. Code, § 66010.4(a).)[3] In addition, community colleges shall offer remedial instruction, instruction in English as a second language, adult noncredit instruction, and support services to help students succeed at the postsecondary level. (Ed. Code, § 66010.4(b).) It is also the mission of community colleges "to advance California's economic growth and global competitiveness through education, training, and services that contribute to continuous work force improvement." (Ed. Code, § 66010.4(b)(3).)

Towards this end, community colleges are authorized to "initiate and carry on any program, activity, or to otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which community college districts are established." (Ed. Code, § 70902(a); Former Ed. Code, § 72233 (Stats. 1976, ch. 1010); Cal. Const., art. IX, § 14.) This general

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[2] <https://www.cccco.edu/About-Us/Board-of-Governors#:~:text=The%20California%20Community%20Colleges%20is,colleges%20that%20constitute%20the%20system> (as of September 1, 2020.)

[3] Education Code section 66010.4 is derived from former Education Code Section 22651, as added by Statutes 1960, chapter 49, 1st extraordinary session.

authority is known as the "permissive code" under which a community college district's governing board can act under its general authority without specific statutory authorization. (*Barnhart v. Cabrillo Community College* (1999) 76 Cal.App.4th 818, 824-825.) Accordingly, community colleges shall establish policies and approve current and long-range academic and facilities plans; develop and approve courses of instruction and educational programs; establish academic standards, probation and dismissal and readmission policies, and graduation requirements not inconsistent with the minimum standards adopted by the state; manage and control district property; establish employment practices, and employ and assign personnel not inconsistent with the minimum standards established by the state; and establish student fees required by law, and, in its discretion, fees authorized by law. (Ed. Code, § 70902(b).)

The State Board of Governors provides general supervision over community college districts and its work "shall at all times be directed to maintaining and continuing, to the maximum degree permissible, local authority and control in the administration of the California Community Colleges." (Ed. Code, § 70901(a), (b).) The Board of Governors shall establish minimum standards for student academics relating to graduation requirements and probation, dismissal, and readmission policies; employment of academic and administrative staff; formation of colleges and districts; credit/no credit classes; and ensuring the right of faculty, staff and students to participate effectively in district and college governance. (Ed. Code, § 70901(b)(1).) The Board of Governors is also responsible for establishing "minimum conditions entitling districts to receive state aid for support of community colleges" and establishing and carrying out "a periodic review of each community college district to determine whether it has met the minimum conditions prescribed by the board of governors." (Ed. Code, § 70901(b)(6).) The Chancellor of the California Community

Colleges is the chief executive officer appointed by the Board of Governors to execute the duties and responsibilities as may be delegated by the Board. (Ed. Code, § 71090.)

Before the passage of Proposition 13 in 1978, funding for community colleges was derived primarily from local real property taxes. (*California Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1526.) Proposition 13 added Article XIII A to the California Constitution limiting the ability of the government to tax real property, which essentially placed the state in control of the allocation of the proceeds and forced the state to assume responsibility for school funding. (*Id.* at p. 1527.) The end result was local governments, K-12 schools, and community colleges were all competing for the same pot of money. (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 244-245.) Since then, several steps have been taken to close the financial gap. Beginning in 1984, community college students were required to pay an enrollment fee. (Ed. Code, § 76500, currently § 76300.) In 1988, Proposition 98 established constitutional minimum funding levels for community colleges and K-12 schools and required a designated portion of general fund monies be set aside to meet those funding levels. (*California Redevelopment Assn. v. Matosantos, supra,* 53 Cal.4th 231, 245; Cal. Const., art. XVI, § 8; Ed. Code §§ 41200 et seq., 84750 et seq.) Proposition 98 set up two tests, later expanded by the passage of Proposition 111 in 1990 to three tests, for determining the mandated minimum funding level for the coming year. The first formula uses a percentage of General Fund revenues appropriated to schools in fiscal year 1986-1987. The second and third formulas use a measure that includes both General Fund revenues and "allocated local proceeds of taxes." (Cal. Const., art. XVI, § 8(b); *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1289-1290.)

Generally, Proposition 98 funds were, and still are, budgeted to provide both categorical restricted funding for certain educational programs and general apportionment funds based on the number of full-time equivalent students and local property tax revenues. (Administrative Record (AR) 3431; see, e.g., Budget Act of 2002, Stats. 2002, ch. 379, Items 6870-001-0001, 6870-101-0001, (AB 425, 2001-2002 Reg. Sess.) at pp. 570-589; Budget Act of 2020, Stats. 2020, ch. 6, Items 6870-001-0001, 6870-101-0001, (SB 74, 2019-2020 Reg. Sess.) at pp. 595-613.) However, not all community college districts receive general apportionment. In a few districts, local property tax and fee revenues alone exceed the districts' annual apportionment obligation. These districts, commonly referred to as "basic aid" or "non-state general fund" districts, are not dependent on state monies to fund enrollment and can keep the excess local revenue and use it for educational programs and services at their discretion. (AR 3429, Comments from the California Community Colleges Chancellor's Office.)

Finally, community colleges also receive funding from the California Lottery (AR 3431; Cal. Const. art. IV, § 19(d); Gov. Code., § 8880.5(b).), federal funding (see, e.g., Budget Act of 2002, Stats. 2002, ch. 379, Items 6110-001-0890, 6110-166-0890, (AB 425, 2001-2002 Reg. Sess., at pp. 410, 466); Budget Act of 2020, Stats. 2020, ch. 6, Items 6100-001-0890, 6100-062-0890, (SB 74, 2019-2020 Reg. Sess., at pp. 490, 504), and community college districts are authorized to assess additional student fees for costs other than enrollment, such as for transportation, instructional materials, fees to audit a course, health fees, and building and operating fees. (Ed. Code, § 76350 et seq.).

C. Test Claims at Issue and Decision of the Commission.

In June 2003, the claimants filed two test claims, 02-TC-25 (AR 459-522) and 02-TC-31 (AR 523-1945) seeking reimbursement for costs associated with 27 Education Code sections enacted and amended by 33

statutes between 1975 and 2002; 138 title 5 regulations sections adopted or amended by 35 registers (1971 through 2003 registers); and two alleged executive orders, all of which prescribe minimum standards and conditions for the formation and basic operation of community colleges. (AR 16-17.)

The test claims were consolidated and on May 26, 2011, the Commission adopted a statement of decision partially approving the consolidated test claim as a reimbursable state-mandated program with a reimbursement period beginning July 1, 2001. (AR 4-170, 2594.) The plain language of the statutes and regulations approved by the Commission imposed state-mandated activities on community colleges requiring them to establish procedures to ensure faculty and student participation in district and college governance; design, adopt, and implement policies intended to facilitate successful matriculation of students from community colleges through the University of California and the California State University and establish transfer counseling centers for students; review vocational or occupational training programs offered by the district to ensure that each program meets a documented labor market demand; adopt regulations governing the standards of scholarship and determine a uniform grading practice; establish policies for and approve educational programs, curriculum, degrees and certificates; and publish a description of each course that is clear and understandable to the prospective student in the official catalog, schedule of classes, and addenda. (AR 156-170.) On April 19, 2013, the Commission adopted parameters and guidelines. (AR 171-239.) On January 24, 2014, a statewide cost estimate was adopted, estimating statewide reimbursable costs of $27,211,419 for the approved reimbursable state-mandated activities for fiscal years 2001-2001 through 2011-2012. (AR 240-458.)

The Commission denied reimbursement for community college districts to comply with California Code of Regulations, title 5, sections

51000 through 51027 ("minimum conditions" or "minimum condition regulations"), which establish the minimum conditions adopted in accordance with Education Code section 70901(b)(6), on the ground that there was no evidence in the record that the requirements were mandated by the state. (AR 28-36.) Section 70901(b)(6) requires the Board of Governors to "[e]stablish minimum conditions entitling districts to receive state aid for support of community colleges" and to periodically review each community college district to determine whether it has met the minimum conditions prescribed by the Board. If the conditions have not been met, the Chancellor shall take one or more actions ranging from doing nothing to withholding "all or part of the district's state aid," with the approval of the Board of Governors. (Cal. Code Regs., tit. 5, §§ 51100, 51102.)

The Commission also denied reimbursement for California Code of Regulations, title 5, section 54626(a), which requires community college districts to adopt a policy identifying categories of directory information that may be released. The Commission denied reimbursement on the ground that the requirement in section 54626(a) was not new since it was previously imposed by a statute, Education Code section 25430.12, that was not pled. (AR 148-151.) Since the unpled statute had an earlier effective date, the same requirement imposed by the later adopted regulation does not impose a *new* program or higher level of service within the meaning of article XIII B, section 6.

D. The Trial Court Upheld the Commission's Decision.

On May 22, 2014, the Districts filed a petition for writ of mandate in Sacramento County Superior Court challenging the statutes and regulations denied by the Commission. (1 Clerk's Transcript (CT) 1-22.) The matter was heard June 12, 2015, and on June 25, 2015, the trial court issued an "Order After Hearing Denying Petition for Writ of Mandate." (1 CT 166-

194.) Judgment was entered on July 6, 2015, and the notice of entry of judgment was filed and served on July 21, 2015. (1 CT 238-267.)

The trial court found that "the Commission was correct in determining that the minimum conditions are not state mandates for which reimbursement is required." (1 CT 170.) The court also found that community college districts are not legally compelled to comply with the minimum conditions. Community college districts only have to comply if they want to become entitled to receive state aid. (1 CT 172.) The court then analyzed whether community college districts are practically compelled to comply with the minimum conditions, and on that issue, found no evidence supporting the allegation that community college districts cannot operate without state funding and, thus, have no meaningful choice but to comply with the minimum conditions:

> It is not clear if this [Petitioners cannot operate without state funding] is true, because Petitioners cite no evidence in their briefs about how much community colleges receive from state aid, how much they receive from property taxes, and how much they receive from other funding sources (or, at least, they point to no such evidence). The more money the colleges receive from state aid, the stronger their "practical compulsion" argument becomes. With no evidence on this issue, however, Petitioners fail to prove their key point (i.e., that they cannot operate without state aid).
>
> At the hearing, Petitioners cited one page in the administrative record (AR 3431) that they contend demonstrates their core point. Not necessarily. This page shows the "2008-09 California Community College Proposition 98 Budget." In 2008-09, Community Colleges were expected to receive approximately $3.3 billion in general state funding; approximately $6.5 million in funding for categorical programs; approximately $2.2 billion in property taxes, and approximately $73 million in other proposition 98 funding (i.e., state funding). Looking solely at state funding, it appears that approximately 53 percent constitutes general aid, 10 percent constitutes categorical funding, 35 percent comes from property taxes, and 1 percent

> constitutes 'other' state funds. However this page does not include federal funds or student fees, and it is thus still difficult to analyze Petitioners' argument that they cannot operate without state funding and thus have no meaningful choice but to comply with the minimum conditions. Nonetheless, the court does not doubt that state aid constitutes a substantial part of the community colleges' budget, and that, to borrow a phrase Petitioners' counsel used at the hearing, it is more money than a prudent person would be willing to put at risk.

(1 CT 178, fn 7.) Moreover, the Districts failed to establish that the alleged penalty (the loss of funding) was certain and severe. (1 CT 174-175.)

The court also found that the claimants were required to allege in their test claims "that a *particular statute or executive order* imposes costs mandated by the state." (1 CT 192 citing Gov. Code, § 17521. Emphasis in the original.) The claimants alleged title 5, section 54626 of the California Code of Regulations but had "failed to allege the particular statute that *first* imposed costs," Education Code section 25430.12. (*Ibid.* Emphasis in the original.)

Finally, the court denied the remaining challenges raised by the Districts, thus affirming the Commission's decision in full. (1 CT 176-194.)

E. The Court of Appeal Partially Reversed the Trial Court.

On September 15, 2015, the Districts filed their notice of appeal to the Court of Appeal, Third Appellate District. (1 CT 270-271.) On March 4, 2020, the court issued its tentative opinion and the matter was heard on March 16, 2020. On April 3, 2020, the court filed its opinion, partially reversing the trial court judgment and approving the petition for writ of mandate. (Slip Opn.) On April 17, 2020, the Commission, joined by the Department of Finance, filed a petition for rehearing on the jurisdictional and pleading issues. On May 1, 2020, the court issued a

modified opinion, agreeing with one minor point in the petition for rehearing, but otherwise denying the request. (Order Modifying Opn.)

The court found that several of the minimum conditions were legally compelled and, thus, mandated by the state. (Slip Opn., p. 7.)[4] The court's holding was based on the underlying law in Education Code section 66010.4, which sets forth the mission of the community colleges to, among other things, offer academic, vocational and remedial instruction through the second year of college and to provide support services to help students succeed at the postsecondary level. The court found that a community college must satisfy the minimum conditions in order to meet these underlying legally-compelled functions. (*Ibid.*)

The appellate court further distinguished this Court's decision in *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727 (*Kern High School Dist.*), which addressed school district participation in underlying programs that were voluntary. Unlike *Kern High School Dist.*, the court found that the underlying programs in the

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[4] In this respect, the appellate court reversed the trial court judgment on California Code of Regulations, title 5, sections 51000, 51006, 51014, 51016, 51018, 51020, 51025 finding these regulations to be mandated by the state and, except for section 51000 (which requires no activities), remanded those regulations to the Commission to determine the remaining issues required under article XIII B, section 6. (Slip Opn., p. 3; Order Modifying Opn., p. 2.)

The court denied the Districts' claim regarding the following minimum condition regulations that incorporated by reference other regulations that were expressly approved for reimbursement by the Commission: California Code of Regulations, title 5, sections 51002, 51004, 51008, 51021, 51022, 51023, 51023.5, 51023.7, and 51027. The court also denied the following minimum condition regulations severed and considered in other test claims: California Code of Regulations, title 5, sections 51008, 51010 and 51026. (Slip Opn., p. 4.) Finally, the court denied California Code of Regulations, title 5, section 51012 (discussed further *infra*) because it did not, itself, require any particular action. (Slip Opn., p. 16.)

instant case are core functions of community college districts that are legally compelled by state law. Thus, the court found that the practical compulsion analysis in *Kern High School Dist.* was inapplicable. (Slip Opn., p. 9.) Also, the court, relying on the Commission's statewide cost estimate adopted for the activities that were approved, found that the costs for the overall program were not modest, unlike the costs at issue *Kern High School Dist.* (Slip Opn., pp. 9-10.)

The court further found that community colleges are not free to decline state aid and that community colleges risk loss of all state aid if they do not comply with the minimum conditions:

> The Commission suggests the minimum conditions are not legally compelled because the community colleges are free to decline state aid. But that argument is inconsistent with the statutory scheme and the appellate record. Education is a governmental function under California law. (*Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172.) Consistent with that function, the state legislature declared that "California must support an educational system that prepares all Californians for responsible citizenship and meaningful careers in a multicultural society[,]" determining that this requires a commitment "to make high-quality education available and affordable for every Californian." (Ed. Code, § 66002, subd. (f)(3).) To accomplish those goals, the Legislature found that California's system of higher education would need to expand. (*Id.*, subd. (f)(4).) That system includes not only the campuses of the University of California and the California State University system, but also the California community colleges. (Ed. Code, §§ 66010, subd. (a), 66010.4, subd. (a), 66700, 100450, subd. (b).) Under state law, those institutions "share goals designed to provide educational opportunity and success to the broadest possible range" of California citizens. (Ed. Code, § 66010.2.) And as provided in our state constitution, no college within the state's public school system shall be transferred from the public school system or placed under the jurisdiction of any other authority. (Cal. Const., art. IX, § 6.) Consistent with those laws and legislative determinations, the state provides funding to the California community college districts to permit them to carry out their mission. (See Ed. Code, § 14000 ["The system of

> public school support should assure that state, local, and other funds are adequate for the support of a realistic funding level."].) "Since 1933, our [state] Constitution has provided that from state revenues there shall first be set apart the moneys to be applied by the state for the support of the public school system and institutions of higher education." (*California Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1522; see Cal. Const., art. XVI, § 8.) The Legislature has declared that the California Constitution requires a specific minimum level of state General Fund revenues be guaranteed and applied for the support of community college districts. (Ed. Code, § 41200, subd. (b).) Moreover, as a result of article XIII A of the state Constitution, the state has assumed a greater share of the responsibility for funding the public school system. (*California Teachers Assn. v. Hayes*, at pp. 1526-1528.) Specifically, in the most recent year for which the appellate record in this case provides information, *more than half* of California community college funding came from the state general fund. In that same year, other funding sources, including federal funds, local funds, and student fees, provided significantly less support. Like public school districts in general, community college districts are dependent on state aid. (See *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1196.)

(Slip Opn., pp. 10-11. Emphasis in the original.) Thus, with respect to the minimum conditions, the court reversed the judgment on California Code of Regulations, title 5, sections 51000, 51006, 51014, 51016, 51018, 51020, 51025 and, except for section 51000 (which requires no activities), remanded those regulations to the Commission to determine the remaining issues required under article XIII B, section 6. (Slip Opn., p. 3; Order Modifying Opn., p. 2.)

In addition, California Code of Regulations, title 5, section 51012, part of the minimum condition regulations, states that community colleges "may only establish such mandatory student fees as it is expressly authorized to establish by law." The court agreed section 51012 does not, itself, require any particular action since it just references what is already authorized by law. (Slip Opn., p. 16.) However, the court found that the

Commission should have taken jurisdiction over Education Code sections 76300-76395, which do address student fees, and remanded those code sections back for a full analysis. (Slip Opn., pp. 16-17.) Education Code sections 76300-76395 were not specifically pled in the test claims, but were generally mentioned in the narrative of test claim 02-TC-31. (AR 523, 577-578).

Finally, California Code of Regulations, title 5, section 54626(a), mandates community college districts to adopt a policy identifying several categories of directory information that may be released. The Commission found that the requirement was state-mandated, but did not impose a new program or higher level of service on the ground that former Education Code section 25430.12, a code section the claimants did not plead in the test claims, imposed the same requirement before the effective date of the regulation. The court, however, found that the requirement in the regulation is new since it implements former Education Code section 25430.12, which was enacted after January 1, 1975, and thus remanded California Code of Regulations, title 5, section 54626(a) to the Commission to determine the remaining issues under article XIII B, section 6. (Slip Opn., pp. 49-50; Order Modifying Opn., p. 2.)

III. STANDARD OF REVIEW

Government Code section 17559 authorizes the commencement of a proceeding to set aside a decision of the Commission in accordance with Code of Civil Procedure section 1094.5, on the ground that the Commission's decision is not supported by substantial evidence. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506.) Ordinarily, when the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, the scope of review on appeal is the same. (*Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 762.) However, the appellate court

independently reviews conclusions as to the meaning and effect of constitutional and statutory provisions. (*Ibid*.) Whether costs are reimbursable under article XIII B, section 6 of the California Constitution is purely a question of law, requiring de novo review. (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64, 71, fn. 15; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.) Thus, the court reviews the entire record before the Commission, which includes references to constitutional provisions, state statutes and regulations, as well as comments and evidence filed by the parties, and independently determines whether it supports the Commission's conclusion that reimbursement is not required in this case. (*Department of Finance v. Commission on State Mandates, supra,* 1 Cal.5th 749, 762.)

Article XIII B, section 6, must be strictly construed and not applied as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities." (*County of Sonoma v. Commission on State Mandates, supra*, 84 Cal.App.4th 1264, 1281.)

IV. ARGUMENT

A. The Regulations That Establish Minimum Conditions Entitling California Community College Districts to Receive State Aid Do Not Impose a Reimbursable State Mandate Within the Meaning of Article XIII B, Section 6 of the California Constitution Because They Do Not Impose State-Mandated Activities.

Education Code section 70901(b)(6) states: "Subject to, and in furtherance of, subdivision (a), and in consultation with community college districts and other interested parties as specified in subdivision (e), the board of governors shall provide general supervision over community college districts, and shall, in furtherance thereof, perform the following functions: [¶]…[¶] (6) Establish minimum conditions entitling districts to receive state aid for support of community colleges. In so doing, the board

of governors shall establish and carry out a periodic review of each community college district to determine whether it has met the minimum conditions prescribed by the board of governors." Title 5, section 51000 of the California Code of Regulations states: "The provisions of this chapter are adopted under the authority of Education Code section 70901(b)(6) and comprise the rules and regulations fixing and affirming the minimum conditions, satisfaction of which entitles a district maintaining community colleges to receive state aid, including state general apportionment, for the support of its community colleges." As a condition entitling districts to receive state aid, community colleges are required to do the following:

- Adopt a policy relating to open access to qualified persons, publish the policy, and file a copy with the Chancellor. (Cal. Code Regs., tit. 5, § 51006.)
- Obtain the approval from the state Board of Governors when planning the formation of a new college or educational center. (Cal. Code Regs., tit. 5, § 51014.)
- Be an accredited institution. (Cal. Code Regs., tit. 5, § 51016 and ACCJC's Handbook of Accreditation and Policy Manual.)
- Adopt regulations and procedures addressing various counseling programs for students, including academic counseling, career counseling, personal counseling. (Cal. Code Regs., tit. 5, § 51018.)
- State objectives for its instructional program and for the functions which it undertakes to perform. (Cal. Code Regs., tit. 5, § 51020.)
- Maintain a full-time faculty percentage of 75 percent. (Cal. Code Regs., tit. 5, § 51025.)

If these conditions are not met, the Chancellor shall take one or more of the following actions: (1) accept in whole or part the district's response regarding noncompliance (in other words, take no action), (2) require the

district to submit and adhere to a plan and timetable for achieving compliance "as a condition for continued receipt of state aid," or (3) "withhold all or part of the district's state aid," with the approval of the Board of Governors. (Cal. Code Regs., tit. 5, §§ 51100, 51102.)

1. Requirements imposed as a condition entitling community college districts to the continued receipt of state aid do not constitute legal compulsion, and therefore require a showing of practical compulsion to support a finding of a state-mandated program under article XIII B, section 6 of the California Constitution.

Article XIII B, section 6 requires that costs incurred be mandated or "ordered" or "commanded" by the state. (*Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 174.) As more fully explained below, the standard to determine whether activities are mandated by the state is set forth by case law: Legal compulsion is found within the plain language of the test claim statutes or regulations and based on the plain language, local government is ordered or forced to do something. On the other hand, practical compulsion may be found where the test claim statutes or regulations contain voluntary, optional, or conditional language if a local government proves, with substantial evidence in the record, that a failure to engage in the activities at issue will result in certain and severe penalties or other draconian consequences, leaving local government no choice but to comply in order to carry out their core essential functions. Activities undertaken at the option or discretion of local government, without legal or practical compulsion, do not trigger a state-mandated program within the meaning or article XIII B, section 6. (*Department of Finance v. Commission on State Mandates (Kern High School Dist.), supra,* 30 Cal.4th 727, 731; *San Diego Unified School Dist. v. Commission on State Mandates, supra,* 33 Cal.4th 859, 884-887;

Department of Finance v. Commission on State Mandates (*POBRA*) (2009) 170 Cal.App.4th 1355, 1365-1366.)

The language used in Education Code section 70901(b)(6) and title 5, section 51000 of the California Code of Regulations —– requirements imposed as a condition entitling the continued receipt of state aid — is similar to the legislation at issue in *City of Sacramento* which addressed federal "carrot and stick" legislation imposed on the state to induce compliance. (*City of Sacramento v. State of California, supra,* 50 Cal.3d 51.) This Court found a federal mandate, even though the federal legislation did *not* impose strict legal compulsion. (*Id*. at pp. 73-76.)

Specifically, in *City of Sacramento*, local agencies were seeking reimbursement under article XIII B, section 6 for state legislation that extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. (*City of Sacramento v. State of California*, *supra*, 50 Cal.3d 51, 58-59.) The state opposed the request for reimbursement, contending that the legislation imposed a federal mandate and, thus, reimbursement was not required. (*Id.* at p. 71.) The state legislation was enacted to conform to a 1976 amendment to the Federal Unemployment Tax Act which required for the first time that a certified state plan include unemployment coverage of employees of public agencies. States that did not comply with the federal amendment faced a "stick": a loss of a federal tax credit and an administrative subsidy. (*Id.* at pp. 57-58.) The state argued that strict legal compulsion was not required to find a federal mandate and that California's failure to comply with the federal "carrot and stick" scheme was so substantial that the state had no realistic discretion to refuse. (*Id*. at p. 71.) This Court agreed that the definition of federal mandate does not require strict legal compulsion and defined a mandate to include situations where the state has no reasonable alternative to the federal scheme or no true

choice but to participate in it. (*Id.* at pp. 73-76.) In such a case, practical compulsion may be found.

In *Department of Finance v. Commission on State Mandates (Kern High School Dist.*) (2003) 30 Cal.4th 727, this Court left open the possibility that a state mandate may be found without strict legal compulsion, but only if local government faces certain and severe penalties, such as double taxation or other draconian consequences. The *Kern High School Dist.* case involved state open meeting laws that were amended to require school site councils and advisory bodies formed under state and federal grant programs to post a notice and an agenda of their meetings and school districts requested reimbursement for those costs pursuant to article XIII B, section 6. (*Id*. at p. 730.) This Court rejected "claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, without regard to whether claimant's participation in the underlying program is voluntary or compelled." (*Id.* at p. 731.) This Court determined that school districts elected to participate in the school site council programs to receive funding associated with the programs and, thus, were not legally compelled to incur the notice and agenda costs required. (*Id*. at pp. 744-745.) The school districts then urged a broad definition of "state mandate" to include situations where participation in the program is coerced as a result of severe penalties that would be imposed for noncompliance, as previously applied in *City of Sacramento*. After reflecting on the purpose of article XIII B, section 6, this Court stated that it "would not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6, properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional

funds." (*Id.* at p. 752.) However, the circumstances in *Kern High School Dist.* did not rise to the level of practical compulsion, since a school district that elects to discontinue participation in the programs does not face certain and severe penalties, such as double taxation or other draconian consequences, but simply must adjust to the withdrawal of grant money. (*Id*. at p. 754.)

In *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, the key issue was whether state requirements for expulsion hearings, which were triggered by a school's authority to expel a student pursuant to Education Code section 48915, were a reimbursable state mandate. The holding did not reach that issue, as this Court decided the expulsion costs were attributable to federal due process requirements. (*Id.* at pp. 888-890.) Nevertheless, this Court questioned the denial of a state mandate whenever an entity makes an initial discretionary decision, such as the number of employees to hire, that in turn can affect or trigger the downstream costs required by state law. (*Id*. at p. 888.)

Finally, in *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, the court considered the above cases and determined that the Peace Officers Procedural Bill of Rights Act (POBRA), which imposed requirements on all law enforcement agencies, did not constitute a state-mandated program on school districts. School districts are authorized, but not required, by state law to hire peace officers and, thus, the court recognized there was no legal compulsion to comply with POBRA. (*Id.* at p. 1368.) The court held there could be a finding of a state mandate if, as a practical matter, exercising the authority to hire peace officers is the only reasonable means to carry out a school district's core mandatory functions. However, the court emphasized that practical compulsion requires a *concrete* showing in the record that a failure to engage in the activities at issue will result in certain and severe penalties or

other draconian consequences, leaving districts no choice but to comply in order to carry out their core essential functions. (*Id.* at p. 1367.) As recognized by the concurring opinion in that case, "instinct is insufficient to support a legal conclusion." (*Id*. at p. 1369.)

Against this backdrop of case authority, the appellate court (and the Districts) completely ignored the plain language of the minimum condition regulations and, instead, found the minimum condition regulations constitute legal compulsion when viewed in light of the core functions and mission of community college districts, the State's required support of the educational system, the threat of the penalty imposed for noncompliance, and because community college districts are not free to decline state aid. (Slip Opn., pp. 10-11.) This analysis is incorrect as it essentially finds that community college districts have no choice but to comply with the regulations. In fact, the Districts have repeated the argument of "no true meaningful choice" and the alleged threat of losing state aid throughout these proceedings. (1 CT 67:15-26; Appellant's Opening Brief in Court of Appeal, pp. 23-30; Appellant's Reply Brief in Court of Appeal, p. 13; Appellant's Answer to Petition for Review, pp. 16-17, 19, 21.) However, having no true choice but to comply and the potential consequence of losing state aid for failing to comply are factors used to establish practical compulsion and not legal compulsion. (*Department of Finance v. Commission on State Mandates* (*POBRA*), *supra*, 170 Cal.App.4th 1355, 1367; *Department of Finance v. Commission on State Mandates (Kern High School Dist.*), *supra*, 30 Cal.4th 727, 754.)

Like the language in *City of Sacramento*, the plain language of the minimum condition regulations here is *conditional* and does not amount to legal compulsion. The language is used to induce compliance, giving community college districts a choice, and therefore requires a practical compulsion analysis, as described in *Department of Finance v. Commission*

on State Mandates (*POBRA*), of whether there is concrete evidence in the record showing that a failure to engage in the activities at issue will result in certain and severe penalties or other draconian consequences leaving the community college districts no true choice but to comply with the regulations in order to carry out their core essential functions. This conditional language, in California Code of Regulations, title 5, section 51000, is unlike the language in other regulatory provisions pled and approved by the Commission in this case which legally compel the community college districts to act by their plain language (e.g., Cal. Code Regs., tit. 5, § 55750, which states, "The governing board of a district maintaining a community college *shall* adopt regulations consistent with this [subchapter]. The regulations *shall* be published in the college catalog under appropriate headings and filed with the Chancellor's Office as required by section 51002 of this [division]." (AR 78-80. Emphasis added.)) When the Legislature or a state agency uses materially different language in the provisions addressing the same or related subjects, the normal inference is that the Legislature or the state agency intended a difference in meaning. (*People v. Trevino* (2001) 26 Cal.4th 237, 242.)

Thus, based on the plain language of the minimum condition regulations, the state is not legally compelling performance. The plain language provides a choice and therefore to find a state-mandated program, the practical compulsion standard must be met.

2. <u>No evidence was submitted during the test claim process to support a finding that a potential loss of state aid is a certain or severe or draconian consequence leaving community college districts no choice but to comply with the minimum conditions in order to carry out their core essential functions.</u>

As indicated by the trial court, state aid may likely constitute a substantial part of the budget for some community colleges. (1 CT 178, fn. 7.) However, "instinct is insufficient to support a legal conclusion."

(*Department of Finance v. Commission on State Mandates* (*POBRA*), *supra,* 170 Cal.App.4th 1355, 1369.)

Applying the practical compulsion standard, the Commission found no evidence in the record and no provision in the law to support a finding that a potential loss of state aid results in certain or severe penalties or other draconian consequences leaving community college districts no choice but to comply with the minimum conditions. The Chancellor may, but is not required by title 5, section 51102, of the California Code of Regulations, to withhold state aid if a district fails to comply with the minimum conditions. According to a plain reading of this regulation, the loss of state aid is not reasonably certain to occur; requiring a "plan and timetable" is just as likely to occur as withholding any state aid. Thus, the potential penalty is not certain. Even if state aid is withheld, the amount would not necessarily be severe, given the "all or part" language of the regulation.

In addition, the Commission was not provided with any evidence or examples of a district actually losing state aid due to non-compliance with the regulations. The only example considered was that of San Mateo County Community College District which failed to comply with section 51010 of the title 5 regulations when appointing a superintendent.[5] In settling the matter, the Chancellor's Office agreed to allow San Mateo County Community College District to increase monitoring, but the district did not lose *any* state aid despite the finding of non-compliance. (AR 35-36.) Thus, there was no concrete evidence, or provision in the law, to show that a failure to comply with the minimum conditions results in certain and severe consequences.

[5] Section 51010 requires as a condition to become entitled to state aid that community college districts substantially comply with the equal employment opportunity regulations in section 53000 et seq.

Moreover, although the Districts assert they cannot operate without state aid, no community college district provided evidence showing how much funding it receives from state aid, local property tax and other sources of revenue including student enrollment fees and federal funds, or a description of the courses of study and programs they offer under the "permissive code." Instead, during the Commission's proceedings, the claimants cited to *City of Sacramento* asserting that "Under the 'carrot and stick' analysis . . ., community college districts' acceptance of state aid is not truly voluntary. The carrot is too large and the stick is too short." (AR 3696, fn. 2.) The claimants then mistakenly asserted they were "legally compelled" to comply with the regulations based only on the threat of withholding state aid and that evidence was not required to be filed:

> The DSA [Draft Staff Analysis] (34) cites *POBRA* to assert a need for a "concrete showing" that a failure to perform the programs would result in "certain and severe penalties." This additional test is not necessary since Section 51000 is, by itself, legally compelling. Notwithstanding, the failure to implement a program can remove the entitlement for *all* state funding, all general program funding, that is, funding for other programs and needs beyond the scope of the single minimum condition program not implemented, subject only to the Board of Governors post facto unilateral unlimited discretion regarding the degree of noncompliance. What degree of "certainty" is needed? Must the test claimants show that a district intentionally failed to implement a mandated program, or intentionally received and misspent the appropriations, and was severely penalized by the Board of Governors? That no district was ever severely penalized is not the proof that the coercion for compliance exists. Does the DSA demand for proof either neglect or malfeasance on the part of one district, or worse, a pattern by many districts, that results in severe fiscal punishment by the Board of Governors at its unfettered discretion? Catastrophic malfeasance is not a practice of the professional public servants who lead the community colleges.

> It is the magnitude of coercion created by the threat of penalty, not any proof of actual penalty, that is the measure of the issue. To decide otherwise is to make the Section 51000 coercion language surplusage since the Board of Governors has the independent Section 51100 duty to review compliance notwithstanding the original Section 51000 entitlement issue. The Board of Governors has made it quite clear that the districts are required to implement the programs included in the Chapter by conditioning receipt of general college funding on that implementation and providing a post-facto audit and penalty system to evaluate the measure of compliance. The fact that no district has catastrophically failed to comply and has been severely punished thereafter does not make this regulatory structure a sham. There is no reason to reach the *POBRA* severe consequences practical compulsion issue since the districts are already legally compelled by Section 51000 to comply with the program regulations.

(AR 3696-3697.) No further testimony or evidence was provided during the Commission hearing. (AR 4239-4240.)

When the case went to trial, the Districts pointed only to a single page summarizing the 2008-2009 California Community College Proposition 98 Budget filed on July 7, 2008, by the California Community Colleges Chancellor's Office, which clarified the Chancellor's position that "[a]lthough most community college districts seek state aid in the form of apportionment; districts are not required to do so, and some districts do not receive apportionment." (1 CT 178, fn. 7; AR 1948, 2426-3427, 3429, 3431.) As correctly summarized by the trial court, the 2008-2009 California Community College Proposition 98 Budget page (AR 3431) shows for that fiscal year, 53 percent of the funding for the colleges constitutes general state aid, but the summary does not identify federal funding or revenues from student fees:

> In 2008-09, Community Colleges were expected to receive approximately $3.3 billion in general state funding; approximately $6.5 million in funding for categorical

> programs; approximately $2.2 billion in property taxes, and approximately $73 million in other proposition 98 funding (i.e., state funding). Looking solely at state funding, it appears that approximately 53 percent constitutes general aid, 10 percent constitutes categorical funding, 35 percent comes from property taxes, and 1 percent constitutes 'other' state funds. However this page does not include federal funds or student fees, and it is thus still difficult to analyze Petitioners' argument that they cannot operate without state funding and thus have no meaningful choice but to comply with the minimum conditions.
>
> (1 CT 178, fn. 7.)

In addition, there are basic aid districts in the state that receive no state general apportionment, but have sufficient funding with local property tax revenue and student fees to carry out their program. Four of these basic aid districts existed in 2008 when the test claim was pending with the Commission: Marin, Mira Costa, South Orange, and "at times" San Mateo Community College Districts (an appellant in this case). (AR 3429.) If one of these basic aid districts fails to comply with the minimum condition requirements, there is no threat of any penalties for the loss of state apportionment.

Any state aid apportioned to a community college district depends on the number of colleges and comprehensive centers in the district, the types of courses the district offers, and the number of full-time equivalent students enrolled. (Ed. Code, § 84750.5.) Community colleges have broad discretion to determine the programs of study to offer and the number of facilities and colleges needed for that purpose. (Ed. Code, §§ 70902(a)(1), 81800; Cal. Code Regs., tit. 5, § 57014.) And, under the permissive code, a community college district's governing board can act under its general authority without specific statutory authorization. (*Barnhart v. Cabrillo Community College*, *supra,* 76 Cal.App.4th 818, 824-825.) However, other than the 2008-2009 budget summary provided by the Chancellor's Office,

no evidence was filed and thus, the Commission could not determine if a potential loss of state funds leaves a community college district no true choice but to comply with the minimum conditions.

Accordingly, substantial evidence has not been submitted to support a finding that a *potential* loss of state aid is a certain or severe or draconian consequence leaving community college districts no choice but to comply with the minimum conditions in order to carry out their core essential functions. Thus, the minimum condition regulations do not impose a reimbursable state-mandated program.

3. If this Court disagrees with the Commission's state mandate finding, the claims should be remanded back to the Commission to determine if the remaining elements required for reimbursement under article XIII B, section 6 have been met.

If this Court determines that the Commission's conclusion on the state mandate issue for the minimum condition regulations is not correct, the claims should be remanded back to the Commission to adopt a new decision consistent with this Court's ruling, and to determine whether the remaining elements required for reimbursement under article XIII B, section 6 have been met. (Gov. Code, §§ 17559; 17552; *Kinlaw v. State of California, supra*, 54 Cal.3d 326, 333-334; *Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d 830, 837; *County of San Diego v. Commission on State Mandates, supra*, 6 Cal.5th 196, 201, 217.) The Commission did not reach the issues of whether the requirements in the minimum condition regulations were new and imposed a new program or higher level of service, or whether they resulted in increased costs mandated by the state; issues disputed by the Chancellor's Office. (AR 1946-1949.) In order for reimbursement to be constitutionally required under article XIII B, section 6, *all* of the legal elements must be satisfied. (*County of Los Angeles v. State of California, supra*, 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d 830, 835; *County of Fresno v. State of*

California, supra, 53 Cal.3d 482, 487; *County of San Diego v. State of California, supra*, 15 Cal.4th 68, 111; *San Diego Unified School Dist. v. Commission on State Mandates, supra*, 33 Cal.4th 859, 874-875.)

B. A Court Lacks Jurisdiction Under Article XIII B, Section 6 of the California Constitution to Make Subvention Findings on Statutes That Were Not Specifically Identified in the Test Claim.

The two jurisdictional issues first identified in the appellate court's slip opinion are: (1) the remand of Education Code sections 76300 through 76395, and (2) the finding that section 54626(a) of title 5 of the California Code of Regulations imposes a new program or higher level of service because it implements Education Code section 25430.12. (Slip Opn., pp. 49-50.) The claimants did not plead Education Code sections 25430.12 and 76300 through 76395 and have never alleged that these code sections were the source of a reimbursable state-mandated program. Having not been pled, the Commission lacks the power and the fundamental jurisdiction over these statutory provisions and thus they are not properly before the Commission or the courts, pursuant to Government Code section 17559(b), and no finding of subvention may be made regarding them.[6]

1. The remand of Education Code sections 76300 through 76395, which were not pled in the test claims, is incorrect as a matter of law.

The appellate court found that one of the minimum conditions, California Code of Regulations, title 5, section 51012, which provides that

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[6] *Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 339; Government Code section 17559(b), which states the following: "A claimant or the state may commence a proceeding in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure to set aside a decision of the commission on the ground that the commission's decision is not supported by substantial evidence. The court may order the commission to hold another hearing regarding the claim and may direct the commission on what basis the claim is to receive a rehearing."

community college districts "may only establish such mandatory student fees as it is expressly authorized to establish by law," did not require any particular action and affirmed the judgment denying the petition for writ of mandate with respect to that regulation. (Slip Opn., p. 16.) The Commission agrees with that finding. The court also found, however, that the Commission failed to consider whether reimbursement was required for costs associated with Education Code sections 76300 through 76395:

> We agree with the Commission that regulation 51012 does not require the community college districts to take any particular action, it merely references what is already authorized by law.
>
> However, the Commission failed to consider the Santa Monica Community College District claim [02-TC-31] that subvention was required for costs associated with Education Code former sections 76300 through 76395. The Commission must decide that issue in the first instance. (Gov. Code, § 17551, subd. (a); Lucia Mar Unified School Dist. v. Honig (1988) 44 Cal.3d 830, 837 (Lucia Mar).)

(Slip Opn., p. 16.) The court directed the trial court to remand the test claim based on Education Code sections 76300 through 76395 to the Commission for determination. (Slip Opn., pp. 4, 55.)[7]

This finding and remand is not correct as a matter of law because Education Code sections 76300 through 76395 were not pled in test claim 02-TC-31, as implied in the court's finding, or in test claim 02-TC-25 and, thus, neither the court nor the Commission have jurisdiction to determine whether Education Code sections 76300 through 76395 impose a

[7] Education Code sections 76300 through 76395 were added by Statutes 1993, chapter 8. Sections 76300 et seq. addresses enrollment fees and financial aid, and sections 76350 through 76395 address authorized fees. These code sections have been amended many times since 1993, and the opinion does not identify which statute and chapter the court is referring to. Accordingly, the scope of the remand is not clearly identified.

reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Test claims must meet certain statutory requirements to come within the jurisdiction of the Commission: test claims must plead each statute and executive order with specificity by identifying the code section, and statute and chapter, or register number of a regulation, alleged to impose the reimbursable mandate, and must be filed within the statute of limitations required by Government Code section 17551. At the time these test claims were filed in 2003, former Government Code section 17521 stated that a "'[t]est claim' means the first claim, including claims joined or consolidated with the first claim, filed with the commission alleging that *a particular statute or executive order* imposes costs mandated by the state." (Emphasis added.) The Commission's regulations at that time required that "[t]he specific sections of the chaptered bill or executive order alleged to impose a mandate must be identified" in the test claim. (Cal. Code Regs., tit. 2, former § 1183(d)(1).)[8] These specific pleading requirements are consistent with the general rule of construction in Government Code section 9605(a), which states that if a statute is amended, "[t]he portions that are not altered are to be considered as having been the law from the time when those provisions were enacted . . ."; and are necessary for the Commission to determine what the prior law required and whether the version of the statute pled in the test claim imposes any *new* state-mandated activities. The pleading requirements are also plainly stated on the Commission's test claim form ("Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the

[8] The requirement to specifically plead each statute and regulation alleged to contain a mandate exists today. (Gov. Code, § section 17553(b)(1).)

particular statutory code citation(s) within the chaptered bill, if applicable.") (AR 461, 523.)

Here, test claim 02-TC-25 pleads only Education Code sections 66281.5 and 66721.5, as enacted by Statutes 1998, chapter 914 and Statutes 2000, chapter 187, and several regulatory provisions, and does not plead Education Code sections 76300 through 76395. (AR 461.) The test claim form and caption of 02-TC-31 identifies only section 51012 of the regulations as being pled, and does not identify Education Code sections 76300 through 76395. (AR 524, 527.) The narrative of the test claim in 02-TC-31 generally refers to Education Code sections 76300 through 76395, but only in the context of section 51012 of the regulations as follows:

> This condition alleges mandated costs reimbursable by the state for community college districts to establish and implement policies and procedures to ensure that the collection of student fees complies with the law (generally, Education Code sections 76300 through 76395).

(AR 577-578.)

Following the receipt of the test claim, the Commission issued a notice of complete test claim inviting comments from the claimants and all interested parties, which identified the statutes and regulations pled and within the jurisdiction of the Commission. That notice identifies only section 51012 of the regulations, and not Education Code sections 76300 through 76395. (AR 4986-4991.) The claimants did not object or comment on the notice of complete test claim. In response to the draft staff analysis of the consolidated test claims, the claimants filed comments on section 51012 of the regulations, but did not mention Education Code sections 76300 through 76395:

> The subject of this program is Title 5, CCR, Section 51012. Section 51012 is the minimum condition that requires the district governing board to only establish such mandatory

> student fees as expressly authorized by law. The DSA does not analyze Section 51012. Education Code Section 70902, subdivision (b)(9), requires the district governing board to establish student fees as is required or authorized by law. The proposed statement of decision should include an analysis to determine whether these sections constitute a new program or higher level of service for community college districts.

(AR 3704.)

The appellate court's remand to the Commission to hear and determine Education Code sections 76300 through 76395 inserts into the test claim process statutes that the claimants did not plead and, apparently, did not intend to plead. Further, the remand conflicts with, and bypasses, the Legislature's requirement to timely plead all statutes and regulations alleged to contain a mandate in a test claim within the established statute of limitations. At the time these test claims were filed, Government Code section 17551 set forth the statute of limitations for filing a test claim and included a grandfather clause to allow the filing of a test claim on any statute, regulation, or executive order enacted after January 1, 1975, and effective *before* January 1, 2002, *until* September 30, 2003. (Gov. Code, § 17551, as amended by Stats. 2002, ch. 1124. Emphasis added.)

Accordingly, the remand of Education Code sections 76300 through 76395 is incorrect as a matter of law.

2. <u>The test claims did not plead former Education Code section 25430.12, which became effective before section 54626(a) of the regulations and, thus, to base the finding that reimbursement is required on a statute that was not pled is incorrect as a matter of law.</u>

Test Claim 02-TC-25 sought reimbursement for the costs to comply with California Code of Regulations, title 5, former section 54626(a), as added in 1976 and last amended in 1983, which imposed the requirement on community college districts to adopt a policy identifying categories of directory information that may be released. (AR 462, 466.)

The appellate court found that the requirement in section 54626(a) constitutes a new program or higher level of service since the regulation implements a statute (former Education Code section 25430.12) enacted after January 1, 1975 which mandated a new program:

> To determine whether a test claim regulation or statute mandates a new program or higher level of service, we compare the requirements in the test claim regulation or statute with the preexisting scheme. (*San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878.) The requirements in a test claim regulation or statute are new if they did not exist prior to the enactment of the test claim regulation or statute. (*Ibid.*; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 75, 98; *Lucia Mar, supra*, 44 Cal.3d at p. 835; *County of Los Angeles v. Commission on State Mandates* (2003)110 Cal.App.4th 1176, 1189.) But there is an additional aspect to the analysis. Reimbursable costs are limited to increased costs a community college district is required to incur after July 1, 1980 as a result of a statute or regulation enacted on or after January 1, 1975. (Gov. Code, §§ 17514, 17516, 17519; *Hayes, supra*, 11 Cal.App.4th at p. 1581.)
>
> The Commission determined that former regulation 54626, subdivision (a) did not involve a new program or higher level of service because the governing statute, Education Code section 76240, already imposed those requirements. However, the statute to first impose those requirements, Education Code former section 25430.12, was enacted in September 1975. [Fn. Omitted.] (Stats. 1975, ch. 816, § 7; cf. Ed. Code, § 76240, subd. (a)(1).) We have not found, and the parties do not cite, a predecessor statute on this subject predating 1975. Thus, former regulation 54626, subdivision (a) implemented a statute enacted after January 1, 1975 that mandated a new program. Costs incurred pursuant to former regulation 54626, subdivision (a) are subject to subvention by the state. (Gov. Code, § 17516.)

(Slip Opn., pp. 48-50.) Footnote 7 of the Slip Opinion acknowledges that Education Code section 25430.12 was not pled, but still finds that the subsequently enacted regulation imposes a new program or higher level of service:

> The Commission says the claimants did not plead Education Code former section 25430.12 in their test claim and reimbursement is not required when a statute is not pleaded in the test claim. It is true that a test claim must identify the specific statute or regulation alleged to impose a mandate. (Gov. Code, § 17553, subd. (b)(1); Cal. Code Regs., tit. 2, former § 1183, subd. (d)(1).) Los Rios Community College District's test claim cited former regulation 54626, subdivision (a) but did not cite the related Education Code sections. Nevertheless, in its statement of decision the Commission acknowledged that former regulation 54626 implemented Education Code section 76240 which was originally enacted as Education Code section 25430.12, and the Commission considered whether former regulation 54626 constituted a new program in light of those Education Code sections. We do the same.

(Slip Opn., p. 49.) The court's findings are not correct as a matter of law.

The court correctly recognized that to determine whether a test claim regulation or statute mandates a new program or higher level of service, the requirements in the test claim regulation or statute are compared with the preexisting scheme. (*San Diego Unified School Dist. v. Commission on State Mandates, supra*, 33 Cal.4th 859, 878.) The requirements in a test claim regulation or statute are new if they did not exist prior to the enactment of the test claim regulation or statute. (*Ibid.; County of San Diego v. State of California, supra*, 15 Cal.4th 68, 75, 98; *Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d 830, 835; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189.)

Using these rules, the Commission found that the requirement in title 5, section 54626(a) of the California Code of Regulations requiring community college districts to adopt a policy identifying categories of directory information that may be released was not new. (AR 151.) Section 54626 of the regulations was adopted in Register 76, Number 10, filed on March 5, 1976, and became effective on the 30th day thereafter,

April 4, 1976.[9] However, former Education Code section 25430.12, which was not pled, required the same activity and was enacted in September 1975 and became effective and operative on January 1, 1976; four months before the effective date of the regulation. (Stats. 1975, ch. 816, § 7.) The claimants did not plead former Education Code section 25430.12, or Statutes 1975, chapter 816, in their test claim. (AR 462, 466.)

While the court recognized that former Education Code section 25430.12 was not pled, the court still found that the requirement in section 54626(a) of the regulations was new and thus imposed a new program or higher level of service because it implemented former Education Code section 25430.12, which was enacted after January 1, 1975. In this respect, the court relied on the rule in article XIII B, section 6, that reimbursable costs are limited to increased costs required to be incurred after July 1, 1980, as a result of a statute or regulation enacted on or after January 1, 1975. This analysis is not correct. First, the rule in article XIII B, section 6 is jurisdictional, in that it defines the potential population of statutes and regulations eligible for reimbursement beginning in fiscal year 1980-1981 (those enacted after January 1, 1975), but it does not define a new program or higher level of service. As explained in *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.5th 1564, 1581, article XIII B became effective on July 1, 1980: "Accordingly, under this constitutional provision, a local agency may seek subvention for costs imposed by legislation [enacted] after January 1, 1975, but reimbursement is limited to costs

[9] See regulatory history to California Code of Regulations, title 5, section 54600, which identifies when sections 54600-54662, including 54626, were originally adopted: "New Chapter 6 Articles 1-7, (Sections 54600-54662, not consecutive) filed 3-5-76; effective thirtieth day thereafter (Register 76, No. 10)." (AR 1378; see also AR 2460, 2473-2475, History Index for Title 5, California Code of Regulations filed in 02-TC-25, showing that section 54262 was added by Register 76-10.)

incurred after July 1, 1980." The local agency or school district, however, must still comply with the controlling statutory law to file a test claim on each statute or regulation, enacted after January 1, 1975, alleged to contain the mandate. "Reimbursement for costs incurred before July 1, 1980, *must be obtained, if at all, under controlling statutory law*." (*Ibid*. citing 68 Ops.Cal.Atty.Gen. 244 (1985). Emphasis added.)

Under the controlling statutory law, test claimants have the burden to identify all potential state-mandated activities that became effective after January 1, 1975, and specifically plead each section of a statute or executive order and effective date and register number of regulations alleged to impose a mandate. (Gov. Code, §§ 17521, 17551, 17553; former Cal. Code Regs., tit. 2, § 1183, as it existed in 2003 [Register 2003, No. 17].) A regulation adopted by an administrative agency pursuant to its delegated rulemaking authority has the force and effect of law, just like a statute. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 401; *California Teacher's Assn. v. California Com. On Teacher Credentialing* (2003) 111 Cal.App.4th 1001, 1008.) Thus, if a statute with an effective date after January 1, 1975, is not pled in a test claim and it is the original source of the mandated activity, then reimbursement is not required even though the same activity is required in a later-enacted regulation that is pled. The mandate in the regulation is simply not new. As this Court and other courts have recognized, "[t]he requirements in a test claim regulation or statute are new if they did not exist prior to the enactment of the test claim regulation or statute." (*County of San Diego v. State of California*, *supra*, 15 Cal.4th 68, 75, 98; *Lucia Mar Unified School Dist. v. Honig*, *supra*, 44 Cal.3d 830, 835, *County of Los Angeles v. Commission on State Mandates*, *supra*, 110 Cal.App.4th 1176, 1189.) Accordingly, the finding that the mandated activity in section 54626(a) is new is incorrect as a matter of law.

C. The Court Lacks Jurisdiction to Remand Education Code Section 76300 Because That Statute Was the Subject of a Prior Final Decision by the Commission on State Mandates.

As explained, *supra*, the claimants did not plead Education Code section 76300 as part of their test claim. The appellate court, however, not only treated Education Code section 76300 as if it had been pled, the court remanded section 76300 in light of section 51012 of the minimum conditions, which provides that community college districts "may only establish such mandatory student fees as it is expressly authorized to establish by law."

Assuming this Court agrees that Education Code section 76300 was actually pled in the test claims at issue here, the appellate court still lacked jurisdiction to remand that code section to the Commission for additional analysis because Education Code section 76300 was the subject of a prior test claim filed by community college districts, which was approved by the Commission in a decision adopted on April 24, 2003 in *Enrollment Fee Collection* (99-TC-13) and *Enrollment Fee Waivers* (00-TC-15) (<https://csm.ca.gov/decisions/99tc13,00tc15sod.pdf> [as of September 1, 2020]; Commission's Request for Judicial Notice (RJN), Exhibit C, filed with the Court of Appeal.)[10] The Commission found, in that prior claim, that Education Code section 76300 and its implementing regulations (Cal. Code Regs., tit. 5, former § 58500 et seq.) imposed a reimbursable state-mandated program to calculate and collect mandatory student fees, waive student fees in accordance with the law, and provide reports to the Chancellor's Office on the fee waivers. (<https://csm.ca.gov/decisions/99tc13,00tc15sod.pdf> [as of September 1,

[10] That test claim pled Education Code section 76300 as added by Statutes 1993, chapter 8, and as derived from prior versions in the law (beginning with Stats. 1984xx, ch. 1, as former section 72252), and as amended in 1994, 1995, 1996, and 1999.

2020] at p. 22; Commission's RJN, Exhibit C, at p. 330.) The Commission adopted parameters and guidelines for these activities on January 26, 2006, and also approved reimbursement to "Prepare district policies and procedures for the collection of enrollment fees." (<https://csm.ca.gov/decisions/99tc13,00tc15pg.pdf> [as of September 1, 2020] at p. 4.) The court acknowledged the prior decision, but found:

> The Commission points out that Los Rios Community College District filed a test claim in 2000 relating to Education Code former section 76300 and its implementing regulations (Cal. Code Regs., tit. 5, former §§ 58500-58508) and the Commission approved reimbursement of some costs associated with Education Code former section 76300 and former regulations 58501, 58502 and 58503. [Fn. omitted.] But the Commission does not assert that it approved the claimants' request for reimbursement of Education Code former section 76300 costs in this case. In addition, the 2000 test claim did not decide whether subvention is required for Education Code former section 76350 et seq. costs. We will direct that these portions of the claim be remanded to the Commission.

(Slip Opn., pp. 16-17.)

This finding is incorrect as a matter of law. Rehearing code sections that were already the subject of a prior test claim would disturb the finality of Commission decisions and conflict with existing law. Once a Commission's decision is final, it is binding, just as are judicial decisions. (*California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1202.) Further, an administrative agency does not have jurisdiction to retry a question that has become final. If a prior decision is retried by the agency, that decision is void. (*Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407 [holding that the civil service commission had no jurisdiction to retry a question and make a different finding at a later time]; *City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 697 [holding that whenever a quasi-judicial agency is vested with the authority

to decide a question, such decision, when made, is res judicata, and as conclusive of the issues involved in the decision as though the adjudication had been made by the court]; *Save Oxnard Shores v. California Coastal Commission* (1986) 179 Cal.App.3d 140, 143 [holding that in the absence of express statutory authority, an administrative agency may not change a determination made on the facts presented at a full hearing once the decision becomes final].) This is consistent with the purpose behind the statutory scheme and procedures established by the Legislature in Government Code section 17500 et seq. to "avoid[] multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created." (*Kinlaw v. State of California, supra,* 54 Cal.3d 326, 333.)

The court's opinion does not explain how the Commission's decision on Education Code section 76300 in *Enrollment Fee Collection* (99-TC-13) and *Enrollment Fee Waivers* (00-TC-15), is any different than what is alleged in the narrative of test claim 02-TC-31 ("This condition alleges mandated costs reimbursable by the state for community college districts to '*establish and implement policies and procedures* to ensure that the collection of student fees complies with the law' (generally, Education Code sections 76300 through 76395).") (AR 577-578. Emphasis added.) Preparing district policies and procedures for the collection of mandatory enrollment fees, and the calculation and collection of such fees, were expressly approved in the *Enrollment Fee Collection* (99-TC-13) and *Enrollment Fee Waivers* (00-TC-15) program. The Commission's prior decision on section 76300 and the allegations here regarding section 76300 both involve the same parties (community college districts), and address the same request for

reimbursement: the establishment and implementation of mandatory student fees.[11]

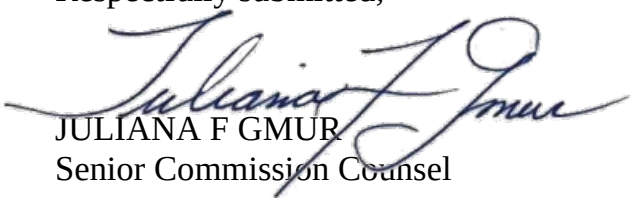
Accordingly, assuming this Court agrees that Education Code section 76300 was actually pled in this case, the Court still lacks jurisdiction to remand that code section to the Commission for additional analysis and findings because it was the subject of a prior final Commission decision.

IV. CONCLUSION

For these reasons, the Commission respectfully requests this Court to reverse the decision of the court of appeal and affirm the decision of the Commission.

Dated: November 12, 2020

Respectfully submitted,



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[11] In 2003, at the time that these test claims were filed, the Commission's regulations required the executive director of the Commission to accept more than one test claim on the same statute or executive order only if the second test claim was filed within 60 days of the first, the second test claim was filed by a different type of claimant or required separate representation, and the second test claim contained a detailed explanation why the first test claim would not result in a complete and fair consideration of the claim. (Cal. Code Regs., tit. 2, former § 1183(i)(1), Register 2003, No. 17, eff. April 21, 2003.) The first test claim pleading Education Code section 76300, *Enrollment Fee Collection* (99-TC-13) and *Enrollment Fee Waivers* (00-TC-15), was filed in 2000 and 2001 and, thus, the test claims here (filed in 2003) would not meet that 60-day deadline for filing duplicate claims.

CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.504(d)(1) of the California Rules of Court, undersigned counsel certifies that this brief contains 13,707 words, including footnotes, as indicated by the word count of the word processing program used.

Dated: November 12, 2020

Respectfully submitted,

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ELECTRONIC PROOF OF SERVICE

I hereby certify that I am over the age of 18 and am employed in the County of Sacramento, where the mailing took place. My business address is located at the Commission on State Mandates, 980 Ninth Street, Suite 300, Sacramento, California, 95814. The Commission on State Mandates' electronic service address is litigation@csm.ca.gov.

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COMMISSION ON STATE MANDATES' OPENING BRIEF ON THE MERITS
Coast Community College District, et al. v. Commission on State Mandates (Department of Finance)
California Supreme Court Case No. S262663
Court of Appeal, Third Appellate District Case No. C080349
Sacramento County Superior Court Case No. 34-2014-80001842-CU-WM-GDS

on the following parties in said action:

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I, **CARLA SHELTON**, declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct and that this declaration was executed on November 12, 2020.

CARLA SHELTON
Sr. Legal Analyst

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **COAST COMMUNITY COLLEGE DISTRICT v. COMMISSION ON STATE MANDATES (DEPARTMENT OF FINANCE)**
Case Number: **S262663**
Lower Court Case Number: **C080349**

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