ITEM 4

TEST CLAIM
FINAL STAFF ANALYSIS
AND
PROPOSED STATEMENT OF DECISION

Public Contract Code Sections 2000, 2001, 3300, 6610, 7104, 7107, 7109, 9203, 10299, 12109, 20100, 20101, 20102, 20103.5, 20103.6, 20103.8, 20104, 20104.2, 20104.4, 20104.6, 20104.50, 20107, 20110, 20111, 20111.5, 20116, 20650, 20651, 20651.5, 20657, 20659, and 22300

Business and Professions Code Section 7028.15

Statutes 1976, Chapter 921; Statutes 1977, Chapter 36; Statutes 1977, Chapter 631; Statutes 1980, Chapter 1255; Statutes 1981, Chapter 194; Statutes 1981, Chapter 470; Statutes 1982; Chapter 251; Statutes 1982, Chapter 465; Statutes 1982, Chapter 513; Statutes 1983, Chapter 256; Statutes 1984, Chapter 173; Statutes 1984, Chapter 728; Statutes 1984, Chapter 758; Statutes 1985, Chapter 1073; Statutes 1986, Chapter 886; Statutes 1986, Chapter 1060; Statutes 1987, Chapter 102; Statutes 1988, Chapter 538; Statutes 1988, Chapter 1408; Statutes 1989, Chapter 330; Statutes 1989, Chapter 863; Statutes 1989, Chapter 1163; Statutes 1990, Chapter 321; Statutes 1990, Chapter 694; Statutes 1990, Chapter 808; Statutes 1990, Chapter 1414; Statutes 1991, Chapter 785; Statutes 1991, Chapter 933; Statutes 1992, Chapter 294; Statutes 1992, Chapter 799; Statutes 1992, Chapter 1042; Statutes 1993, Chapter 1032; Statutes 1993, Chapter 1195; Statutes 1994, Chapter 726; Statutes 1995, Chapter 504; Statutes 1995, Chapter 897; Statutes 1997, Chapter 390; Statutes 1997, Chapter 722; Statutes 1998, Chapter 657; Statutes 1998, Chapter 857; Statutes 1999, Chapter 972; Statutes 2000, Chapter 126; Statutes 2000, Chapter 127; Statutes 2000, Chapter 159; Statutes 2000, Chapter 292; Statutes 2000, Chapter 776; and Statutes 2002, Chapter 455

California Code of Regulations, Title 5, Sections 59500, 59504, 59505, 59506, and 59509

Register 94, number 6

Public Contracts (K-14)
02-TC-35

Clovis Unified School District and
Santa Monica Community College District, Claimants

Table of Contents

Exhibit A

Test Claim filed by claimants, dated June 24, 2003 3

Exhibit B

Comments filed by the California Community Colleges, Chancellor's Office, dated March 24, 2004 410

Exhibit C

Comments filed by the Department of Finance, dated April 16, 2004 423

Exhibit D

Comments filed by the claimants in response to comments filed by the Chancellor's Office and Department of Finance, dated May 7, 2004 430

Exhibit E

Supplement to the test claim filed by claimants, dated October 5, 2007.....571

Exhibit F

Draft Staff Analysis 584

Exhibit G

Comments filed by the Department of Finance, dated May 1, 2012 662

Exhibit H

Supporting Documentation 665

- Case law:
    - *California Teachers Assn. v. Huff* (1992) 5 Cal.App.4th 1513
    - *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16
    - *Goleta Union Elementary School Dist. v. Ordway* (C.D.Cal. 2002) 248 F.Supp.2d 936
    - *Hall v. City of Taft* (1956) 47 Cal.2d 177
    - *Hiatt v. City of Berkeley* (1982) 130 Cal.App.3d 298
    - *In re Rudy L.* (1994) 29 Cal.App.4th 1007
    - *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24
    - *Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332
    - *Mississippi University for Women v. Hogan* (1982) 458 U.S. 718
    - *Monterey Mechanical Co. v. Wilson* (9th Cir. 1997) 125 F.3d 702
    - *People v. Oken* (1958) 159 Cal.App.2d 456
    - *Regents of University of California v. Bakke* (1978) 438 U.S. 265
    - *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953
    - *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1
    - *Santa Barbara School District v. Superior Court* (1975) 13 Cal.3d 315
    - *Welch v. Oakland Unified School Dist.* (2001) 91 Cal.App.4th 1421
    - *Wygant v. Jackson Board of Education* (1986) 476 U.S. 267

SixTen and Associates
Mandate Reimbursement Services

KEITH B. PETERSEN, MPA, JD, President
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Telephone: (858) 514-8605
Fax: (858) 514-8645
E-Mail: Kbpsixten@aol.com

June 20, 2003

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: TEST CLAIM OF Clovis Unified School District and
Santa Monica Community College District
Statutes of 2002/ Chapter 455
Public Contracts (K-14)

Dear Ms. Higashi:

Enclosed are the original and seven copies of the Clovis Unified School District and Santa Monica Community College District test claim for the above referenced mandate.

I have been appointed by the Districts as their representative for the test claim. The Districts request that all correspondence originating from your office and documents subject to service by other parties be directed to me, with copies to:

William McGuire,
Associate Superintendent, Business Services
Clovis Unified School District
1450 Herndon Avenue
Clovis, California 93611-0599 AND

Cheryl Miller,
Associate Vice President, Business Services
Santa Monica Community College District
1900 Pico Boulevard
Santa Monica, CA 90405-1628

The Commission regulations provide for an informal conference of the interested parties within thirty days. If this meeting is deemed necessary, I request that it be conducted in conjunction with a regularly scheduled Commission hearing.

Sincerely,

Keith B. Petersen

C: William McGuire, Associate Superintendent, Business Services
Clovis Unified School District
Cheryl Miller, Associate Vice President, Business Services
Santa Monica Community College District

State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 2 (1/91)

For Official Use Only

RECEIVED
JUN 24 2003
COMMISSION ON STATE MANDATES

TEST CLAIM FORM

Claim No. 02-TC-35

Local Agency or School District Submitting Claim

CLOVIS UNIFIED SCHOOL DISTRICT and **SANTA MONICA COMMUNITY COLLEGE DISTRICT**

Contact Person	Telephone Number
Keith B. Petersen, President SixTen and Associates	Voice: 858-514-8605 Fax: 858-514-8645

Claimant Address

Clovis Unified School District 1450 Herndon Avenue Clovis, California 93611-0599	Santa Monica Community College District 1900 Pico Boulevard Santa Monica, California 90405-1628

Representative Organization to be Notified

Dr. Carol Berg, Consultant, Education Mandated Cost Network c/o School Services of California 1121 L Street, Suite 1060 Sacramento, CA 95814	Voice: 916-446-7517 Fax: 916-446-2011

This claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIII B of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code citation(s) within the chaptered bill, if applicable.

Public Contracts K-14

See: Attachment

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative	Telephone No.
William McGuire Associate Superintendent Business Services Clovis Unified School District	Voice: (559) 327-9115 Fax: (559) 327-9059

Signature of Authorized Representative	Date
X Bill McGuire	June 16, 2003

State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 2 (1/91)

For Official Use Only

TEST CLAIM FORM

Claim No.

Local Agency or School District Submitting Claim

CLOVIS UNIFIED SCHOOL DISTRICT and **SANTA MONICA COMMUNITY COLLEGE DISTRICT**

Contact Person

Keith B. Petersen, President
SixTen and Associates

Telephone Number

Voice: 858-514-8605
Fax: 858-514-8645

Claimant Address

Clovis Unified School District
1450 Herndon Avenue
Clovis, California 93611-0599

Santa Monica Community College District
1900 Pico Boulevard
Santa Monica, California 90405-1628

Representative Organization to be Notified

Dr. Carol Berg, Consultant, Education Mandated Cost Network
c/o School Services of California
1121 L Street, Suite 1060
Sacramento, CA 95814

Voice: 916-446-7517
Fax: 916-446-2011

This claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIII B of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code citation(s) within the chaptered bill, if applicable.

Public Contracts (K-14)

See: Attachment

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative

Cheryl Miller
Associate Vice President Business Services
Santa Monica Community College District

Telephone No.

Voice (310) 434-4221
Fax: (310) 434-3607

Signature of Authorized Representative

x Cheryl Miller

Date

June 18, 2003

Attachment To:
COSM Form CSM 2 (1/91)
Test Claim of Clovis Unified School District
Chapter 455, Statutes of 2002
Public Contracts (K-14)

Chapter 455, Statutes of 2002
Chapter 776, Statutes of 2000
Chapter 292, Statutes of 2000
Chapter 159, Statutes of 2000
Chapter 127, Statutes of 2000
Chapter 126, Statutes of 2000
Chapter 972, Statutes of 1999
Chapter 857, Statutes of 1998
Chapter 657, Statutes of 1998
Chapter 722, Statutes of 1997
Chapter 390, Statutes of 1997
Chapter 897, Statutes of 1995
Chapter 504, Statutes of 1995
Chapter 726, Statutes of 1994
Chapter 1195, Statutes of 1993
Chapter 1032, Statutes of 1993
Chapter 1042, Statutes of 1992
Chapter 799, Statutes of 1992
Chapter 294, Statutes of 1992
Chapter 933, Statutes of 1991
Chapter 785, Statutes of 1991
Chapter 1414, Statutes of 1990
Chapter 808, Statutes of 1990
Chapter 694, Statutes of 1990
Chapter 321, Statutes of 1990
Chapter 1163, Statutes of 1989
Chapter 863, Statutes of 1989
Chapter 330, Statutes of 1989
Chapter 1408, Statutes of 1988
Chapter 538, Statutes of 1988
Chapter 102, Statutes of 1987
Chapter 1060, Statutes of 1986
Chapter 886, Statutes of 1986
Chapter 1073, Statutes of 1985
Chapter 758, Statutes of 1984
Chapter 728, Statutes of 1984
Chapter 173, Statutes of 1984
Chapter 256, Statutes of 1983
Chapter 513, Statutes of 1982
Chapter 465, Statutes of 1982
Chapter 251, Statutes of 1982
Chapter 470, Statutes of 1981
Chapter 194, Statutes of 1981
Chapter 1255, Statutes of 1980
Chapter 631, Statutes of 1977
Chapter 36, Statutes of 1977
Chapter 921, Statutes of 1976

Public Contract Code Section 2000
Public Contract Code Section 2001
Public Contract Code Section 3300
Public Contract Code Section 6610
Public Contract Code Section 7104
Public Contract Code Section 7107
Public Contract Code Section 7109
Public Contract Code Section 9203
Public Contract Code Section 10299
Public Contract Code Section 12109
Public Contract Code Section 20100
Public Contract Code Section 20101
Public Contract Code Section 20102
Public Contract Code Section 20103.5
Public Contract Code Section 20103.6
Public Contract Code Section 20103.8
Public Contract Code Section 20104
Public Contract Code Section 20104.2
Public Contract Code Section 20104.4
Public Contract Code Section 20104.6
Public Contract Code Section 20104.50
Public Contract Code Section 20107
Public Contract Code Section 20110
Public Contract Code Section 20111
Public Contract Code Section 20111.5
Public Contract Code Section 20116
Public Contract Code Section 20650
Public Contract Code Section 20651
Public Contract Code Section 20651.5
Public Contract Code Section 20657
Public Contract Code Section 20659
Public Contract Code Section 22300

Business and Professions Code Section 7028.15

Title 5, California Code of Regulations
Section 59500
Section 59504
Section 59505
Section 59506
Section 59509

Claim Prepared By:
Keith B. Petersen
SixTen and Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117
Voice: (858) 514-8605

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

	)	
	)	No. CSM _____
	)	
	)	Chapter 455, Statutes of 2002
Test Claim of:	)	Chapter 776, Statutes of 2000
	)	Chapter 292, Statutes of 2000
	)	Chapter 159, Statutes of 2000
	)	Chapter 127, Statutes of 2000
Clovis Unified School District	)	Chapter 126, Statutes of 2000
	)	Chapter 972, Statutes of 1999
and	)	Chapter 857, Statutes of 1998
	)	Chapter 657, Statutes of 1998
Santa Monica	)	Chapter 722, Statutes of 1997
Community College District,	)	Chapter 390, Statutes of 1997
	)	Chapter 897, Statutes of 1995
	)	Chapter 504, Statutes of 1995
	)	Chapter 726, Statutes of 1994
Test Claimants.	)	Chapter 1195, Statutes of 1993
	)	Chapter 1032, Statutes of 1993
	)	Chapter 1042, Statutes of 1992
	)	Chapter 799, Statutes of 1992
	)	Chapter 294, Statutes of 1992
	)	Chapter 933, Statutes of 1991
	)	Chapter 785, Statutes of 1991
	)	Chapter 1414, Statutes of 1990
	)	Chapter 808, Statutes of 1990
	)	Chapter 694, Statutes of 1990
	)	Chapter 321, Statutes of 1990
	)	(Continued on Next Page)
	)	
	)	Public Contracts (K-14)
	)	
	)	TEST CLAIM FILING

Chapter 1163, Statutes of 1989
Chapter 863, Statutes of 1989
Chapter 330, Statutes of 1989
Chapter 1408, Statutes of 1988
Chapter 538, Statutes of 1988
Chapter 102, Statutes of 1987
Chapter 1060, Statutes of 1986
Chapter 886, Statutes of 1986
Chapter 1073, Statutes of 1985
Chapter 758, Statutes of 1984
Chapter 728, Statutes of 1984
Chapter 173, Statutes of 1984
Chapter 256, Statutes of 1983
Chapter 513, Statutes of 1982
Chapter 465, Statutes of 1982
Chapter 251, Statutes of 1982
Chapter 470, Statutes of 1981
Chapter 194. Statutes of 1981
Chapter 1255, Statutes of 1980
Chapter 631, Statutes of 1977
Chapter 36, Statutes of 1977
Chapter 921, Statutes of 1976

Public Contract Code Sections:
2000, 2001, 3300, 6610, 7104, 7107, 7109, 9203, 10299, 12109, 20100, 20101, 20102, 20103.5, 20103.6, 20103.8, 20104, 20104.2, 20104.4, 20104.6, 20104.50, 20107, 20110, 20111, 20111.5, 20116, 20650, 20651, 20651.5, 20657, 20659 and 22300

Business and Professions Code Section 7028.15

Title 5, California Code of Regulations Sections 59500, 59504, 59505, 59506 and 59509

PART 1. AUTHORITY FOR THE CLAIM

The Commission on State Mandates has the authority pursuant to Government Code section 17551(a) to "...hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for

costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." Clovis Unified School District is a "school district" as defined in Government Code section 17519.[1]

PART II. LEGISLATIVE HISTORY OF THE CLAIM

This test claim alleges mandated costs reimbursable by the state for school districts, county offices of education, and community college districts to use standardized questionnaires and financial statements, maintaining those questionnaires and financial statements confidential not subject to public inspection, rating bidders on the basis of those questionnaires and financial statements, prequalifying bidders, following required dispute resolution procedures (including meet and confer requirements, attending mediations, and mandatory judicial arbitrations), detailing specific reason for changes to plans and specifications, verifying contractor licensing status, specifying bid procedures for additive and deductive contract items, paying interest on certain claims, receiving and returning bidder's security, and requiring bidders to participate with minority and women business enterprises in contracts, require competitive bidding for certain purchases, services and repairs and complying with the requirements of Minority, Women, and Disabled Veteran Business Enterprise Participation Goals for Community Colleges.

[1] Government Code Section 17519, as added by Chapter 1459/84:

"School District" means any school district, community college district, or county superintendent of schools."

SECTION 1. LEGISLATIVE HISTORY PRIOR TO 1975

Education Code Section 15951[2] required school districts to let contracts to the lowest responsible bidder who shall give required security, or else reject all bids, when the expenditure was for more than $5,000 for work to be done, or $8,000 for materials or supplies to be furnished, sold or leased to the district.

Education Code Section 15952[3] required school districts, for the purpose of securing bids, to publish, at least once a week for two weeks in a newspaper of general circulation, a call for bids stating the work to be done or materials or supplies to be furnished and the time when and the place where bids will be opened. No bids could be received after that time.

---

[2] Education Code Section 15951, as amended by Chapter 321, Statutes of 1973, Section 1:

"The governing board of any school district shall let any contracts involving an expenditure of more than five thousand dollars ($5,000) for work to be done or more than eight thousand dollars ($8,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise."

[3] Education Code Section 15952, as amended by Chapter 1010, Statutes of 1965, Section 1:

"For the purpose of securing bids the board shall publish at least once a week for two weeks in some newspaper of general circulation published in the district, or if there is no such paper, then in some newspaper of general circulation, circulated in the county a notice calling for bids, stating the work to be done or materials or supplies to be furnished and the time when and the place where bids will be opened. Whether or not bids are opened exactly at the time fixed in the public notice for opening bids, a bid shall not be received after that time."

Education Code Section 15954[4] created an exception to the advertisement for bids when contracting, leasing, acquiring or purchasing from any public corporation.

Education Code Section 15954.5[5] created another exception when purchasing materials, equipment or supplies through the Department of General Services.

Education Code Section 15955[6] permitted continuing contracts not to exceed five

---

[4] Education Code Section 15954, as amended by Chapter 1496, Statutes of 1967:

"Notwithstanding any other provision of Sections 15951 to 15960, inclusive, the governing board of any school district without advertising for bids may authorize by contract, lease, requisition or purchase order, any public corporation or agency within the county whose superintendent of schools has jurisdiction over such school district, including the county, any city, town, district, or other school district of such county under the jurisdiction of the same county superintendent of schools, to lease data processing equipment, purchase materials, supplies, equipment, automotive vehicles, tractors and other personal property for the district in the manner in which such other public corporation or agency is authorized by law to make such leases or purchases. Upon receipt of any such personal property, provided the same complies with the specifications set forth in the contract, lease, requisition or purchase order, the school district shall draw a warrant in favor of such other public corporation or agency for the amount of the approved invoice, including the reasonable costs to such other public corporation or agency for furnishing the services incidental to the lease or purchase of such personal property."

[5] Education Code Section 15954.5, as added by Chapter 1084, Statutes of 1971:

"Nothing in this code shall preclude the governing board of any school district from purchasing materials, equipment or supplies through the Department of General Services pursuant to Government Code Section 14814."

[6] Education Code Section 15955, as amended by Chapter 2120, Statutes of 1961:

"Continuing contracts for work to be done, services to be performed, or for apparatus or equipment to be furnished, sold, built, leased, installed, or repaired for the district, or for

years for work, services, apparatus or equipment with accepted vendors. Continuing contracts for materials or supplies were not to exceed three years.

Education Code Section 15955.1[7] provided that contracts for the rental, lease or lease-purchase of motor vehicles (other than school buses), equipment or systems could not exceed five years.

Education Code Section 15955.2[8] provided that continuing contracts for the lease of electronic data-processing systems could be made with an acceptable lessor until the

---

materials or supplies to be furnished, sold or leased to the district may be made with an accepted vendor or lessor as follows: for work or services, or for apparatus or equipment, not to exceed five years; for materials or supplies, not to exceed three years."

[7] Education Code Section 15955.1, as added by Chapter 1178, Statutes of 1969:

"Contracts for the rental, lease, or lease-purchase of motor vehicles, other than schoolbuses, equipment or systems to be furnished, built or installed for the district may be made for a period not to exceed five years, such contracts to be renewable at the option of the district for an additional period not to exceed five years; provided, that rate of the renewal contract is not greater than the rate set in the existing contract. For the sole purpose of identifying that portion of each annual rental or lease payment which may represent tax exempt reimbursement to the vendor, lessor or their assignees, bidders may include in their bids abstractions of their quotations indicating the pricing structure used to compute the annual rental or lease payments."

[8] Education Code Section 15955.2, as amended by Chapter 545, Statutes of 1971:

"Continuing contracts for the lease of electronic data-processing systems may be made with an acceptable lessor until the governing board of the school district determines that it is in the best interests of that school district to replace the present electronic data-processing systems. The governing board may make such contracts with an acceptable lessor who is one of the three lowest responsible bidders."

governing board determined that it was in the best interest of the district to replace those systems. The section required the governing board to make those lease contracts with one of the three lowest bidders.

Education Code Section 15955.5[9] provided that, to meet emergency situations, or to meet temporary peak workloads, the governing board could contract for electromechanical or electronic data processing work for a period not to exceed 90 days.

Education Code Section 15956[10] provided that, in an emergency, when repairs,

---

[9] Education Code Section 15955.5, as added by Chapter 294, Statutes of 1963:

"The governing board of a school district may contract for electromechanical or electronic data processing work to be done, or related services to be performed, for a period not to exceed 90 days, to meet emergency situations, or to meet temporary peak workloads, or on a temporary basis for specific projects when it is determined by the governing board, in its judgment, to be essential to the district to accomplish the work or services within established time limits, and when the personnel commission finds that it is not practical to employ temporary personnel pursuant to Article 5 (commencing with Section 13701) of Chapter 3 of Division 10. In emergency situations arising between regularly scheduled meetings of the personnel commission, the approval of the personnel director shall constitute authority for an interim contract. The findings of the personnel director shall be effective until the next regular meeting of the personnel commission."

[10] Education Code Section 15956, as enacted by Chapter 2, Statutes of 1959, Section 15956:

"In an emergency when any repairs, alterations, work or improvement is necessary to permit the continuance of existing school classes, or to avoid danger to life or property, the board may by unanimous vote, with the approval of the county superintendent of schools, make a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing of materials or supplies for the purpose without advertising for or inviting bids."

alterations, work or improvement was necessary to permit the continuance of existing school classes or to avoid danger to life or property, the governing board could, by unanimous vote and with the approval of the county superintendent of schools, make a contract in writing, or otherwise, for the performance of labor and furnishing of materials or supplies without advertising for or inviting bids.

Education Code Section 15957[11] provided that the governing board of each school district could make repairs, alterations or additions to school buildings, repair or build apparatus or equipment, make improvements on the school grounds and erect new buildings by day labor or force account when the cost of labor did not exceed $3,500, or the total number of hours on the job did not exceed 350 hours. The amount was reduced to $3,000 for school districts within a city with a population of over 1,900,000.

---

[11] Education Code Section 15957, as amended by Chapter 1373, Statutes of 1970, Section 1:

"In each school district, the governing board may make repairs, alterations or additions to school buildings, repair or build apparatus or equipment, make improvements on the school grounds, and erect new buildings by day labor, or by force account, whenever the total cost of labor on the job does not exceed three thousand five hundred dollars ($3,500) or the total number of hours on the job does not exceed 350 hours, whichever is greater, provided that in any school district situated wholly or partly within a city containing a population of over 1,900,000 according to the 1950 federal census, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment by day labor or by force account whenever the total cost of labor on the job does not exceed three thousand dollars ($3,000) or the total number of hours on the job does not exceed 750 hours, whichever is greater.

For purposes of this section, day labor shall include the use of maintenance men, whether employed on a permanent or temporary basis."

Education Code Section 15957.5[12] provided that the governing board of a school district, with an average daily attendance of 400,000 or more, could employ certificated employees as classified employees during vacation periods or other days when not required to perform certificated services, to repair or build apparatus or equipment related to their certificated duties, even though the total cost of labor exceeds $1,000.

Education Code Section 15958[13] provided that the governing board of a school district could purchase supplementary textbooks, library books, educational films, audiovisual materials, test materials or workbooks in any amount without taking estimates or advertising for bids. Test materials, educational films and audiovisual

---

[12] Education Code Section 15957.5, as added by Chapter 1019, Statutes of 1961:

"The governing board of any district defined hereafter, in addition to any other authority granted by law, may employ as classified employees, in accordance with rules and regulations established by the Personnel Commission, any certificated employees of the district or districts during vacation periods, or on any other day or days when the certificated employee is not required to perform services for the district, to repair or build apparatus or equipment related to their duties as certificated employees even though the total cost of labor exceeds one thousand dollars ($1,000). This section applies only when the average daily attendance of any school district, or of two or more school districts governed by governing boards of identical personnel, is 400,000 or more, as shown by the annual report of the county superintendent of schools for the preceding school year."

[13] Education Code Section 15958, as amended by Chapter 1367, Statutes of 1967:

"The governing board of any school district may purchase supplementary textbooks, library books, and educational films, audiovisual materials, test materials, or workbooks in any amount needed for the operation of the schools of the district without taking estimates or advertising for bids. Test materials, educational films, and audiovisual materials may be leased for a period not exceeding 10 years."

materials could be leased for a period not to exceed 10 years.

Education Code Section 15960[14] required the governing board of a school district to determine the method of payment for construction contracts, including progress payments.

Education Code Section 15961[15] provided that the power to contract could be delegated to its district superintendent, or to such persons as the superintendent may designate. The delegation could be limited as to time, money or subject matter.

---

[14] Education Code Section 15960:

"The governing board of any school district shall determine the method of payment for construction contracts, including progress payments for completed portions of the work or for materials delivered on the ground or stored subject to the control of the board and unused."

[15] Education Code Section 15961, as amended by Chapter 940, Statutes of 1972:

"Wherever in this code the power to contract is invested in the governing board of the school district or any member thereof, such power may by a majority vote of the board be delegated to its district superintendent, or to such persons as he may designate, or if there be no district superintendent then to such other officer or employee of the district as the board may designate. Such delegation of power may be limited as to time, money or subject matter or may be a blanket authorization in advance of its exercise, all as the governing board may direct; provided, however, that no contract made pursuant to such delegation and authorization shall be valid or constitute an enforceable obligation against the district unless and until the same shall have been approved or ratified by the governing board, said approval or ratification to be evidenced by a motion of said board duly passed and adopted. In the event of malfeasance in office, the school district official invested by the governing board with such power of contract shall be personally liable to the school district employing him for any and all moneys of the district paid out as a result of such malfeasance."

Education Code Section 15962[16] provided that the governing board could delegate to an officer or employee the authority to purchase supplies, materials, apparatus or equipment involving expenditures of less than $10,000. All such transactions were required to be reviewed by the governing board every 60 days.

Education Code Section 15962.5[17] provided that the governing board of a school district, with an average daily attendance of not less than 60,000, could authorize its district superintendent, or his designee, to expend up to $100 per transaction for work done, compensation for employees or consultants, and purchases of equipment,

---

[16] Education Code Section 15962, as amended by Chapter 940, Statutes of 1972:

"The governing board by majority vote may adopt a rule, delegating to such officer or employee of the district as the board may designate, the authority to purchase supplies, materials, apparatus and equipment. No such rule shall authorize any officer or employee to make any purchases involving an expenditure by the district of ten thousand dollars ($10,000) or more. The rule shall prescribe the limits of the delegation as to time, money, and subject matter. All transactions entered into by such officer or employee shall be reviewed by the governing board every 60 days.

In the event of malfeasance in office, the school district officer or employee invested by the governing board with the power to contract shall be personally liable for any and all moneys of the district paid out as a result of such malfeasance."

[17] Education Code Section 15962.5, as added by Chapter 940, Statutes of 1972:

"The governing board of any school district with an average daily attendance of not less than 60,000 may by majority vote authorize its district superintendent, or such person as he may designate, to expend up to one hundred dollars ($100) per transaction for work done, compensation for employees or consultants , and purchases of equipment, supplies, or materials. Ratification by the governing board shall not be required with respect to transactions entered into pursuant to this section. In the event of malfeasance in office, the school district official invested by the governing board with authority to act under this section shall be personally liable for any and all moneys of the district paid out as a result of such malfeasance."

supplies or materials, without ratification.

Education Code Section 15963[18] provided that if any change or alteration of a contract was ordered by the governing board, the change or alteration was to be in writing and the cost agreed upon between the governing board and the contractor. The board was authorized to proceed without the formality of securing bids if the cost of the change or alteration did not exceed specified amounts or 10 percent of the original contract price. School districts with an average daily attendance of 400,000, or more, were authorized to contract for changes or alterations, other than for the construction of

[18] Education Code Section 15963, as amended by Chapter 514, Statutes of 1967:

"If any change or alteration of a contract governed by the provisions of this article (commencing with Section 15951) is ordered by the governing board of the district, such change or alteration shall be specified in writing and the cost agreed upon between the governing board and the contractor. The board may authorize the contractor to proceed with performance of the change or alteration without the formality of securing bids, if the cost so agreed upon does not exceed the greater of:

(a) The amount specified in Section 15951, 15953, or 15957, whichever is applicable to the original contract; or

(b) Ten percent (10%) of the original contract price.

The governing board of any school district, or of two or more school districts governed by governing boards of identical personnel, having an average daily attendance of 400,000 or more as shown by the annual report of the county superintendent of schools for the preceding year, may also authorize any change or alteration of a contract for reconstruction or rehabilitation work other than for the construction of new buildings or other new structures, where the cost of the change or alteration is in excess of the limitations in subdivisions (a) and (b) but does not exceed 25 percent of the original contract price, without the formality of securing bids, when such change or alteration is a necessary and integral part of the work under the contract and the taking of bids would delay the completion of the contract. Changes exceeding 15 percent of the original contract price shall be approved by an affirmative vote of not less than 75 percent of the members of the governing board."

new buildings, where the cost did not exceed 25 percent of the original contract price when the change or alteration was a necessary and integral part of the work under contract and the taking of bids would delay completion of the contract.

Education Code Section 17005[19] provided that perishable foodstuffs and seasonal commodities needed in the operation of cafeterias should be purchased in accordance with rules and regulations adopted by the governing board notwithstanding the provisions of this code.

Education Code Section 19412[20] (part of the State School Building Aid Law of 1949) prohibited a school district from expending any money apportioned under that law unless the contracts under which the funds were expended had been let after competitive bids pursuant to this code.

SECTION 2. LEGISLATIVE HISTORY AFTER 1974

A. Local Agency Public Construction Act

Chapter 465, Statutes of 1982, Section 11, added Public Contract Code Section

---

[19] Education Code Section 17005:

"Perishable foodstuffs and seasonal commodities needed in the operation of the cafeterias may be purchased by the school district in accordance with rules and regulations for such purchase adopted by the governing board of said district notwithstanding any provisions of this code in conflict with such rules and regulations."

[20] Education Code Section 19412:

A school district shall not expend money apportioned under this chapter (Sections 19401 to 19486, inclusive) unless the contracts under which the funds are expended have been let after competitive bids thereafter pursuant to this code."

20100[21] to provide that the chapter may be cited as the "Local Agency Public Construction Act". Section 20110[22] provides that the provisions of this part shall apply to contracts awarded by school districts subject to Part 21 (commencing with Section 35000) of Division 3 of Title 2 of the Education Code.

Chapter 513, Statutes of 1982, Section 4, added Public Contract Code Section 12109[23] which provides that the Director of General Services may make the services of the department available, upon such terms and conditions as may be deemed satisfactory, to any tax-supported public agency in the state, including a school district, for assisting the agency in the purchase or lease of electronic data processing goods or services."

---

[21] Public Contract Code Section 20100, added by Chapter 465, Statutes of 1982, Section 11:

"This chapter may be cited as the Local Agency Public Construction Act."

[22] Public Contract Code Section 20110, added by Chapter 465, Statutes of 1982, Section 11:

"The provisions of this part shall apply to contracts awarded by school districts subject to Part 21 (commencing with Section 35000) of Division 3 of Title 2 of the Education Code."

[23] Public Contract Code Section 12109, added by Chapter 513, Statutes of 1982, Section 4:

"The Director of General Services may make the services of the department under this chapter available, upon such terms and conditions as may be deemed satisfactory, to any tax-supported public agency in the state, including a school district, for assisting the agency in the purchase or lease of electronic data-processing goods or services."

Chapter 728, Statutes of 1984, Section 6, amended Public Contract Code Section 12109 to make technical changes.

Chapter 758, Statutes of 1984, Section 2, added Public Contract Code Section 20102[24] which provides that, when plans and specifications have been prepared by a public agency and, subsequently, the public agency decides to perform the project by day's labor, the public agency shall perform the work in strict accordance with the plans and specifications. Section 20102 also requires school districts to justify any such revisions of the plans and specifications detailing the specific reasons for the change or changes and have the change(s) approved by the district or its project director and placed in the project file. The section had a sunset date of January 1, 1991.

Chapter 1073, Statutes of 1985, Section 2, added Public Contract Code Section

[24] Education Code Section 20102, added by Chapter 758, Statutes of 1984, Section 2:

"Notwithstanding any other provision of this part to the contrary, where plans and specifications have been prepared by a public agency, whose activities are subject to this part, in order for a public project to be put out for formal or informal bid, and, subsequently, the public agency elects to perform the work by day's labor, the public agency shall perform the work in strict accordance with these plans and specifications.

Revisions of the plans and specifications may be made once a justification detailing the specific reasons for the change or changes has been approved by the public agency or its project director and a copy of the change and its justification is placed in the project file.

This section shall remain in effect only until January 1, 1991, and as of such date is repealed, unless a later enacted statute, which is chaptered on or before January 1, 1991, deletes or extends such date."

3300[25] which provides that any public entity, as defined in Section 1100, shall specify the classification of the contractor's license which a contractor shall possess at the time a contract is awarded. The specification shall be included in any plans prepared for a public project and in any notice inviting bids required pursuant to this code.

Chapter 1408, Statutes of 1988, Section 11, added Public Contract Code Section 22300[26] which requires that provisions shall be included in any invitation for bid and in

---

[25] Public Contract Code Section 3300, added by Chapter 1073, Statutes of 1985, Section 2:

"(a) Any public entity, as defined in Section 1100, the University of California, and the California State University shall specify the classification of the contractor's license which a contractor shall possess at the time a contract is awarded. The specification shall be included in any plans prepared for a public project and in any notice inviting bids required pursuant to this code.

This requirement shall apply only with respect to contractors who contract directly with the public entity.

(b) A contractor who is not awarded a public contract because of the failure of an entity, as defined in subdivision (a), to comply with that subdivision shall not receive damages for the loss of the contract."

[26] Public Contract Code Section 22300, added by 1408, Statutes of 1988, Section 11:

"Provisions shall be included in any invitation for bid and in any contract documents to permit the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract, provided that substitution of securities provisions shall not be required in contracts in which there will be financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. Section 562. 1921 et seq.), and where federal regulations or policies, or both, do not allow the substitution of securities. At the request and expense of the contractor, securities equivalent to the amount withheld shall be deposited with the public agency, or with a state or federally chartered bank as the escrow agent, who shall then pay those moneys to the contractor. Upon satisfactory completion of the contract, the securities shall be

returned to the contractor.

Securities eligible for investment under this section shall include those listed in Section 16430 of the Government Code, bank or savings and loan certificates of deposit, interest bearing demand deposit accounts, standby letters of credit, or any other security mutually agreed to by the contractor and the public agency.

The contractor shall be the beneficial owner of any securities substituted for moneys withheld and shall receive any interest thereon.

Failure to include these provisions in bid and contract documents shall void any provisions for performance retentions in a public agency contract.

For purposes of this section, the term "public agency" shall include, but shall not be limited to, chartered cities.

The Legislature hereby declares that the provisions of this section are of statewide concern and are necessary to encourage full participation by contractors in public contract procedures.

The escrow agreement used hereunder shall be null, void, and unenforceable unless it is substantially similar to the following form

ESCROW AGREEMENT FOR
SECURITY DEPOSITS IN LIEU OF RETENTION

This Escrow Agreement is made and entered into by and between

_____

whose address is

_____

_____

hereinafter called "Owner,"

_____

whose address is

_____

_____

hereinafter called "Contractor," and

_____

whose address is

_____

_____

hereinafter called "Escrow Agent."

For the consideration hereinafter set forth, the Owner, Contractor, and Escrow Agent agree as follows:

1

(1) Pursuant to Section 22200 of the Public Contract Code of the State of California, Contractor has the option to deposit securities with Escrow Agent as a substitute for retention earnings required to be withheld by Owner pursuant to the Construction Contract entered into between the Owner and Contractor for ____ in the amount of ____ dated ____ (hereinafter referred to as the "Contract"). When Contractor deposits the securities as a substitute for Contract earnings, the Escrow Agent shall notify the Owner within 10 days of the deposit. The market value of the securities at the time of the substitution shall be at least equal to the cash amount then required to be withheld as retention under the terms of the Contract between the Owner and Contractor. Securities shall be held in the name of ____, and shall designate the Contractor as the beneficial owner.

(2) The Owner shall make progress payments to the Contractor for such funds which otherwise would be withheld from progress payments pursuant to the Contract provisions, provided that the Escrow Agent holds securities in the form and amount specified above.

(3) Alternatively, the Owner may make payments directly to Escrow Agent in the amount of retention for the benefit of the Owner until such time as the escrow created hereunder is terminated.

(4) Contractor shall be responsible for paying all fees for the expenses incurred by Escrow Agent in administering the Escrow Account. These expenses and payment terms shall be determined by the Owner, Contractor and Escrow Agent.

(5) The interest earned on the securities or the money market accounts held in escrow and all interest earned on that interest shall be for the sole account of Contractor and shall be subject to withdrawal by Contractor at any time and from time to time without notice to the Owner.

(6) Contractor shall have the right to withdraw all or any part of the principal in the Escrow Account only by written notice to Escrow Agent accompanied by written authorization from Owner to the Escrow Agent that Owner consents to the withdrawal of the amount sought to be withdrawn by Contractor.

(7) The Owner shall have a right to draw upon the securities in the event of default by the Contractor. Upon seven days' written notice to the escrow agent from the owner of the default, the escrow agent shall immediately convert the securities to cash and shall distribute the cash as instructed by the Owner.

(8) Upon receipt of written notification from the Owner certifying that the Contract is final and complete, and that the Contractor has complied with all requirements and procedures applicable to the Contract, Escrow Agent shall release to Contractor all securities and interest on deposit less escrow fees and charges of the Escrow Account. The escrow shall be closed immediately upon disbursement of all moneys and securities on deposit and payments of fees and charges.

any contract documents to permit the substitution of securities for any moneys withheld

(9) Escrow Agent shall rely on the written notifications from the Owner and the Contractor pursuant to Sections (4) to (6), inclusive, of this agreement and the Owner and Contractor shall hold Escrow Agent harmless from Escrow Agent's release and disbursement of the securities and interest as set forth above.

(10) The names of the persons who are authorized to give written notice or to receive written notice on behalf of the Owner and on behalf of Contractor in connection with the foregoing, and exemplars of their respective signatures are as follows

On behalf of the Owner:	On behalf of the Contractor:
Title	Title
Name	Name
Signature	Signature
Address	Address

On behalf of the Escrow Agent:

Title

Name

Signature

Address

At the time the Escrow Account is opened, the Owner and Contractor shall deliver to the Escrow Agent a fully executed counterpart of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement by their proper officers on the date first set forth above

Owner	Contractor
Title	Title
Name	Name
Signature	Signature

This part shall remain in effect only until January 1, 1992, and as of that date is repealed, unless a later enacted statute, which is chaptered on or before January 1, 1992, deletes or extends that date."

by a public agency to ensure performance under a contract, subject to stated exceptions.

Chapter 330, Statutes of 1989, Section 1, added Public Contract Code Section 7104[27] which, at subdivision (a), requires that any public works contract of a local public entity which involves digging trenches or other excavations that extend deeper than four

---

[27] Public Contract Code Section 7104, added by Chapter 330, Statutes of 1989, Section 1:

"Any public works contract of a local public entity which involves digging trenches or other excavations that extend deeper than four feet below the surface shall contain a clause which provides the following:

(a) That the contractor shall promptly, and before the following conditions are disturbed, notify the public entity, in writing, of any:

(1) Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.

(2) Subsurface or latent physical conditions at the site differing from those indicated.

(3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

(b) That the public entity shall promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work shall issue a change order under the procedures described in the contract.

(c) That, in the event that a dispute arises between the public entity and the contractor whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor's cost of, or time required for, performance of any part of the work, the contractor shall not be excused from any scheduled completion date provided for by the contract, but shall proceed with all work to be performed under the contract. The contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties."

feet below the surface shall contain a clause which provides the following:

(a) That the contractor shall promptly, and before the following conditions are disturbed, notify the public entity, in writing, of any:

(1) Material that the contractor believes may be hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.

(2) Subsurface or latent physical conditions at the site differing from those indicated.

(3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

Subdivision (b) requires the public entity to promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work, it shall issue a change order under the procedures described in the contract. Subdivision (c) provides that, in the event that a dispute arises between the public entity and the contractor whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor's cost of, or time required for, performance of any part of the work, the contractor shall not be excused from any scheduled completion date provided for by the contract, but shall

proceed with all work to be performed under the contract. The contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties.

Chapter 863, Statutes of 1989, Section 1, added Business and Professions Code Section 7028.15[28]. Subdivision (e), provides that, a licensed contractor shall not submit

---

[28] Business and Professions Code Section 7028.15, added by Chapter 863, Statutes of 1989, Section 1:

"(a) It is a misdemeanor for any person to submit a bid to a public agency in order to engage in the business or act in the capacity of a contractor within this state without having a license therefor, except in any of the following cases:

(1) The person is particularly exempted from the provisions of this chapter.

(2) The bid is submitted on a state project governed by Section 10164 of the Public Contract Code.

(b) If a person has been previously convicted of the offense described in this section, the court shall impose a fine of 20 percent of the price of the contract under which the unlicensed person performed contracting work, or four thousand five hundred dollars ($4,500), whichever is greater, or imprisonment in the county jail for not less than 10 days nor more than six months, or both.

In the event the person performing the contracting work has agreed to furnish materials and labor on an hourly basis, "the price of the contract" for the purposes of this subdivision means the aggregate sum of the cost of materials and labor furnished and the cost of completing the work to be performed.

(c) This section shall not apply to a joint venture license, as required by Section 7029.1. However, at the time of making a bid as a joint venture, each person submitting the bid shall be subject to this section with respect to his or her individual licensure.

(d) This section shall not affect the right or ability of a licensed architect, or registered professional engineer to form joint ventures with licensed contractors to render services within the scope of their respective practices.

(e) A licensed contractor shall not submit a bid to a public agency unless his or her contractor's license number appears clearly on the bid, the license expiration date is stated, and the bid contains a statement that the representations made therein are made under penalty of perjury. Any bid not containing this information, or a bid containing information which is subsequently proven false, shall be considered nonresponsive and shall be rejected by the public agency."

a bid to a public agency unless his or her contractor's license number appears clearly on the bid, the license expiration date is stated, and the bid contains a statement that the representations made therein are made under penalty of perjury. Any bid not containing this information, or a bid containing information which is subsequently proven false, shall be considered nonresponsive and shall be rejected by the public agency.

Chapter 1163, Statutes of 1989, Section 1, added Section 20107[29] which requires that bids shall be accompanied by prescribed security and school districts were required to return the security to unsuccessful bidders. Therefore, for the first time, school districts were required to receive from, and return security to, bidders.

Chapter 321, Statutes of 1990, Section 1, amended Business and Professions Code Section 7028.15[30], subdivision (e), to delete the requirement that the contractor's

---

[29] Public Contract Code Section 20107, added by Chapter 1163, Statutes of 1989, Section 1:

"All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the school district.

(c) A certified check made payable to the school district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the school district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the school district beyond 60 days from the time the award is made."

[30] Business and Professions Code Section 7028.15, added by Chapter 863, Statutes of 1989, Section 1, as amended by Chapter 321, Statutes of 1990, Section 1:

"(e) ~~A licensed contractor shall not submit a bid to a public agency unless his or~~

license number appears clearly on the bid, the license expiration date is stated, and the bid contains a statement that the representations made therein are made under penalty of perjury. The amendment also, for the first time, requires that, unless one of the foregoing exceptions applies, a local public agency shall, before awarding a bid, verify that the contractor was properly licensed when the contractor submitted the bid. The amendment also made technical changes.

Chapter 321, Statutes of 1990, Section 2, added Public Contract Code Section 20104[31] which, for the first time, requires school districts, where federal funds are

---

~~her contractor's license number appears clearly on the bid, the license expiration date is stated, and the bid contains a statement that the representations made therein are made under penalty of perjury. Any bid not containing this information, or a bid containing information which is subsequently proven false,~~ Unless one of the foregoing exceptions applies, a bid submitted to a public agency by a contractor who is not licensed in accordance with this chapter shall be considered nonresponsive and shall be rejected by the public agency. Unless one of the foregoing exceptions applies, a local public agency shall, before awarding a bid, verify that the contractor was properly licensed when the contractor submitted the bid."

[31] Public Contract Code Section 20104, added by Chapter 321, Statutes of 1990, Section 2:

"In all contracts subject to this part where federal funds are involved, no bid submitted shall be invalidated by the failure of the bidder to be licensed in accordance with the laws of this state. However, at the time the contract is awarded, the contractor shall be properly licensed in accordance with the laws of this state. The first payment for work or material under any contract shall not be made unless and until the Registrar of Contractors verifies to the agency that the records of the Contractors' State License Board indicate that the contractor was properly licensed at the time the contract was awarded. Any bidder or contractor not so licensed shall be subject to all legal penalties imposed by law, including, but not limited to, any appropriate disciplinary action by the Contractors' State License Board. The agency shall include a statement to that effect in the standard form of prequalification questionnaire and financial statement. Failure of

involved, to obtain verification from the Registrar of Contractors, before the first payment for work or material, that the contractor was properly licensed at the time the contract was awarded.

Chapter 694, Statutes of 1990, Section 8, added Public Contract Code Section 9203[32] which requires local agencies, on any contract for the creation, construction, alteration, repair, or improvement of any public structure, building, road, or other improvement, of any kind which will exceed in cost a total of five thousand dollars ($5,000), to withhold not less than 5 percent of the contract price until final completion and acceptance of the project. However, at any time after 50 percent of the work has been completed, if the legislative body finds that satisfactory progress is being made, it

---

the bidder to obtain proper and adequate licensing for an award of a contract shall constitute a failure to execute the contract and shall result in the forfeiture of the security of the bidder."

[32] Public Contract Code Section 9203, added by Chapter 694, Statutes of 1990, Section 8:

"Payment on any contract with a local agency for the creation, construction, alteration, repair, or improvement of any public structure, building, road, or other improvement, of any kind which will exceed in cost a total of five thousand dollars ($5,000), shall be made as the legislative body prescribes upon estimates approved by the legislative body, but progress payments shall not be made in excess of 95 percent of the percentage of actual work completed plus a like percentage of the value of material delivered on the ground or stored subject to, or under the control of, the local agency, and unused. The local agency shall withhold not less than 5 percent of the contract price until final completion and acceptance of the project. However, at any time after 50 percent of the work has been completed, if the legislative body finds that satisfactory progress is being made, it may make any of the remaining progress payments in full for actual work completed."

may make any of the remaining progress payments in full for actual work completed.

Chapter 694, Statutes of 1990, Section 9, amended Public Contract Code Section 20102 to make a technical change and to delete the January 1, 1991 sunset date.

Chapter 808, Statutes of 1990, Section 1, amended Public Contract Code Section 20107[33] to make it clear that the bid and security requirements only pertained to "construction work".

Chapter 1414, Statutes of 1990, Section 1, renumbered Public Contract Code Section 20104 as Section 20103.5.

Chapter 1414, Statutes of 1990, Section 2, added Article 1.5 (Resolution of Construction Claims) to Chapter 1 of Part 3 of the Public Contract Code to add Sections 20104, 20104.2, 20104.4, 20104.6 and 20104.8.

---

[33] Public Contract Code Section 20107, added by Chapter 1163, Statutes of 1989, Section 1, as amended by Chapter 808, Statutes of 1990, Section 1:

"All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:
(a) Cash.
(b) A cashier's check made payable to the school district.
(c) A certified check made payable to the school district.
(d) A bidder's bond executed by an admitted surety insurer, made payable to the school district.
Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the school district beyond 60 days from the time the award is made."

New Public Contract Code Section 20104[34] provides that the Article only applies to public works claims of $375,000, or less, which arise between a contractor and a local agency. "Claim" is defined therein as (a) a time extension, (b) payment of money or damages arising from work done and payment of which is not otherwise expressly provided for or the claimant is not otherwise entitled to, or (c) an amount the payment of which is disputed by the local agency. Therefore, for the first time, school districts are required to comply with the dispute resolution procedures of Article 1.5 to resolve claims, as defined, when the public works project is for $375,000, or less.

---

[34] Public Contract Code Section 20104, added by Chapter 1414, Statutes of 1990, Section 2:

> "(a) (1) This article applies to all public works claims of three hundred seventy-five thousand dollars ($375,000) or less which arise between a contractor and a local agency.
>
> (2) This article shall not apply to any claims resulting from a contract between a contractor and a public agency when the public agency has elected to resolve any disputes pursuant to Article 7.1 (commencing with Section 10240) of Chapter 1 of Part 2.
>
> (b) (1) "Public work" has the same meaning as in Sections 3100 and 3106 of the Civil Code, except that "public work" does not include any work or improvement contracted for by the state or the Regents of the University of California.
>
> (2) "Claim" means a separate demand by the contractor for (A) a time extension, (B) payment of money or damages arising from work done by, or on behalf of, the contractor pursuant to the contract for a public work and payment of which is not otherwise expressly provided for or the claimant is not otherwise entitled to, or (C) an amount the payment of which is disputed by the local agency.
>
> (c) The provisions of this article or a summary thereof shall be set forth in the plans or specifications for any work which may give rise to a claim under this article.
>
> (d) This article applies only to contracts entered into on or after January 1, 1991."

Section 20104.2[35], subdivision (b), requires a school district to respond to a

[35] Public Contract Code Section 20104.2, added by Chapter 1414, Statutes of 1990, Section 2:

"For any claim subject to this article, the following requirements apply:

(a) The claim shall be in writing and include the documents necessary to substantiate the claim. Claims must be filed on or before the date of final payment. Nothing in this subdivision is intended to extend the time limit or supersede notice requirements otherwise provided by contract for the filing of claims.

(b) (1) For claims of less than fifty thousand dollars ($50,000), the local agency shall respond in writing to any written claim within 45 days of receipt of the claim, or may request, in writing, within 30 days of receipt of the claim, any additional documentation supporting the claim or relating to defenses or claims the local agency may have against the claimant.

(2) If additional information is thereafter required, it shall be requested and provided pursuant to this subdivision, upon mutual agreement of the local agency and the claimant.

(3) The local agency's written response to the claim, as further documented, shall be submitted to the claimant within 15 days after receipt of the further documentation or within a period of time no greater than that taken by the claimant in producing the additional information, whichever is greater.

(c) (1) For claims of over fifty thousand dollars ($50,000) and less than or equal to three hundred seventy-five thousand dollars ($375,000), the local agency shall respond in writing to all written claims within 60 days of receipt of the claim, or may request, in writing, within 30 days of receipt of the claim, any additional documentation supporting the claim or relating to defenses or claims the local agency may have against the claimant.

(2) If additional information is thereafter required, it shall be requested and provided pursuant to this subdivision, upon mutual agreement of the local agency and the claimant.

(3) The local agency's written response to the claim, as further documented, shall be submitted to the claimant within 30 days after receipt of the further documentation, or within a period of time no greater than that taken by the claimant in producing the additional information or requested documentation, whichever is greater.

(d) If the claimant disputes the local agency's written response, or the local agency fails to respond within the time prescribed, the claimant may so notify the local agency, in writing, either within 15 days of receipt of the local agency's response or within 15 days of the local agency's failure to respond within the time prescribed,

written claim (excluding tort claims) of less than $50,000, in writing, within 45 days or request additional documentation within 30 days; and the district's written response, as further documented, shall be submitted to the claimant within 15 days after receipt of the additional documentation. Subdivision (c) requires districts to respond to a written claim (excluding tort claims) of over $50,000 and less than or equal to $375,000, in writing, within 60 days or request additional documentation within 30 days; and the district's written response, as further documented, shall be submitted to the claimant within 30 days after receipt of the additional documentation. Subdivision (d) requires the district to meet and confer, within 30 days, upon the claimant's notification that it disputes the district's written response or if the district fails to respond timely, Subdivision (e) provides that, following the meet and confer conference, if the claim or any portion thereof remains in dispute, the claimant may file a claim pursuant to the Government Code provisions for the filing of claims against public entities.

---

respectively, and demand an informal conference to meet and confer for settlement of the issues in dispute. Upon a demand, the local agency shall schedule a meet and confer conference within 30 days for settlement of the dispute.

(e) If following the meet and confer conference, if the claim or any portion remains in dispute, the claimant may file a claim pursuant to Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of Division 3.6 of Title 1 of the Government Code. For purposes of those provisions, the running of the period of time within which a claim must be filed shall be tolled from the time the claimant submits his or her written claim pursuant to subdivision (a) until the time the claim is denied, including any period of time utilized by the meet and confer process."

Section 20104.4[36] provides procedures for all civil actions to resolve claims subject to this article. Subdivision (a) requires the court to submit the matter to nonbinding arbitration, unless waived by all parties. In the event the matter remains in dispute, subdivision (b) requires the matter be submitted to judicial arbitration, to which the Civil Discovery Act of 1986 shall be applicable, and the fees of the arbitrator shall be paid equally by the parties. In the event any party requests a trial de novo after the

[36] Public Contract Code Section 20104.4, added by Chapter 1414, Statutes of 1990, Section 2:

"The following procedures are established for all civil actions filed to resolve claims subject to this article:

(a) Within 60 days, but no earlier than 30 days, following the filing or responsive pleadings, the court shall submit the matter to nonbinding mediation unless waived by mutual stipulation of both parties. The mediation process shall provide for the selection within 15 days by both parties of a disinterested third person as mediator, shall be commenced within 30 days of the submittal, and shall be concluded within 15 days from the commencement of the mediation unless a time requirement is extended upon a good cause showing to the court.

(b) (1) If the matter remains in dispute, the case shall be submitted to judicial arbitration pursuant to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, notwithstanding Section 1141.11 of that code. The Civil Discovery Act of 1986 (Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure) shall apply to any proceeding brought under this subdivision consistent with the rules pertaining to judicial arbitration.

(2) In addition to Chapter 2.5 (commencing with Section 1141.10) ofTitle 3 of Part 3 of the Code of Civil Procedure, (A) arbitrators shall, when possible, be experienced in construction law, and (B) any party appealing an arbitration award who does not obtain a more favorable judgment shall, in addition to payment of costs and fees under that chapter, also pay the attorney's fees on appeal of the other party.

(c) The court may, upon request by any party, order any witnesses to participate in the mediation or arbitration process."

decision of the judicial arbitration, but does not obtain a more favorable judgment, that party shall be required to pay the other party's attorney fees in addition to the payment of costs and fees.

Section 20104.6[37], subdivision (a), requires school districts to pay money as to any portion of a claim which is undisputed. Subdivision (b) requires local agencies to pay interest at the legal rate on any arbitration award or judgment commencing on the date the suit is filed in a court of law.

Section 20104.8[38] provided a sunset date to the article of January 1, 1994.

Chapter 785, Statutes of 1991, Section 2, amended Business and Professions

---

[37] Public Contract Code Section 20104.6, added by Chapter 1414, Statutes of 1990, Section 2:

"(a) No local agency shall fail to pay money as to any portion of a claim which is undisputed except as otherwise provided in the contract.
(b) In any suit filed under Section 20104.4, the local agency shall pay interest at the legal rate on any arbitration award or judgment. The interest shall begin to accrue on the date the suit is filed in a court of law."

[38] Public Contract Code Section 20104.8, added by Chapter 1414, Statutes of 1990, Section 2:

"(a) This article shall remain in effect only until January 1, 1994, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1994, deletes or extends that date.
(b) As stated in subdivision (c) of Section 20104, any contract entered into between January 1, 1991, and January 1, 1994, which is subject to this article shall incorporate this article. To that end, these contracts shall be subject to this article even if this article is repealed pursuant to subdivision (a)."

Code Section 7028.15[39], subdivision (e), to add a provision that a citation may be issued to any public officer or employee of a public entity who knowingly awards a contract or issues a purchase order to a contractor who is not licensed pursuant to this chapter. Subdivision (g) was added to provide that a public employee or officer shall not be subject to a citation pursuant to this section if the public employee, officer, or employing agency made an inquiry to the board for the purposes of verifying the license status of any person or contractor and the board failed to respond to the inquiry within three business days.

---

[39] Business and Professions Code Section 7028.15, added by Chapter 863, Statutes of 1989, Section 1, as amended by Chapter 785, Statutes of 1991, Section 2:

"(e) Unless one of the foregoing exceptions applies, a bid submitted to a public agency by a contractor who is not licensed in accordance with this chapter shall be considered nonresponsive and shall be rejected by the public agency. Unless one of the foregoing exceptions applies, a local public agency shall, before awarding a ~~bid~~ contract or issuing a purchase order, verify that the contractor was properly licensed when the contractor submitted the bid. Notwithstanding any other provision of law, unless one of the foregoing exceptions applies, the registrar may issue a citation to any public officer or employee of a public entity who knowingly awards a contract or issues a purchase order to a contractor who is not licensed pursuant to this chapter. The amount of civil penalties, appeal, and finality of such citations shall be subject to Sections 7028.7 to 7028.13, inclusive. Any contract awarded to, or any purchase order issued to, a contractor who is not licensed pursuant to this chapter is void.

(f) ,,,

(g) A public employee or officer shall not be subject to a citation pursuant to this section if the public employee, officer, or employing agency made an inquiry to the board for the purposes of verifying the license status of any person or contractor and the board failed to respond to the inquiry within three business days. For purposes of this section, a telephone response by the board shall be deemed sufficient."

1 Chapter 933, Statutes of 1991, amended Public Contract Code Section 22300[40]

[40] Public Contract Code Section 22300, added by 1408, Statutes of 1988, Section 11, as amended by Chapter 933, Statutes of 1991, Section 1:

"(a) Provisions shall be included in any invitation for bid and in any contract documents to permit the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract provided that substitution of securities provisions shall not be required in contracts in which there will be financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. Section 562. 1921 et seq.), and where federal regulations or policies, or both, do not allow the substitution of securities. At the request and expense of the contractor, securities equivalent to the amount withheld shall be deposited with the public agency, or with a state or federally chartered bank in California as the escrow agent, who shall then pay those moneys to the contractor. Upon satisfactory completion of the contract, the securities shall be returned to the contractor.

(b) Alternatively, the contractor may request and the owner shall make payment of retentions earned directly to the escrow agent at the expense of the contractor. At the expense of the contractor, the contractor may direct the investment of the payments into securities and the contractor shall receive the interest earned on the investments upon the same terms provided for in this section for securities deposited by the contractor. Upon satisfactory completion of the contract, the contractor shall receive from the escrow agent all securities, interest, and payments received by the escrow agent from the owner, pursuant to the terms of this section. The contractor shall pay to each subcontractor, not later than 20 days of receipt of the payment, the respective amount of interest earned, net of costs attributed to retention withheld from each subcontractor, on the amount of retention withheld to insure the performance of the contractor.

(c) Securities eligible for investment under this section shall include those listed in Section 16430 of the Government Code, bank or savings and loan certificates of deposit, interest-bearing demand deposit accounts, standby letters of credit, or any other security mutually agreed to by the contractor and the public agency.

The contractor shall be the beneficial owner of any securities substituted for moneys withheld and shall receive any interest thereon.

Failure to include these provisions in bid and contract documents shall void any provisions for performance retentions in a public agency contract.

For purposes of this section, the term "public agency" shall include, but shall not be limited to, chartered cities.

(d) The Legislature hereby declares that the provisions of this section are of

statewide concern and are necessary to encourage full participation by contractors in public contract procedures.

(e) The escrow agreement used hereunder shall be null, void, and unenforceable unless it is substantially similar to the following form

ESCROW AGREEMENT FOR
SECURITY DEPOSITS IN LIEU OF RETENTION

This Escrow Agreement is made and entered into by and between

_____
whose address is

_____
_____
_____
hereinafter called "Owner,"

_____
whose address is

_____
_____
_____
hereinafter called "Contractor," and

_____
whose address is

_____
_____
_____
hereinafter called "Escrow Agent."

For the consideration hereinafter set forth, the Owner, Contractor, and Escrow Agent agree as follows:

(1) Pursuant to Section 22200 of the Public Contract Code of the State of California, Contractor has the option to deposit securities with Escrow Agent as a substitute for retention earnings required to be withheld by Owner pursuant to the Construction Contract entered into between the Owner and Contractor for ____ in the amount of ____ dated ____ (hereinafter referred to as the "Contract"). Alternatively, on written request of the contractor, the owner shall make payments of the retention earnings directly to the escrow agent. When Contractor deposits the securities as a substitute for Contract earnings, the Escrow Agent shall notify the Owner within 10 days of the deposit. The market value of the securities at the time of the substitution shall be at least equal to the cash amount then required to be withheld as retention under the terms of the Contract between the Owner and Contractor. Securities shall be held in the name of ____, and shall designate the Contractor as the beneficial owner.

1

(2) The Owner shall make progress payments to the Contractor for such funds which otherwise would be withheld from progress payments pursuant to the Contract provisions, provided that the Escrow Agent holds securities in the form and amount specified above.

(3) ~~Alternatively, the Owner may make payments directly to Escrow Agent in the amount of retention for the benefit of the Owner~~ When the owner makes payment of retentions earned directly to the escrow agent, the escrow agent shall hold them for the benefit of the contractor until such time as the escrow created hereunder this contract is terminated. The contractor may direct the investment of the payments into securities. All terms and conditions of this agreement and the rights and responsibilities of the parties shall be equally applicable and binding when the owner pays the escrow agent directly.

(4) Contractor shall be responsible for paying all fees for the expenses incurred by Escrow Agent in administering the Escrow Account and all expenses of the Owner. These expenses and payment terms shall be determined by the Owner, Contractor, and Escrow Agent.

(5) The interest earned on the securities or the money market accounts held in escrow and all interest earned on that interest shall be for the sole account of Contractor and shall be subject to withdrawal by Contractor at any time and from time to time without notice to the Owner.

(6) Contractor shall have the right to withdraw all or any part of the principal in the Escrow Account only by written notice to Escrow Agent accompanied by written authorization from the Owner to the Escrow Agent that Owner consents to the withdrawal of the amount sought to be withdrawn by Contractor.

(7) The Owner shall have a right to draw upon the securities in the event of default by the Contractor. Upon seven days' written notice to the Escrow Agent from the owner of the default, the Escrow Agent shall immediately convert the securities to cash and shall distribute the cash as instructed by the Owner.

(8) Upon receipt of written notification from the Owner certifying that the Contract is final and complete, and that the Contractor has complied with all requirements and procedures applicable to the Contract, Escrow Agent shall release to Contractor all securities and interest on deposit less escrow fees and charges of the Escrow Account. The escrow shall be closed immediately upon disbursement of all moneys and securities on deposit and payments of fees and charges.

(9) Escrow Agent shall rely on the written notifications from the Owner and the Contractor pursuant to Sections (4) to (6), inclusive, of this Agreement and the Owner and Contractor shall hold Escrow Agent harmless from Escrow Agent's release and disbursement of the securities and interest as set forth above.

(10) The names of the persons who are authorized to give written notice or to

to letter the major paragraphs and to amend subdivision (b) to add provisions relating to subcontractors. Subdivision (b)(4) was amended to additionally require the contractor to pay the escrow expenses of the owner. In addition, the sunset date was deleted and

receive written notice on behalf of the Owner and on behalf of Contractor in connection with the foregoing, and exemplars of their respective signatures are as follows

On behalf of the owner:	On behalf of the contractor:
Title	Title
Name	Name
Signature	Signature
Address	Address

On behalf of the escrow agent:

Title

Name

Signature

Address

At the time the Escrow Account is opened, the Owner and Contractor shall deliver to the Escrow Agent a fully executed counterpart of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement by their proper officers on the date first set forth above

Owner	Contractor
Title	Title
Name	Name
Signature	Signature

~~This part shall remain in effect only until January 1, 1992, and as of that date is repealed, unless a later enacted statute, which is chaptered on or before January 1, 1992, deletes or extends that date.~~"

other technical changes were made.

Chapter 294, Statutes of 1992, amended Business and Professions Code Section 7028.15 to make technical changes.

Chapter 799, Statutes of 1992, Section 2, added Article 1.7 (Modifications; Performance; Payment) to Chapter 1 of Part 3 of Division 2 of the Public Contract Code to add Section 20104.50[41] which requires each school district to review each request for

---

[41] Public Contract Code Section 20104.50, added by Chapter 799, Statutes of 1992, Section 2:

"(a) (1) It is the intent of the Legislature in enacting this section to require all local governments to pay their contractors on time so that these contractors can meet their own obligations. In requiring prompt payment by all local governments, the Legislature hereby finds and declares that the prompt payment of outstanding receipts is not merely a municipal affair, but is, instead, a matter of statewide concern.

(2) It is the intent of the Legislature in enacting this article to fully occupy the field of public policy relating to the prompt payment of local governments' outstanding receipts. The Legislature finds and declares that all government officials, including those in local government, must set a standard of prompt payment that any business in the private sector which may contract for services should look towards for guidance.

(b) Any local agency which fails to make any progress payment within 30 days after receipt of an undisputed and properly submitted payment request from a contractor on a construction contract shall pay interest to the contractor equivalent to the legal rate set forth in subdivision (a) of Section 685.010 of the Code of Civil Procedure.

(c) Upon receipt of a payment request, each local agency shall act in accordance with both of the following:

(1) Each payment request shall be reviewed by the local agency as soon as practicable after receipt for the purpose of determining that the payment request is a proper payment request.

(2) Any payment request determined not to be a proper payment request suitable for payment shall be returned to the contractor as soon as practicable, but not later than seven days, after receipt. A request returned pursuant to this paragraph shall be accompanied by a document setting forth in writing the

payment as soon as practicable after receipt and, within 7 days thereof, to return any request determined to be improper to the contractor along with a document setting forth, in writing, the reasons why the payment request is not proper. The district is also required to pay interest of any undisputed and properly submitted request if it fails to make a progress payment within 30 days of receipt.

Chapter 1042, Statutes of 1992, Section 1, added Public Contract Code Section 7107[42] which, at subdivision (c), requires a public agency to release the retention

---

reasons why the payment request is not proper.

(d) The number of days available to a local agency to make a payment without incurring interest pursuant to this section shall be reduced by the number of days by which a local agency exceeds the seven-day return requirement set forth in paragraph (2) of subdivision (c).

(e) For purposes of this article:

(1) A "local agency" includes, but is not limited to, a city, including a charter city, a county, and a city and county, and is any public entity subject to this part.

(2) A "progress payment" includes all payments due contractors, except that portion of the final payment designated by the contract as retention earnings.

(3) A payment request shall be considered properly executed if funds are available for payment of the payment request, and payment is not delayed due to an audit inquiry by the financial officer of the local agency.

(f) Each local agency shall require that this article, or a summary thereof, be set forth in the terms of any contract subject to this article."

[42] Public Contract Code Section 7107, added by Chapter 1042, Statutes of 1992, Section 1:

"(a) This section is applicable with respect to all contracts entered into on or after January 1, 1993, relating to the construction of any public work of improvement.

(b) The retention proceeds withheld from any payment by the public entity from the original contractor, or by the original contractor from any subcontractor, shall be subject to this section.

(c) Within 60 days after the date of completion of the work of improvement, the

1

retention withheld by the public entity shall be released. In the event of a dispute between the public entity and the original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount. For purposes of this subdivision, "completion" means any of the following:

(1) The occupation, beneficial use, and enjoyment of a work of improvement, excluding any operation only for testing, startup, or commissioning, by the public agency, or its agent, accompanied by cessation of labor on the work of improvement.

(2) The acceptance by the public agency, or its agent, of the work of improvement.

(3) After the commencement of a work of improvement, a cessation of labor on the work of improvement for a continuous period of 100 days or more, due to factors beyond the control of the contractor.

(4) After the commencement of a work of improvement, a cessation of labor on the work of improvement for a continuous period of 30 days or more, if the public agency files for record a notice of cessation or a notice of completion.

(d) Subject to subdivision (e), within 10 days from the time that all or any portion of the retention proceeds are received by the original contractor, the original contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received. However, if a retention payment received by the original contractor is specifically designated for a particular subcontractor, payment of the retention shall be made to the designated subcontractor, if the payment is consistent with the terms of the subcontract.

(e) The original contractor may withhold from a subcontractor its portion of the retention proceeds if a bona fide dispute exists between the subcontractor and the original contractor. The amount withheld from the retention payment shall not exceed 150 percent of the estimated value of the disputed amount.

(f) In the event that retention payments are not made within the time periods required by this section, the public entity or original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorney's fees and costs.

(g) If a state agency retains an amount greater than 125 percent of the estimated value of the work yet to be completed pursuant to Section 10261 of the Public Contract Code, the state agency shall distribute undisputed retention proceeds in accordance with subdivision (c). However, notwithstanding subdivision (c), if a state agency retains an amount equal to or less than 125 percent of the estimated value of the work yet to be completed, the state agency shall have 90 days in which to release undisputed

withheld from a contractor within 60 days after the date of completion of the work of improvement. In the event of a dispute between the public entity and the original contractor, the public agency may withhold from the final payment an amount not to exceed 150 percent of the disputed amount. Subdivision (f) requires a public agency to pay a charge of 2 percent per month on an improperly withheld amount, in lieu of any interest otherwise due, in the event that retention payments are not made within the time periods required by this section. Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorney's fees and costs.

Chapter 1195, Statutes of 1993, Section 25.5, amended Public Contract Code Section 22300 to make technical changes.

Public Contract Codes Sections 20104, 20104.2, 20104.4 and 20104.6 expired on January 1, 1994, pursuant to the sunset date set forth in Section 20104.8.

Chapter 726, Statutes of 1994, Section 22, added new Public Contract Code Sections 20104, 20104.2, 20104.4 and 20104.6, effective September 22, 1994 which replaced the expired sections without change.

Chapter 504, Statutes of 1995, Section 1, added Public Contract Code Section 7109[43] to require a public entity, which determines that a project may be vulnerable to

---

retentions.

(h) Any attempted waiver of the provisions of this section shall be void as against the public policy of this state."

[43] Public Contract Code Section 7109, added by Chapter 504, Statutes of 1995, Section 1:

graffiti, may do one or more of the following:

(1) Include a provision in the public works contract that specifies requirements for antigraffiti technology in the plans and specifications for the project.

(2) Establish a method to finance a graffiti abatement program.

(3) Establish a program to deter graffiti.

Chapter 722, Statutes of 1997, Section 1, added Public Contract Code Section 20103.6[44]. Subdivision (a) requires any school district, subject to this chapter, in the

---

"(a) For purposes of this section:

(1) "Antigraffiti technology" means landscaping, paint, or other covering resistant to graffiti, or other procedures to deter graffiti.

(2) "Graffiti" means any unauthorized inscription, work, figure, or design that is marked, etched, scratched, drawn, or painted on any structural component of any building, structure, or other facility regardless of its content or nature and regardless of the nature of the material of the structural component.

(3) "Project" means the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind.

(b) If a public entity determines that a project may be vulnerable to graffiti and the public entity will be awarding a public works contract after January 1, 1996, for that project, it is the intent of the Legislature that the public entity may do one or more of the following:

(1) Include a provision in the public works contract that specifies requirements for antigraffiti technology in the plans and specifications for the project.

(2) Establish a method to finance a graffiti abatement program.

(3) Establish a program to deter graffiti."

[44]Public Contract Code Section 20103.6, added by Chapter 722, Statutes of 1997, Section 1:

"(a) (1) Any local agency subject to this chapter shall, in the procurement of architectural design services requiring an expenditure in excess of ten thousand

procurement of architectural design services of more than $10,000 to include, in any request for proposals, a disclosure of any contract provision that would require the contracting architect to indemnify and hold harmless the district against any and all liability, whether or not caused by the activity of the architect. Subdivision (b) requires a school district, in the event it fails to comply with subdivision (a), to (1) be precluded from requiring the selected architect to agree to such a contract provision, (2) cease discussions with the selected architect and reopen the request for proposals, or (3) mutually agree to an indemnity clause acceptable to both parties.

Chapter 857, Statutes of 1998, Section 3, amended subdivision (d) of Public Contract Code Section 7107[45] to change the time that a contractor must pay his or her

---

dollars ($10,000), include in any request for proposals for those services or invitations to bid from a prequalified list for a specific project a disclosure of any contract provision that would require the contracting architect to indemnify and hold harmless the local agency against any and all liability, whether or not caused by the activity of the contracting architect.

(2) The disclosure statement shall be prominently set forth in bold type.

(b) In the event a local agency fails to comply with paragraph (1) of subdivision (a), that local agency shall (1) be precluded from requiring the selected architect to agree to any contract provision requiring the selected architect to indemnify or hold harmless the local agency against any and all liability not caused by the activity of the selected architect, (2) cease discussions with the selected architect and reopen the request for proposals or invitations to bid from a qualification list, or (3) mutually agree to an indemnity clause acceptable to both parties.

(c) This section shall become operative on July 1, 1998."

[45] Public Contract Code Section 7107, added by Chapter 1042, Statutes of 1992, Section 1, as amended by Chapter 857, Statutes of 1998, Section 3:

"(d) Subject to subdivision (e), within ~~10~~ seven days from the time that all or any portion of the retention proceeds are received by the original contractor, the original

subcontractors from 10 to 7 days and made other technical changes.

Chapter 897, Statutes of 1998, Section 13, amended Public Contract Code Section 22300[46], subdivision (b), to delete the portion pertaining to subcontractors. A

---

contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received. However, if a retention payment received by the original contractor is specifically designated for a particular subcontractor, payment of the retention shall be made to the designated subcontractor, if the payment is consistent with the terms of the subcontract."

[46] Public Contract Code Section 22300, added by 1408, Statutes of 1988, Section 11, as last amended by Chapter 857, Statutes of 1998, Section 13:

"(b) Alternatively, the contractor may request and the owner shall make payment of retentions earned directly to the escrow agent at the expense of the contractor. At the expense of the contractor, the contractor may direct the investment of the payments into securities and the contractor shall receive the interest earned on the investments upon the same terms provided for in this section for securities deposited by the contractor. Upon satisfactory completion of the contract, the contractor shall receive from the escrow agent all securities, interest, and payments received by the escrow agent from the owner, pursuant to the terms of this section. ~~The contractor shall pay to each subcontractor, not later than 20 days of receipt of the payment, the respective amount of interest earned, net of costs attributed to retention withheld from each subcontractor, on the amount of retention withheld to insure the performance of the contractor.~~

(c) ....

(d) (1) Any contractor who elects to receive interest on moneys withheld in retention by a public agency shall, at the request of any subcontractor, make that option available to the subcontractor regarding any moneys withheld in retention by the contractor from the subcontractor. If the contractor elects to receive interest on any moneys withheld in retention by a public agency, then the subcontractor shall receive the identical rate of interest received by the contractor on any retention moneys withheld from the subcontractor by the contractor, less any actual pro rata costs associated with administering and calculating that interest. In the event that the interest rate is a fluctuating rate, the rate for the subcontractor shall be determined by calculating the interest rate paid during the time that retentions were withheld from the subcontractor. If the contractor elects to substitute securities in lieu of retention, then, by mutual consent of the

new Subdivision (d) was added to add a provision relating to contractors and subcontractors. Former subdivisions (d) and (e) were relettered as subdivisions (e) and (f) along with other technical changes.

Chapter 972, Statutes of 1999, Section 4, added Public Contract Code Section 20101[47]. Subdivision (a) requires public entities subject to this part to require from each

---

contractor and subcontractor, the subcontractor may substitute securities in exchange for the release of moneys held in retention by the contractor.

(2) This subdivision shall apply only to those subcontractors performing more than five percent of the contractor's total bid.

(3) No contractor shall require any subcontractor to waive any provision of this section."

[47] Public Contract Code Section 20101, added by Chapter 972, Statutes of 1999, Section 4:

"(a) Except as provided in Section 20111.5, a public entity subject to this part may require that each prospective bidder for a contract complete and submit to the entity a standardized questionnaire and financial statement in a form specified by the entity, including a complete statement of the prospective bidder's experience in performing public works. The standardized questionnaire may not require prospective bidders to disclose any violations of Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code committed prior to January 1, 1998, if a violation was based on a subcontractor's failure to comply with these provisions and the bidder had no knowledge of the subcontractor's violations. The Department of Industrial Relations, in collaboration with affected agencies and interested parties, shall develop model guidelines for rating bidders, and draft the standardized questionnaire, that may be used by public entities for the purposes of this part. The Department of Industrial Relations, in developing the standardized questionnaire, shall consult with affected public agencies, cities and counties, the construction industry, the surety industry, and other interested parties. The questionnaire and financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaires and financial statements shall not be public records and shall not be open to public inspection; however, records of the names of contractors applying for prequalification status shall be public records subject to disclosure under Chapter 3.5

prospective bidder a standardized questionnaire and financial statement on a form developed by the Department of Industrial Relations. Subdivision (b) requires that districts requiring prospective bidders to complete and submit questionnaires and financial statements to adopt and apply a uniform objective system of rating bidders in

---

(commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

(b) Any public entity requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine both the minimum requirements permitted for qualification to bid, and the type and size of the contracts upon which each bidder shall be deemed qualified to bid. The uniform system of rating prospective bidders shall be based on objective criteria.

(c) A public entity may establish a process for prequalifying prospective bidders pursuant to this section on a quarterly basis and a prequalification pursuant to this process shall be valid for one calendar year following the date of initial prequalification.

(d) Any public entity requiring prospective bidders on a public works project to prequalify pursuant to this section shall establish a process that will allow prospective bidders to dispute their proposed prequalification rating prior to the closing time for receipt of bids. The appeal process shall include the following:

(1) Upon request of the prospective bidder, the public entity shall provide notification to the prospective bidder in writing of the basis for the prospective bidder's disqualification and any supporting evidence that has been received from others or adduced as a result of an investigation by the public entity.

(2) The prospective bidder shall be given the opportunity to rebut any evidence used as a basis for disqualification and to present evidence to the public entity as to why the prospective bidder should be found qualified.

(3) If the prospective bidder chooses not to avail itself of this process, the proposed prequalification rating may be adopted without further proceedings.

(e) For the purposes of subdivision (a), a financial statement shall not be required from a contractor who has qualified as a Small Business Administration entity pursuant to paragraph (1) of subdivision (d) of Section 14837 of the Government Code, when the bid is no more than 25 percent of the qualifying amount provided in paragraph (1) of subdivision (d) of Section 14837 of the Government Code.

(f) Nothing in this section shall preclude an awarding agency from prequalifying or disqualifying a subcontractor. The disqualification of a subcontractor by an awarding agency does not disqualify an otherwise prequalified contractor."

order to determine both the minimum requirements permitted for qualification to bid and the type and size of contracts upon which each bidder shall be deemed qualified to bid. Subdivision (c) allows a district to prequalify prospective bidders on a quarterly basis which will be valid for one calendar year after qualification. Subdivision (d) requires districts to establish a process that allows prospective bidders to dispute their proposed prequalification rating prior to the closing time set for receipt of bids.

Chapter 126, Statutes of 2000, Section 1 amended Public Contract Code Section 9203 to letter the paragraph as subdivision (a) and to add a new subdivision (b)[48] which pertains only to county water authorities.

Chapter 127, Statutes of 2000, Section 30, added Public Contract Code Section 10299[49]. Subdivision (b) provides that school districts may, without further competitive

---

[48] Public Contract Code Section 9203, added by Chapter 694, Statutes of 1990, Section 8, as amended by Chapter 126, Statutes of 2000, Section 1:

"(b) Notwithstanding the dollar limit specified in subdivision (a), a county water authority shall be subject to a twenty-five thousand dollar ($25,000) limit for purposes of subdivision (a)."

[49] Public Contract Code Section 10299, added by Chapter 127, Statutes of 2000, Section 30:

"(a) Notwithstanding any other provision of law, the director may consolidate the needs of multiple state agencies for information technology goods and services, and, pursuant to the procedures established in Chapter 3 (commencing with Section 12100), establish contracts, master agreements, multiple award schedules, cooperative agreements, including agreements with entities outside the state, and other types of agreements that leverage the state's buying power, for acquisitions authorized under Chapter 2 (commencing with Section 10290), Chapter 3 (commencing with Section 12100), and Chapter 3.6 (commencing with Section 12125). State agencies and local

bidding, utilize contracts, master agreements, multiple award schedules, cooperative agreements, or other types of agreements established by the department for use by school districts for the acquisition of information technology, goods, and services.

Chapter 159, Statutes of 2000, Section 1, added Public Contract Code Section 6610[50] which requires that notices inviting formal bids that include a requirement for any type of mandatory prebid conference, site visit, or meeting, shall include the time, date, and location of the mandatory prebid site visit, conference or meeting, and when and where project documents, including final plans and specifications are available. Any mandatory prebid site visit, conference or meeting shall not occur within a minimum of

---

agencies may contract with suppliers awarded the contracts without further competitive bidding.

(b) The director may make the services of the department available, upon the terms and conditions agreed upon, to any school district empowered to expend public funds. These school districts may, without further competitive bidding, utilize contracts, master agreements, multiple award schedules, cooperative agreements, or other types of agreements established by the department for use by school districts for the acquisition of information technology, goods, and services. The state shall incur no financial responsibility in connection with the contracting of local agencies under this section."

[50] Public Contract Code Section 6610, added by Chapter 159, Statutes of 2000, Section 1:

"Notice inviting formal bids for projects by a public agency that include a requirement for any type of mandatory prebid conference, site visit, or meeting shall include the time, date, and location of the mandatory prebid site visit, conference or meeting, and when and where project documents, including final plans and specifications are available. Any mandatory prebid site visit, conference or meeting shall not occur within a minimum of five calendar days of the publication of the initial notice. This provision shall not apply to the Regents of the University of California."

five calendar days of the publication of the initial notice.

Chapter 292, Statutes of 2000, section 4, added Article 1.3 (Award of Contracts) to Chapter 1 of Part 3 of Division 2 of the Public Contract Code which added Section 20103.8[51] which allows a local agency to require in a bid for a public works contract the inclusion of prices for items that may be added to, or deducted from, the scope of the work in the contract for which the bid is being submitted. A school district which includes a requirement that bidders include prices for items that may be added to, or deducted from, the scope of the work, when determining the lowest bid, is required to

[51] Public Contract Code Section 20103.8, added by Chapter 292, Statutes of 2000, Section 4:

"A local agency may require a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted. Whenever additive or deductive items are included in a bid, the bid solicitation shall specify which one of the following methods will be used to determine the lowest bid. In the absence of such a specification, only the method provided by subdivision (a) will be used:

(a) The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

(b) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

(c) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items taken in order from a specifically identified list of those items, depending upon available funds as identified in the solicitation.

(d) The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

A responsible bidder who submitted the lowest bid as determined by this section shall be awarded the contract, if it is awarded. This section does not preclude the local agency from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined."

use one of three methods: (1) the lowest bid shall be the lowest bid price on the base contract without consideration of the prices of the additive or deductive items, (2) the lowest bid price shall be the lowest base price, plus the additive items, less the deductive items, (3) the lowest bid shall be the lowest base price, plus or minus those items taken in order specified in the solicitation, or (4) the lowest bid shall be determined in a manner preventing identification of the bidders before ranking all bidders.

Chapter 776, Statutes of 2000, Section 46, amended Public Contract Code Section 12109[52] to substitute "acquisition" for "purchase or lease" and the substitute the term "information technology" for "electronic data processing or telecommunications."

Chapter 455, Statutes of 2002, Section 3, amended Public Contract Code Section 20103.8[53] to add proposed subcontractors and suppliers to those not to be

---

[52] Public Contract Code Section 12109, added by Chapter 513, Statutes of 1982, Section 4, as amended by Chapter 776, Statutes of 2000, Section 46, effective September 27, 2000:

"The Director of General Services may make the services of the department under this chapter available, upon ~~such~~ the terms and conditions ~~as~~ that may be deemed satisfactory, to any tax-supported public agency in the state, including a school district, for assisting the agency in the ~~purchase or lease~~ acquisition of ~~electronic data processing or telecommunications~~ information technology goods or services."

[53] Public Contract Code Section 20103.8, added by Chapter 292, Statutes of 2000, Section 4, as amended by Chapter 455, Statutes of 2002, Section 3:

"A local agency may require a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted. Whenever additive or deductive items are included in a bid, the bid solicitation shall specify which one of the following methods will be used to determine the lowest bid. In the absence of such a specification, only the method provided by

identified before ranking all bidders and made other technical changes.

B. Laws Pertaining to School Districts

Chapter 921, Statutes of 1976, Section 1, added Education Code Section 15957.1[54] to make it unlawful to split or separate any project into smaller work orders or projects for the purpose of evading the provisions of this article requiring competitive bidding.

---

subdivision (a) will be used:

(a) The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

(b) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

(c) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items taken in order from a specifically identified list of those items~~, depending upon available funds as identified~~ that, when in the solicitation, and added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the local agency before the first bid is opened.

(d) The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders or proposed subcontractors or suppliers from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

A responsible bidder who submitted the lowest bid as determined by this section shall be awarded the contract, if it is awarded. This section does not preclude the local agency from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined.

(e) Nothing in this section shall preclude the prequalification of subcontractors."

[54] Education Code Section 15957.1, added by Chapter 921, Statutes of 1976, Section 1:

"It shall be unlawful to split or separate into smaller work orders or projects any project for the purpose of evading the provisions of this article requiring work to be done by contract after competitive bidding."

Chapter 1010, Statutes of 1976, Section 2, recodified and renumbered the above referrenced Education Code Sections:

1959 Code Section	1010/76 Section
15951	39640
15952	39641
15954	39642
15954.5	39643
15955	39644
15955.1	Deleted
15955.2	39645
15955.5	39646
15956	39648
15957	39649
15957.1	39649.5
15957.5	39650
15958	39651
15960	39652
15961	39656
15962	39657
15962.5	39658
15963	39659

17005	39873
19412	15711

Chapter 36, Statutes of 1977, Section 452, added Education Code Section 39649.5 as enacted by Chapter 1010, Statutes of 1976 and restated the provisions of Section 15957.1.

Chapter 631, Statutes of 1977, Section 2, amended Education Code Section 39640[55] to increase the amounts excluded from competitive bidding from $5,000 to $8,000 for work to be done, and from $8,000 to $12,000 for materials or supplies.

Chapter 1255, Statutes of 1980, Section 3, amended Education Code Section 39649.5[56] to require school districts, for the first time, to maintain job orders or similar

---

[55] Education Code Section 39640 (formerly 15951), as amended by Chapter 631, Statutes of 1977, Section 2:

"The governing board of any school district shall let any contracts involving an expenditure of more than ~~five thousand dollars ($5,000)~~ eight thousand dollars ($8,000) for work to be done or more than ~~eight thousand dollars ($8,000)~~ twelve thousand dollars ($12,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise."

[56] Education Code Section 39649.5, added by Chapter 36, Statutes of 1977, Section 452, as amended by Chapter 1255, Statutes of 1980, Section 3:

"It shall be unlawful to split or separate into smaller work orders or projects any project for the purpose of evading the provisions of this article requiring work to be done by contract after competitive bidding.

The district shall maintain job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California School Accounting Manual for a period of not less than

records indicating total costs expended on each project in accordance with the procedures established in the most recent edition of the California School Accounting Manual for a period of not less than three years. The amendment also permits informal bidding on projects estimated to cost less than the limits set in Section 39469 and requires school districts, for the first time, to publish annually a notice inviting contractors to register so they can be notified of future informal bidding projects and requires the district to give notice to all those who have registered of all informal bid projects.

Chapter 194, Statutes of 1981, Section 1, amended Education Code Section 39640[57] to increase the amounts excluded from competitive bidding from $8,000 to

---

three years after completion of the project.

Notwithstanding the provisions of Section 39640, informal bidding may be used on projects estimated by the district to cost up to and including the limits set forth in Section 39649. For the purposes of securing informal bids, the board shall publish annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. All contractors included on the informal bidding list shall be given notice of all informal bid projects in such manner as the district deems appropriate."

[57] Education Code Section 39640 (formerly 15951), as amended by Chapter 194, Statutes of 1981, Section 1:

"The governing board of any school district shall let any contracts involving an expenditure of more than ~~eight thousand dollars ($8,000)~~ twelve thousand dollars ($12,000) for work to be done or more than ~~twelve thousand dollars ($12,000)~~ sixteen thousand dollars ($16,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise."

$12,000 for work to be done, and from $12,000 to $16,000 for materials or supplies.

Chapter 465, Statutes of 1982, Sections 2 and 6, repealed Education Code Sections 39640 and 39649.5. Section 11 added Article 3 (School Districts) to Chapter 1 of Part 3 of the Public Contract Code, commencing with Section 20110. Section 20110[58] provides that the part shall apply to contracts awarded by school districts subject to Part 21, commencing with Section 35000 of the Education Code. Section 11 added Public Contract Code Section 20111 to replace former Education Code Section 39640, without change. Section 11 added Public Contract Code Section 20116 to replace former Education Code Section 39649.5, without change.

Chapter 173, Statutes of 1984, Section 3, amended Public Contract Code Section 20111[59] to increase the amounts excluded from competitive bidding from

---

[58] Public Contract Code Section 20110, added by Chapter 465, Statutes of 1982, Section 11:

"The provisions of this part shall apply to contracts awarded by school districts subject to Part 21 (commencing with Section 35000) of Division 3 of Title 2 of the Education Code."

[59] Public Contract Code Section 20111, added by Chapter 465, Statutes of 1982, Section 11, as amended by Chapter 173, Statutes of 1984, Section 3:

"The governing board of any school district shall let any contracts involving an expenditure of more than ~~twelve thousand dollars ($12,000)~~ fifteen thousand dollars ($15,000) for work to be done or more than ~~sixteen thousand dollars ($16,000)~~ twenty-one thousand dollars ($21,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise."

$12,000 to $15,000 for work to be done, and from $16,000 to $21,000 for materials or supplies.

Chapter 886, Statutes of 1986, Section 33, added Public Contract Code Section 20111.5[60] which provides the procedures which shall apply to any contract entered into by any school district pursuant to the funding approval of any project under Chapter 22,

---

[60] Public Contract Code Section 20111.5, added by Chapter 886, Statutes of 1986, Section 33:

"The following procedures shall apply to any contracts entered into by any school district pursuant to the funding approval of any district project under Chapter 22 (commencing with Section 17700) of Part 10 of the Education Code:

(a) The governing board of the district may require that each prospective bidder for a contract, as described under Section 20111, complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's financial ability and experience in performing public works. The questionnaire and financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaires and financial statements shall not be public records and shall not be open to public inspection.

(b) Any school district requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine size of the contracts upon which each bidder shall be deemed qualified to bid.

(c) Each prospective bidder on any contract described under Section 20111 for a project funded under Chapter 22 (commencing with Section 17700) of Part 10 of the Education Code shall be furnished by the school district letting the contract with a standardized proposal form that, when completed and executed, shall be submitted as his or her bid. Bids not presented on the forms so furnished shall be disregarded. A proposal form shall not be accepted from any person or other entity who is required to submit a completed questionnaire and financial statement for prequalification pursuant to subdivision (a), but has not done so at least five days prior to the date fixed for the public opening of sealed bids or has not been prequalified, pursuant to subdivision (a), for at least one day prior to that date."

commencing with Section 17700[61]:

(a) The governing board may require that each prospective bidder complete and submit to the district a standardized questionnaire and financial statement on a form specified by the district, including a complete statement of the prospective bidder's financial ability and experience in performing public works.

(b) Those school districts shall adopt and apply a uniform system of rating bidders on the basis of the questionnaires and financial statements, in order to determine the size of the contracts upon which each bidder shall be deemed qualified to bid.

(c) Those school districts shall furnish each prospective bidder a standardized proposal form that, when completed and executed, shall be submitted as his or her bid. Bids not presented on the forms furnished shall be disregarded.

Chapter 1060, Statutes of 1986, Section 2, added Public Contract Code Section 2000[62]. Subdivision (a), provides that, notwithstanding any other provision of law

---

[61] Education Code Section 17700 was later repealed by Chapter 277, Statutes of 1996, Section 1. Section 2 replaced the repealed section with new Education Code Section 17000. Both sections are known as the Leroy F. Greene State School Building Lease-Purchase Law of 1976.

[62] Public Contract Code Section 2000, added by Chapter 1060, Statutes of 1986, Section 2:

1

"(a) Notwithstanding any other provision of law requiring a local agency to award contracts to the lowest responsible bidder, any local agency may require that a contract be awarded to the lowest responsible bidder who also does either of the following:

(1) Meets goals and requirements established by the local agency relating to participation in the contract by minority business enterprises and women business enterprises. If the bidder does not meet the goals and requirements established by the local agency for that participation, the local agency shall evaluate the good faith effort of the bidder to comply with those goals and requirements as provided in paragraph (2).

(2) Makes a good faith effort, in accordance with the criteria established pursuant to subdivision (b), prior to the time bids are opened, to comply with the goals and requirements established by the local agency relating to participation in the contract by minority or women business enterprises.

(b) (1) The bidder attended any presolicitation or prebid meetings that were scheduled by the local agency to inform all bidders of the minority and women business enterprise program requirements for the project for which the contract will be awarded. A local agency may waive this requirement if it determines that the bidder is informed as to those program requirements.

(2) The bidder identified and selected specific items of the project for which the contract will be awarded to be performed by minority or women business enterprises to provide an opportunity for participation by those enterprises.

(3) The bidder advertised, not less than 10 calendar days before the date the bids are opened, in one or more daily or weekly newspapers, trade association publications, minority or trade oriented publications, trade journals, or other media, specified by the local agency for minority or women business enterprises that are interested in participating in the project.

This paragraph applies only if the local agency gave public notice of the project not less than 15 calendar days prior to the date the bids are opened.

(4) The bidder provided written notice of his or her interest in bidding on the contract to the number of minority or women business enterprises required to be notified by the project specifications not less than 10 calendar days prior to the opening of bids. To the extent possible, the local agency shall make available to the bidder not less than 15 calendar days prior to the date the bids are opened a list or a source of lists of enterprises which are certified by the local agency as minority or women business enterprises. If the local agency does not provide that list or source of lists to the bidder, the bidder may utilize the list of certified minority or women business enterprises prepared by the Department of Transportation pursuant to Section 14030.5 of the Government Code for this

1

purpose.

(5) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested in performing specific items of the project.

(6) The bidder provided interested minority and women business enterprises with information about the plans, specifications, and requirements for the selected subcontracting or material supply work.

(7) The bidder requested assistance from minority and women community organizations; minority and women contractor groups; local, state, or federal minority and women business assistance offices; or other organizations that provide assistance in the recruitment and placement of minority or women business enterprises, if any are available.

(8) The bidder negotiated in good faith with the minority or women business enterprises, and did not unjustifiably reject as unsatisfactory bids prepared by any minority or women business enterprises, as determined by the local agency.

(9) Where applicable, the bidder advised and made efforts to assist interested minority and women business enterprises in obtaining bonds, lines of credit, or insurance required by the local agency or contractor.

(10) The bidder's efforts to obtain minority and women business enterprise participation could reasonably be expected by the local agency to produce a level of participation sufficient to meet the goals and requirements of the local agency.

(c) The performance by a bidder of all of the criteria specified in subdivision (b) shall create a rebuttable presumption, affecting the burden of producing evidence, that a bidder has made a good faith effort to comply with the goals and requirements relating to participation by minority and women business enterprises established pursuant to subdivision (a).

(d) "Local agency," as used in this section, means a county or city, whether general law or chartered, city and county or district. "District," as used in this section, means an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.

(e) "Minority or women business enterprise," as used in this section, means a business enterprise that meets both of the following criteria:

(1) A business that is at least 51 percent owned by one or more minority persons or women or, in the case of any business whose stock is publicly held, at least 51 percent of the stock is owned by one or more minority persons or women.

(2) A business whose management and daily business operations are controlled by one or more minority persons or women.

requiring a local agency to award contracts to the lowest responsible bidder, a local agency may require that a contract be awarded to the lowest responsible bidder who also does either of the following: (1) meets district goals and requirements relating to participation in the contract by minority business enterprises and women business enterprises, or (2) makes a good faith effort to meet the criteria established pursuant to subdivision (b).

Subdivision (b) of section 2000 sets forth the criteria by which to measure a "good faith effort":

(1) The bidder attended presolicitation or prebid meetings scheduled to inform all bidders of the minority and women business enterprise program

---

(f) "Minority person," for purposes of this section, means Black Americans, Hispanic Americans, Native Americans (including American Indians, Eskimos, Aleuts, and Native Hawaiians), Asian-Pacific Americans (including persons whose origins are from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the United States Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, and Taiwan), or any other group of natural persons identified as minorities in the project specifications by the local agency.

(g) This section does not apply to any of the following:

(1) Any contract, funded in whole or in part by the federal government, to the extent of any conflict between the requirements imposed by this section and any requirements imposed by the federal government relating to participation in a contract by a minority or women business enterprise as a condition of receipt of the federal funds.

(2) The San Francisco Bay Area Rapid Transit District, the Los Angeles County Transportation Commission, or any other local agency that has authority to facilitate the participation of minority or women business enterprises substantially similar to the authority granted to the San Francisco Bay Area Rapid Transit District pursuant to Section 20229 of this code or the Los Angeles County Transportation Commission pursuant to Section 130239 of the Public Utilities Code."

requirements.

(2) The bidder identified and selected specific items of the project for which the contract will be awarded to be performed by minority and women business enterprises.

(3) The bidder advertised in one or more daily or weekly newspapers, trade association publications, minority or trade oriented publications, trade journals, or other media, specified by the local agency for minority or women business enterprises that are interested in participating in the project.

(4) The bidder provided written notice of his or her interest in bidding on the contract to the number of minority or women business enterprises required to be notified by the project specifications. To the extent possible, the local agency shall make available to the bidder not less than 15 calendar days prior to the date the bids are opened a list or a source of lists of enterprises which are certified by the local agency as minority or women business enterprises.

(5) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested in performing specific items of the project.

(6) The bidder provided interested minority and women business enterprises with information about the plans, specifications, and requirements for the

selected subcontracting or material supply work.

(7) The bidder requested assistance from minority and women community organizations; minority and women contractor groups; local, state, or federal minority and women business assistance offices; or other organizations that provide assistance in the recruitment and placement of minority or women business enterprises, if any are available.

(8) The bidder negotiated in good faith with the minority or women business enterprises, and did not unjustifiably reject as unsatisfactory bids prepared by any minority or women business enterprises, as determined by the local agency.

(9) Where applicable, the bidder advised and made efforts to assist interested minority and women business enterprises in obtaining bonds, lines of credit, or insurance required by the local agency or contractor.

(10) The bidder's efforts to obtain minority and women business enterprise participation could reasonably be expected by the local agency to produce a level of participation sufficient to meet the goals and requirements of the local agency.

Subdivision (e) defines "minority and women business enterprise. Subdivision (f) defines "minority person". Subdivision (g) sets forth certain exclusions.

Chapter 102, Statutes of 1987, Section 1, amended Public Contract Code

Section 20111.5[63] to delete the references to Chapter 22 of the Education Code Section.

Chapter 538, Statutes of 1988, Section 1, amended Public Contract Code Section 2000, at subdivision (d)[64], to add "school districts" to the definition of "local

---

[63]Public Contract Code Section 20111.5, added by Chapter 886, Statutes of 1986, Section 33, as amended by Chapter 102, Statutes of 1987, Section 1:

~~"The following procedures shall apply to any contracts entered into by any school district pursuant to the funding approval of any district project under Chapter 22 (commencing with Section 17700) of Part 10 of the Education Code:~~

"(a) The governing board of the district may require that each prospective bidder for a contract, as described under Section 20111, complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's financial ability and experience in performing public works. The questionnaire and financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaires and financial statements shall not be public records and shall not be open to public inspection.

(b) Any school district requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine size of the contracts upon which each bidder shall be deemed qualified to bid.

(c) Each prospective bidder on any contract described under Section 20111 ~~for a project funded under Chapter 22 (commencing with Section 17700) of Part 10 of the Education Code~~ shall be furnished by the school district letting the contract with a standardized proposal form that, when completed and executed, shall be submitted as his or her bid. Bids not presented on the forms so furnished shall be disregarded. A proposal form shall not be accepted from any person or other entity who is required to submit a completed questionnaire and financial statement for prequalification pursuant to subdivision (a), but has not done so at least five days prior to the date fixed for the public opening of sealed bids or has not been prequalified, pursuant to subdivision ~~(a)~~(b), for at least one day prior to that date."

[64] Public Contract Code Section 2000, added by Chapter 1060, Statutes of 1986, Section 2, as amended by Chapter 538, Statutes of 1988, Section 1:

"...(d) "Local agency," as used in this section, means a county or city, whether general

agency". Therefore, for the first time, school districts became subject to its provisions relating to contract participation by minority business enterprises and women business enterprises.

Chapter 538, Statutes of 1988, Section 2, amended Public Contract Code Section 20111[65] to require school districts, for the first time, to let contracts in accordance with any requirement established by the board pursuant to subdivision (a) of Public Contract Code Section 2000.

Chapter 1163, Statutes of 1989, Section 2, amended Public Contract Code Section 20111[66] to require, for the first time, that all bids presented be accompanied

---

law or chartered, city and county, school district, or other district. "District," as used in this section, means an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries...."

[65] Public Contract Code Section 20111, added by Chapter 465, Statutes of 1982, Section 11, as amended by Chapter 538, Statutes of 1988, Section 2:

"The governing board of any school district, in accordance with any requirement established by that governing board pursuant to subdivision (a) of Section 2000, shall let any contracts involving an expenditure of more than fifteen thousand dollars ($15,000) for work to be done or more than twenty-one thousand dollars ($21,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise."

[66] Public Contract Code Section 20111, added by Chapter 465, Statutes of 1982, Section 11, as amended by Chapter 1163, Statutes of 1989, Section 2:

"(a) The governing board of any school district, in accordance with any requirement established by that governing board pursuant to subdivision (a) of Section 2000, shall let any contracts involving an expenditure of more than fifteen thousand

with bidder's security in the form of (1) cash, (2) cashier's check, (3) certified check, or (4) a bidder's bond; and that the district shall return security to unsuccessful bidders in a reasonable time, not to exceed 60 days.

Chapter 808, Statutes of 1990, Section 4, amended Public Contract Code Section 20111[67] to clarify that the bids requiring bidder's security are bids "for

---

dollars ($15,000) for work to be done or more than twenty-one thousand dollars ($21,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids.

(b) All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(1) Cash

(2) A cashier's check made payable to the school district.

(3) A certified check made payable to the school district.

(4) a bidder's bond executed by an admitted surety insurer, made payable to the school district.

Upon an award to the lowest bidder, the security of the unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the school district beyond 60 days from the time the award is made.

(c) This section applies to all materials and supplies whether patented or otherwise.

[67] Public Contract Code Section 20111, added by Chapter 465, Statutes of 1982, Section 11, as amended by Chapter 808, Statutes of 1990, Section 4:

"(a) The governing board of any school district, in accordance with any requirement established by that governing board pursuant to subdivision (a) of Section 2000, shall let any contracts involving an expenditure of more than fifteen thousand dollars ($15,000) for work to be done or more than twenty-one thousand dollars ($21,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids.

(b) All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(1) Cash

construction work".

Chapter 1032, Statutes of 1993, Section 4, added Public Contract Code Section 2001.[68] Subdivision (a) requires districts, when requiring that contracts be awarded to

---

(2) A cashier's check made payable to the school district.
(3) A certified check made payable to the school district.
(4) a bidder's bond executed by an admitted surety insurer, made payable to the school district.
Upon an award to the lowest bidder, the security of the unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the school district beyond 60 days from the time the award is made.
(c) This section applies to all materials and supplies whether patented or otherwise.

[68] Public Contract Code Section 2001, added by Chapter 1032, Statutes of 1993, Section 4:

"(a) Any local agency, as defined in subdivision (d) of Section 2000, that requires that contracts be awarded to the lowest responsible bidder meeting, or making a good faith effort to meet, participation goals for minority, women, or disabled veteran business enterprises shall provide in the general conditions under which bids will be received, that any person making a bid or offer to perform a contract shall, in his or her bid or offer, set forth the following information:
(1) The name and the location of the place of business of each subcontractor certified as a minority, women, or disabled veteran business enterprise who will perform work or labor or render service to the prime contractor in connection with the performance of the contract and who will be used by the prime contractor to fulfill minority, women, and disabled veteran business enterprise participation goals.
(2) The portion of work that will be done by each subcontractor under paragraph (1). The prime contractor shall list only one subcontractor for each portion of work as is defined by the prime contractor in his or her bid or offer.
(b) The Subletting and Subcontracting Fair Practices Act (Chapter 4 (commencing with Section 4100) shall apply to the information required by subdivision (a) relating to subcontractors certified as minority, women, or disabled veteran business enterprises.
(c) For purposes of this section, "subcontractor" and "prime contractor" shall have the same meaning as those terms are defined in Section 4113.

the lowest responsible bidder meeting, or making a good faith effort to meet, participation goals for minority, women, or disabled veteran business enterprises to provide in the general conditions under which bids will be received, that any person making a bid or offer to perform a contract shall, in his or her bid or offer, set forth the following information:

(1) The name and the location of the place of business of each subcontractor certified as a minority, women, or disabled veteran business enterprise who will perform work or labor or render service to the prime contractor in connection with the performance of the contract and who will be used by the prime contractor to fulfill minority, women, and disabled veteran business enterprise participation goals.

(2) The portion of work that will be done by each subcontractor under paragraph (1). The prime contractor shall list only one subcontractor for each portion of work as is defined by the prime contractor in his or her bid or offer.

Chapter 897, Statutes of 1995, Section 1, amended Public Contract Code Section 20111[69], subdivision (a), to require, for the first time, that bids for (1) the

---

(d) As used in this section, "contract" does not include a contract negotiated pursuant to Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code."

[69] Public Contract Code Section 20111, added by Chapter 465, Statutes of 1982, Section 11, as amended by Chapter 897, Statutes of 1995, Section 1:

1

"(a) The governing board of any school district, in accordance with any requirement established by that governing board pursuant to subdivision (a) of Section 2000, shall let any contracts involving an expenditure of more than ~~fifteen thousand dollars $15,000 for work to be done or more than twenty one thousand dollars ($21,000) for materials or supplies to be furnished, sold, or leased to the district,~~ fifty thousand dollars ($50,000) for any of the following:

(1) The purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district.

(2) Services, except construction services.

(3) Repairs, including maintenance as defined in Section 20115, that are not a public project as defined in subdivision (c) of Section 22002.

The contract shall be let to the lowest responsible bidder who shall give security as the board requires, or else reject all bids.

(b) The governing board shall let any contract for a public project, as defined in subdivision (c) of Section 22002, involving an expenditure of fifteen thousand dollars ($15,000) or more, to the lowest responsible bidder who shall give security as the board requires, or else reject all bids. All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(1) Cash.

(2) A cashier's check made payable to the school district.

(3) A certified check made payable to the school district.

(4) A bidder's bond executed by an admitted surety insurer, made payable to the school district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the school district beyond 60 days from the time the award is made.

(c) This section applies to all equipment, materials, or supplies, whether patented or otherwise, and to contracts awarded pursuant to subdivision (a) of Section 2000. This section shall not apply to professional services or advice, insurance services, or any other purchase or service otherwise exempt from this section, or to any work done by day labor or by force account pursuant to Section 20114.

(d) Commencing January 1, 1997, the Superintendent of Public Instruction shall annually adjust the dollar amounts specified in subdivision (a) to reflect the percentage change in the annual average value of the Implicit Price Deflator for State and Local Government Purchases of Goods and Services for the United States, as published by the United States Department of Commerce for the 12-month period ending in the prior fiscal year. The annual adjustments shall be rounded to the nearest one hundred dollars ($100)."

purchase of equipment, materials or supplies, (2) services (except construction services), and (3) repairs involving more than $50,000 be subject to competitive bidding. Subdivision (b) was amended to continue the limit of $15,000 for a public project as defined in subdivision (c) of Section 22002[70] (construction, reconstruction, erection, alteration, renovation, improvement, demolition and repair work and painting or repainting) and continued the requirement that the bids for construction work be submitted with bidder's security. Subdivision (c) was amended to provide that the section applied to contracts awarded pursuant to Section 2000 and excluded professional services or advice and insurance services. Subdivision (d) was added to allow for percentage changes in the annual average Implicit Price Deflator.

Chapter 897, Statutes of 1995, Section 4, amended Public Contract Code

---

[70] Public Contract Code Section 22002, renumbered and amended by Chapter 1019, Statutes of 1986, Section 39, as amended by Chapter 733, Statutes of 1989, Section 1:

> "(c) "Public project" means any of the following:
> (1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.
> (2) Painting or repainting of any publicly owned, leased, or operated facility.
> (3) In the case of a publicly owned utility system, "public project" shall include only the construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher."

Section 20116[71] to expand the prohibition against splitting to now also include "work", "service" and "purchase" to "projects" and to include those new definitions within the informal bidding requirements.

Chapter 390, Statutes of 1997, Section 5, amended Public Contract Code Section 20111.5[72] to separate subdivision (c) into subdivisions (c) and (d), and to add a

---

[71] Public Contract Code Section 20116, added by Chapter 465, Statutes of 1982, Section 11, as amended by Chapter 897, Statutes of 1995, Section 4:

"It shall be unlawful to split or separate into smaller work orders or projects any work, project, service, or purchase for the purpose of evading the provisions of this article requiring ~~work to be done by contract~~ contracting after competitive bidding.

The district shall maintain job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California School Accounting Manual for a period of not less than three years after completion of the project.

~~Notwithstanding the provisions of Section 20111~~ Informal bidding may be used on work, projects, ~~estimated by the district to~~ services, or purchases that cost up to ~~and including~~ the limits set forth in ~~Section 20114~~ this article. For the purpose of securing informal bids, the board shall publish annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. All contractors included on the informal bidding list shall be given notice of all informal bid projects in any manner as the district deems appropriate."

[72] Public Contract Code Section 20111.5, added by Chapter 886, Statutes of 1986, Section 33, as amended by Chapter 390, Statutes of 1997, Section 5:

"(a) The governing board of the district may require that each prospective bidder for a contract, as described under Section 20111, complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's financial ability and experience in performing public works. The questionnaire and financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaires and financial statements shall not be public records and

new subdivision (e) to allow the district to establish a process for prequalifying prospective bidders on a quarterly basis that may be valid for up to one calendar year.

C. Laws Pertaining to Community College Districts

Chapter 921, Statutes of 1976, Section 1, added Education Code Section 15957.1[73] to make it unlawful to split or separate any project into smaller work orders or projects for the purpose of evading the provisions of this article requiring competitive bidding.

---

shall not be open to public inspection.

(b) Any school district requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine size of the contracts upon which each bidder shall be deemed qualified to bid.

(c) Each prospective bidder on any contract described under Section 20111 shall be furnished by the school district letting the contract with a standardized proposal form that, when completed and executed, shall be submitted as his or her bid. Bids not presented on the forms so furnished shall be disregarded.

(d) A proposal form required pursuant to subdivision (c) shall not be accepted from any person or other entity who is required to submit a completed questionnaire and financial statement for prequalification pursuant to subdivision (a), but has not done so at least five days prior to the date fixed for the public opening of sealed bids or has not been prequalified, pursuant to subdivision (b), for at least one day prior to that date.

(e) Notwithstanding subdivision (d), any school district may establish a process for prequalifying prospective bidders pursuant to this section on a quarterly basis and may authorize that prequalification be considered valid for up to one calendar year following the date of initial prequalification."

[73] Education Code Section 15957.1, added by Chapter 921, Statutes of 1976, Section 1:

See: Footnote 34

Chapter 1010, Statutes of 1976, Section 2, recodified and renumbered the above referenced Education Code Sections:

1959 Code Section	1010/76 Section
15951	81640
15952	81641
15954	81642
15954.5	81643
15955	81644
15955.1	Deleted
15955.2	81645
15955.5	81646
15956	81648
15957	81649
15957.1	81649.5
15957.5	81650
15958	81651
15960	81652
15961	81655
15962	81656
15962.5	81657
15963	81658

17005 82363

Chapter 631, Statutes of 1977, Section 3, amended Education Code Section 81640[74] to increase the value of the work to be done without awarding it to the lowest responsible bidder from $5,000 to $8,000 and to increase the value of materials or supplies furnished without awarding it to the lowest responsible bidder from $8,000 to $12,000.

Chapter 1255, Statutes of 1980, Section 6, amended Education Code Section 81649.5[75] to require districts, for the first time, to maintain job orders or similar records

---

[74] Education Code Section 81640 (formerly 15951), as amended by Chapter 631, Statutes of 1977, Section 3:

"The governing board of any community college district shall let any contracts involving an expenditure of more than ~~five thousand dollars ($5,000)~~ eight thousand dollars ($8,000) for work to be done or more than ~~eight thousand dollars ($8,000)~~ twelve thousand dollars ($12,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise."

[75] Education Code Section 81649.5 (formerly Section 15957.1), as amended by Chapter 1255, Statutes of 1980, Section 6:

"It shall be unlawful to split or separate into smaller work orders or projects any project for the purpose of evading the provisions of this article requiring work to be done by contract after competitive bidding.

The district shall maintain job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California Community College Budget and Accounting Manual for a period of not less than three years after completion of the project.

Notwithstanding the provisions of Section 81640, informal bidding may be used on projects estimated by the district to cost up to and including the limits set forth in

indicating the total cost expended on each project in accordance with the California Community College Budget and Accounting Manual for at least three years. It also provided that informal bidding may be used on projects described in Section 81649 and, for the purpose of securing informal bids, the district is required to publish annually a notice inviting contractors to register to be notified of future informal bidding projects. The section requires districts to give notice of all informal bid projects to all contractors on the list.

Chapter 194, Statutes of 1981, Section 2, amended Education Code Section 81640[76] to increase the amounts requiring bids be awarded to the lowest responsible bidder for work to be done from $8,000 to $12,000, and for materials and supplies from $12,000 to $16,000.

Section 81649. For the purpose of securing informal bids, the board shall publish annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. All contractors included on the informal bidding list shall be given notice of all informal bid projects, in any manner as the district deems appropriate."

[76] Education Code Section 81640, as amended by Chapter 194, Statutes of 1981, Section 2:

"The governing board of any community college district shall let any contracts involving an expenditure of more than ~~eight thousand dollars ($8,000)~~ twelve thousand dollars ($12,000)for work to be done or more than ~~twelve thousand dollars ($12,000)~~ sixteen thousand dollars ($16,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise."

Chapter 470, Statutes of 1981, Section 249, and Chapter 251, Statutes of 1982, Section 16, amended Education Code Section 81640[77] to increase the amount of materials or supplies that could purchased without competitive bidding from $16,000 to $18,000.

Chapter 256, Statutes of 1983, Sections 1, 7 and 9 repealed Education Code Sections 81640, 81649.5, and 81658, respectively. Chapter 256, Statutes of 1983, Section 84, replaced those Education Code Sections by adding Article 41 to Part 3 of the Public Contract Code, including Sections 20651, 20657 and 20659. Section 84 also added Public Contract Code Section 20650[78] which declares that the provisions of the article shall apply to contracts by community college districts as provided in Part 49[79]

---

[77] Education Code Section 81640, recodified and renumbered by Chapter 1010, Statutes of 1976, Section 2, as amended by Chapter 251, Statutes of 1982, Section 16:

"The governing board of any community college district shall let any contracts involving an expenditure of more than twelve thousand dollars ($12,000) for work to be done or more than ~~sixteen thousand dollars ($16,000)~~ eighteen thousand dollars ($18,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise."

[78] Public Contract Code Section 20650, added by Chapter 256, Statutes of 1983, Section 84"

"The provisions of this article shall apply to contracts by community college districts as provided for in Part 49 (commencing with Section 81000) of the Education Code."

[79] Part 49 of the Education Code is entitled "Community Colleges, Education Facilities" and includes school sites (Chapter 1, commencing with Section 81003), sale, lease, use and exchange of property (Chapter 2, commencing with Section 81250), management and control of property (Chapter 3, commencing with Section 81600),

(commencing with Section 81000) of the Education Code.

Public Contract Code Section 20651 restated former Education Code Section 81640, without change.

Public Contract Code Section 20657 restated former Education Code Section 81649.5 and was amended only to change the references from Sections 81640 and 81649 of the Education Code Section to Sections 20651 and 20655 of the Public Contract Code.

Public Contract Code Section 20659 restated former Education Code Section 81658 and was amended only to change the references from Section 81640 and 81649 of the Education Code to Sections 20651 and 20655 of the Public Contract Code.

Chapter 1060, Statutes of 1986, Section 2, added Public Contract Code Section 2000[80]. Subdivision (a), notwithstanding any other provision of law requiring a local agency to award contracts to the lowest responsible bidder, allows a local agency to require that a contract be awarded to the lowest responsible bidder who also does either of the following: (1) meets district goals and requirements relating to participation in the contract by minority business enterprises and women business enterprises, or (2) makes

---

design-build contracts, (Chapter 3.5, commencing with Section 81700), Community College Construction Act of 1980 (commencing with Section 81800), Community College Revenue Bond Act of 1961 (commencing with Section 81901), supplementary services, including transportation, schoolbuses and cafeterias (commencing with Section 82305.6) and miscellaneous activities (commencing with Section 82530).

[80] See: Footnote 42

a good faith effort to meet the criteria established pursuant to subdivision (b).

Subdivision (b) of section 2000 sets forth the criteria by which to measure a "good faith effort":

(1) The bidder attended presolicitation or prebid meetings scheduled to inform all bidders of the minority and women business enterprise program requirements.

(2) The bidder identified and selected specific items of the project for which the contract will be awarded to be performed by minority and women business enterprises.

(3) The bidder advertised in one or more daily or weekly newspapers, trade association publications, minority or trade oriented publications, trade journals, or other media, specified by the local agency for minority or women business enterprises that are interested in participating in the project.

(4) The bidder provided written notice of his or her interest in bidding on the contract to the number of minority or women business enterprises required to be notified by the project specifications. To the extent possible, the local agency shall make available to the bidder not less than 15 calendar days prior to the date the bids are opened a list or a source of lists of enterprises which are certified by the local agency as minority or women business enterprises.

(5) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested in performing specific items of the project.

(6) The bidder provided interested minority and women business enterprises with information about the plans, specifications, and requirements for the selected subcontracting or material supply work.

(7) The bidder requested assistance from minority and women community organizations; minority and women contractor groups; local, state, or federal minority and women business assistance offices; or other organizations that provide assistance in the recruitment and placement of minority or women business enterprises, if any are available.

(8) The bidder negotiated in good faith with the minority or women business enterprises, and did not unjustifiably reject as unsatisfactory bids prepared by any minority or women business enterprises, as determined by the local agency.

(9) Where applicable, the bidder advised and made efforts to assist interested minority and women business enterprises in obtaining bonds, lines of credit, or insurance required by the local agency or contractor.

(10) The bidder's efforts to obtain minority and women business enterprise participation could reasonably be expected by the local agency to produce a level of participation sufficient to meet the goals and requirements of the

local agency.

Subdivision (e) defines "minority and women business enterprise" . Subdivision (f) defines "minority person". Subdivision (g) sets forth certain exclusions.

Chapter 538, Statutes of 1988, Section 1, amended Public Contract Code Section 2000, at subdivision (d)[81], to add "school districts"[82] to the definition of "local agency". Therefore, for the first time, community college districts became subject to its provisions relating to contract participation by minority business enterprises and women business enterprises.

Chapter 538, Statutes of 1988, Section 2, amended Public Contract Code Section 20111[83] to require school districts, for the first time, to let contracts in

---

[81] Public Contract Code Section 2000, added by Chapter 1060, Statutes of 1986, Section 2, as amended by Chapter 538, Statutes of 1988, Section 1:

"...(d) "Local agency," as used in this section, means a county or city, whether general law or chartered, city and county, school district, or other district. "District," as used in this section, means an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries...."

[82] "School district" means any school district, community college district, or county superintendent of schools. Government Code Section 17519 (see footnote 1, supra)

[83] Public Contract Code Section 20111, added by Chapter 465, Statutes of 1982, Section 11, as amended by Chapter 538, Statutes of 1988, Section 2:

"The governing board of any school district, in accordance with any requirement established by that governing board pursuant to subdivision (a) of Section 2000, shall let any contracts involving an expenditure of more than fifteen thousand dollars ($15,000) for work to be done or more than twenty-one thousand dollars ($21,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder

accordance with any requirement established by the board pursuant to subdivision (a) of Public Contract Code Section 2000.

Chapter 1163, Statutes of 1989, Section 45, added Public Contract Code Section 20651.5[84] to require, for the first time, bids presented be accompanied by bidder's security in the form of (a) cash, (b) cashier's check, (c) certified check, or (4) bidder's bond; and requires school districts to return the security of unsuccessful bidders within 60 days from the time of the award.

Chapter 808, Statutes of 1990, Section 42, amended Public Contract Code Section 20651.5[85] to clarify that bidder's security is only required for "construction work".

---

who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise."

[84] Public Contract Code Section 20651.5, added by Chapter 1163, Statutes of 1989, Section 45:

"All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:
(a) Cash.
(b) A cashier's check made payable to the district.
(c) A certified check made payable to the district.
(d) a bidder's bond executed by an admitted surety insurer, made payable to the district.
Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made."

[85] Public Contract Code Section 20651.5, added by Chapter 1163, Statutes of 1989, Section 45, as amended by Chapter 808, Statutes of 1990, Section 42:

"All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

Chapter 1032, Statutes of 1993, Section 4, added Public Contract Code Section 2001[86]. Subdivision (a) requires districts, when requiring that contracts be awarded to the lowest responsible bidder meeting, or making a good faith effort to meet, participation goals for minority, women, or disabled veteran business enterprises to provide in the general conditions under which bids will be received, that any person making a bid or offer to perform a contract shall, in his or her bid or offer, set forth the following information:

(1) The name and the location of the place of business of each subcontractor certified as a minority, women, or disabled veteran business enterprise who will perform work or labor or render service to the prime contractor in connection with the performance of the contract and who will be used by the prime contractor to fulfill minority, women, and disabled veteran business enterprise participation goals.

(a) Cash.
(b) A cashier's check made payable to the district.
(c) A certified check made payable to the district.
(d) a bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made."

[86] Public Contract Code Section 2001, added by Chapter 1032, Statutes of 1993, Section 4:

See: Footnote 48

(2) The portion of work that will be done by each subcontractor under paragraph (1). The prime contractor shall list only one subcontractor for each portion of work as is defined by the prime contractor in his or her bid or offer.

Chapter 897, Statutes of 1995, Section 5, amended Public Contract Code Section 20651[87], subdivision (a), to raise the limit for which competitive bidding was

---

[87] Public Contract Code Section 20651, added by Chapter 256, Statutes of 1983, Section 84, as amended by Chapter 897, Statutes of 1995, Section 5:

"(a) The governing board of any community college district shall let any contracts involving an expenditure of more than ~~twelve~~ fifty thousand dollars ~~($12,000) for work to be done or more than eighteen thousand dollars ($18,000) for~~ ($50,000) for any of the following:

(1) The purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district~~;~~.

(2) Services, except construction services.

(3) Repairs, including maintenance as defined in Section 20656, that are not a public project as defined in subdivision (c) of Section 22002.

The contract shall be let to the lowest responsible bidder who shall give ~~such~~ security as the board requires, or else reject all bids.

(b) The governing board shall let any contract for a public project, as defined in subdivision (c) of Section 22002, involving an expenditure of fifteen thousand dollars ($15,000) or more to the lowest responsible bidder who shall give security as the board requires, or else reject all bids. All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(1) Cash.

(2) A cashier's check made payable to the community college district.

(3) A certified check made payable to the community college district.

(4) A bidder's bond executed by an admitted surety insurer, made payable to the community college district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

required from $12,000 to $50,000, but expanded the activities subject to the section to include, for the first time, (1) equipment, (2) services (except construction services), and (3) repairs, including maintenance. Subdivision (b) was added to require the governing board to let contracts for public projects (as defined in Section 2002(c)) of more than $15,000 to the lowest possible bidder and to require submission of bids to be accompanied by bidder's security in the form of (a) cash, (b) cashier's check, (c) certified check, or (4) bidder's bond; and requires districts to return the security of unsuccessful bidders within 60 days from the time of the award. Subdivision (c) excludes professional services or advice, insurance services or exempt purchases or services.

Chapter 897, Statutes of 1995, Section 6, repealed Public Contract Code Section 20651.5, as the requirement of security in designated forms was incorporated in the amendment to Section 20651.

Chapter 897, Statutes of 1995, Section 9, amended Public Contract Code

---

(c) This section applies to all equipment, materials ~~and~~, or supplies, whether patented or otherwise. This section shall not apply to professional services or advice, insurance services, or any other purchase or service otherwise exempt from this section, or to any works done by day labor or by force account pursuant to Section 20655.

(d) Commencing January 1, 1997, the Board of Governors of the California Community Colleges shall annually adjust the dollar amounts specified in subdivision (a) to reflect the percentage change in the annual average value of the Implicit Price Deflator for State and Local Government Purchases of Goods and Services for the United States, as published by the United States Department of Commerce for the 12-month period ending in the prior fiscal year. The annual adjustments shall be rounded to the nearest one hundred dollars ($100)."

Section 20657[88] to add, for the first time, "work", "service" or "purchase" to those activities subject to the prohibition against splitting work orders or projects for the purchase of evading the provisions of this article and subject to the requirements for records maintenance and retention.

Chapter 657, Statutes of 1998, Section 5, added a new Public Contract Code Section 20651.5[89]. Subdivision (a), allows community college districts, for the first time,

---

[88] Public Contract Code Section 20657, added by Chapter 256, Statutes of 1983, Section 84, as amended by Chapter 897, Statutes of 1995, Section 9:

"It shall be unlawful to split or separate into smaller work orders or projects any work, project, service, or purchase for the purpose of evading the provisions of this article requiring ~~work~~ contracting after competitive bidding.

The district shall maintain job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California Community College Budget and Accounting Manual for a period of not less than three years after completion of the project.

~~Notwithstanding the provisions of Section 20651,~~ Informal bidding may be used on work, projects, ~~estimated by the district to~~ services, or purchases that cost up to ~~and including~~ the limits set forth in ~~Section 20655~~ this article. For the purpose of securing informal bids, the board shall publish annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. All contractors included on the informal bidding list shall be given notice of all informal bid projects, in ~~such~~ any manner as the district deems appropriate."

[89] Public Contract Code Section 20651.5, added by Chapter 657, Statutes of 1998, Section 5:

"(a) The governing board of any community college district may require each prospective bidder for a contract, as described under Section 20651, to complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's financial ability and experience in performing public works. The questionnaire and

to require that each prospective bidder for a contract, as described in Section 20651, complete and submit a standardized and financial statement form, including a complete statement of the prospective bidders's financial ability and experience in performing public works. Subdivision (b) requires those districts which include a requirement that bidders include prices for items that may be added to, or deducted from, the scope of the work, to adopt and apply a uniform system of rating bidders on the basis of those questionnaires and financial statements. Subdivision (c) requires that each prospective bidder be furnished, by those districts, with a standardized proposal form that, when completed and executed shall be submitted as his or her bid. Bids not presented on the

---

financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaire responses of prospective bidders and their financial statements shall not be deemed public records and shall not be open to public inspection.

(b) Any community college district requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine the size of the contracts upon which each bidder shall be deemed financially qualified to bid. The prequalification of a prospective bidder shall neither limit nor preclude a district's subsequent consideration of a prequalified bidder's responsibility on factors other than the prospective bidder's financial qualifications.

(c) Each prospective bidder on any contract described under Section 20651 that is subject to this section shall be furnished, by the community college district letting the contract, with a standardized proposal form that, when completed and executed, shall be submitted as his or her bid. Bids not presented on the forms so furnished shall be deemed nonresponsive and shall be rejected. A proposal form shall not be accepted from any person who, or other entity which, is required to submit a completed questionnaire and financial statement for prequalification pursuant to subdivision (a), but who or which has not done so at least five days prior to the date fixed for the public opening of sealed bids and has not been prequalified, pursuant to subdivision (b), at least one day prior to that date."

forms furnished shall be deemed nonresponsive and shall be rejected.

D. Minority, Women, and Disabled Veteran Business Enterprise Participation

Subchapter 9 entitled "Minority, Women, and Disabled Veteran Business Enterprise Participation Goals for the California Community Colleges" was filed on December 29, 1993 as part of Chapter 10, Division 6, of Title 5, California Code of Regulations, commencing at Section 59500.

Section 59500[90], subdivision (a), requires each California community college to provide opportunities for minority, women, and disabled veteran business enterprise participation in the award of district contracts consistent with the subchapter. The statewide goal for such participation is not less than 15 percent minority business enterprise participation, not less than 5 percent women business enterprise participation, and not less than 3 percent disabled veteran business enterprise

[90] Title 5, California Code of Regulations, Section 59500:

"(a) The California Community Colleges shall provide opportunities for minority, women, and disabled veteran business enterprise participation in the award of district contracts consistent with this Subchapter. The statewide goal for such participation is not less than 15 percent minority business enterprise participation, not less than 5 percent women business enterprise participation, and not less than 3 percent disabled veteran business enterprise participation of the dollar amount expended by all districts each year for construction, professional services, materials, supplies, equipment, alternation, repair, or improvement. However, each district shall have flexibility to determine whether or not to seek participation by minority, women, and disabled veteran business enterprises for any given contract.

(b) Nothing in this Subchapter authorizes any district to discriminate in awarding contracts on the basis of ethnic group identification, ancestry, religion, age, sex, race, color, or physical or mental disability."

participation of the dollar amount expended by all districts each year for construction, professional services, materials, supplies, equipment, alternation, repair, or improvement. However, each district shall have flexibility to determine whether or not to seek participation by minority, women, and disabled veteran business enterprises for any given contract.

Section 59502[91] supplies definitions for the subchapter. Subdivisions (d), (e), and

---

[91] Title 5, California Code of Regulations, Section 59502:

"The definitions set forth in Subsections (d), (e), and (f) of Section 10115.1 of the Public Contract Code, as they may be amended from time to time, apply to this Subchapter and are incorporated herein as though fully set forth in addition, for purposes of this Subchapter:

(a) "Certification" means a process to identify minority, women and disabled veteran business enterprises.

(b) "Contract" includes any agreement or joint development agreement to provide labor, services, material, supplies, or equipment in the performance of a contract, franchise, concession, or lease granted, let, or awarded for and on behalf of the district. The term "contract" does not include payment to utility companies or purchases, leases or services secured through other public agencies and corporations, the Department of General Services, or the federal government pursuant to Public Contract Code sections 20652 and 20653 and Education Code Section 81653;

(c) "Contractor" means any person or persons, regardless of ethnic group identification, ancestry, religion, sex, race, or color, or any firm, partnership, corporation, or combination thereof, whether or not a minority, women, and disabled veteran business enterprise, who enters into a contract with a district.

(d) "District" means any community college district, board of trustees or officer, employee, or agent of such a district or board empowered to enter into contracts on behalf of the district.

(e) "MBE/WBE/DVBE/WBE/DVBE/WBE/DVBE" means a minority business enterprise, a women business enterprise, and/or disabled veteran business enterprise. Although a business enterprise may qualify under multiple categories, the entry shall be designated in one specific category for the purposes of these regulations.

(f) "Goal" means a numerically expressed objective for systemwide MBE/WBE/DVBE/WBE/DVBE/WBE/DVBE participation that districts are expected to

(f) of Section 10115.1 of the Public Contract Code are incorporated by reference.

Subsection (d)[92] defines "minority". Subsection (e)[93] defines "minority business

---

contribute to achieving. Goals are not quotas, set-asides, or rigid proportions.

(g) "Disabled veteran business enterprise" means a business enterprise certified as a disabled veteran business enterprise by the Office of Small and Minority Business, pursuant to Military and Veterans Code Section 999, or a business enterprise that certifies that it has met such standards."

[92] Public Contract Code Section 10115.1, added by Chapter 61, Statutes of 1988, Section 3, as amended by Chapter 846, Statutes of 1994, Section 2:

"...

(d) "Minority," for purposes of this section, means a citizen or lawful permanent resident of the United States who is an ethnic person of color and who is: Black (a person having origins in any of the Black racial groups of Africa); Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin regardless of race); Native American (an American Indian, Eskimo, Aleut, or Native Hawaiian); Pacific-Asian (a person whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, or the United States Trust Territories of the Pacific including the Northern Marianas); Asian-Indian (a person whose origins are from India, Pakistan, or Bangladesh); or any other group of natural persons identified as minorities in the respective project specifications of an awarding department or participating local agency...

..."

[93] Public Contract Code Section 10115.1 added by Chapter 61, Statutes of 1988, Section 3, as amended by Chapter 846, Statutes of 1994, Section 2:

"...

(e) "Minority business enterprise" means a business concern that meets all of the following criteria:

(1) The business is an individual proprietorship, partnership, corporation, or joint venture at least 51 percent owned by one or more minorities or, in the case of any business whose stock is publicly held, at least 51 percent of the stock is owned by one or more minorities.

(2) A business whose management and daily operations are controlled by

enterprise". Subsection (f)[94] defines "women business enterprise".

Section 59504[95] requires each community college district to undertake

---

one or more minorities who own the business.

(3) A business concern with its home office located in the United States which is not a branch or subsidiary of a foreign corporation, firm, or other business.

..."

[94] Public Contract Code Section 10115.1, added by Chapter 61, Statutes of 19 1988, Section 3, as amended by Chapter 846, Statutes of 1994, Section 2:

"...

(f) "Women business enterprise" means a business concern that meets all of the following criteria:

(1) The business is an individual proprietorship, partnership, corporation, or joint venture at least 51 percent owned by one or more women or, in the case of any business whose stock is publicly held, at least 51 percent of the stock is owned by one or more women.

(2) A business whose management and daily operations are controlled by one or more women who own the business.

(3) A business concern with its home office located in the United States which is not a branch or subsidiary of a foreign corporation, firm, or other business.

..."

[95] Title 5, California Code of Regulations, Section 59504:

"Each district shall undertake appropriate efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises in district contracts. Appropriate efforts may include vendor and service contractor orientation programs related to participating in district contracts or in understanding and complying with the provisions of this Subchapter, developing a listing of minority, women, and disabled veteran business enterprises potentially available as contractors or suppliers, or such other activities they may assist interested parties in being considered for participation in district contracts. Districts shall also undertake efforts to contribute to achievement of the systemwide goals established in Section 59500 by seeking minority, women, and disabled veteran business enterprises as contractors for such contracts as the district may deem appropriate pursuant to Section 59505."

appropriate efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises in district contracts. Appropriate efforts may include vendor and service contractor orientation programs related to participating in district contracts or in understanding and complying with the provisions of the subchapter, developing a listing of minority, women, and disabled veteran business enterprises potentially available as contractors or suppliers, or such other activities that may assist interested parties in being considered for participation in district contracts. Districts shall also undertake efforts to contribute to achievement of the systemwide goals established in Section 59500 by seeking minority, women, and disabled veteran business enterprises as contractors for such contracts as the district may deem appropriate pursuant to Section 59505.

Section 59505[96], subdivision (a), requires a district, when electing to apply

[96] Title 5, California Code of Regulations, Section 59505:

"(a) If a district elects to apply MBE/WBE/DVBE goals to any contract which is to be awarded to the lowest responsible bidder, bidding notices shall include a statement that at the time of bid opening, bidders shall be considered responsive only if they document to the satisfaction of the district that they meet or have made a good faith effort to meet minority, women, and disabled veteran business enterprise participation goals.

(b) A responsive bidder documents a good faith effort to meet the participation goals if, in connection with the submission of a bid, the bidder provides evidence satisfactory to the district that efforts were made to seek out and consider minority, women, and disabled veteran business enterprises as potential subcontractors, materials and/or equipment suppliers, or both subcontractors and/or suppliers.

(c) The district may also elect to seek minority, women and disabled veteran business enterprises to serve as contractors for any other contracts not covered by subsection (a).

MBE/WBE/DVBE goals to any particular contract which is to be awarded to the lowest responsible bidder, to include in bidding notices a statement that, at the time of bid opening, bidders shall be considered responsive only if they document to the satisfaction of the district that they meet or have made a good faith effort to meet minority, women, and disabled veteran business enterprise participation goals. Subdivision (b) requires districts to obtain and verify, as satisfactory, proffered evidence from bidders showing that efforts were made to seek out and consider minority, women, and disabled veteran business enterprises as potential subcontractors, materials and/or equipment suppliers, or both subcontractors and/or suppliers. Subdivision (c) allows districts to also elect to seek minority, women and disabled veteran business enterprises to serve as contractors for any other contracts not covered by subsection (a). Subdivision (d) requires each district to assess the status of each of its contractors to determine if the contractor is a certified or self-certified minority, women, and disabled veteran business enterprise subcontractor and/or supplier to the satisfaction of the district in order to include the actual dollar amount attributable to minority, women, and disabled veteran business enterprise participation in reporting its participation activity pursuant to Section 59509.

(d) The district shall assess the status of each of its contractors and, if the contractor is a certified or self-certified minority, women, and disabled veteran business enterprise subcontractors and/or suppliers to the satisfaction of the district, the district may include the actual dollar amount attributable to minority, women, and disabled veteran business enterprise participation in reporting its participation activity pursuant to Section 59509."

Section 59506[97], subdivision (a) requires each district to establish a process to collect and retain certification information provided by a business enterprise claiming minority, women, and disabled veteran business enterprise status. Subdivision (b) requires the process described in subdivision (a) to include notification to responsive bidders subject to Section 59505(a) of the requirements for qualification as a responsive bidder.

Section 59509[98] requires each district to monitor its participation as specified in the subchapter and each district is required to report to the Chancellor, on forms prescribed by the Chancellor, the level of participation by minority, women, and disabled

---

[97] Title 5, California Code of Regulations, Section 59506:

"(a) Each district shall establish a process to collect and retain certification information provided by a business enterprise claiming minority, women, and disabled veteran business enterprise status.
(b) The process described in subsection (a) shall include notification to responsive bidders subject to Section 59505(a) of the requirements for qualification as a responsive bidder."

[98] Title 5, California Code of Regulations, Section 59509:

"Each district shall monitor its participation as specified in this Subchapter. Beginning October 15, 1994, and by each October 15 thereafter, each district shall report to the Chancellor the level of participation by minority, women, and disabled veteran business enterprises pursuant to this Subchapter for the previously completed fiscal year. Even if a district elects not to apply minority, women, and disabled veteran business enterprise goals to one or more particular contract(s), all such contracts shall be reported to the Chancellor and shall be taken into account in determining whether the community college system as a whole has achieved the goals set forth in Section 59500. The Chancellor shall prescribe forms to be used by the districts in making their yearly reports."

veteran business enterprises pursuant to the subchapter for the previously completed fiscal year. Even if a district elects not to apply minority, women, and disabled veteran business enterprise goals to one or more particular contract(s), all such contracts shall be reported to the Chancellor and shall be taken into account in determining whether the community college system as a whole has achieved the goals set forth in Section 59500.

PART III. STATEMENT OF THE CLAIM

SECTION 1. COSTS MANDATED BY THE STATE

The Statutes, Code Sections, and California Code of Regulations sections referenced in this test claim result in school districts, county offices of education and community college districts incurring costs mandated by the state, as defined in Government Code section 17514[99], by creating new state-mandated duties related to the uniquely governmental function of providing public education and services to students and these statutes apply to school districts and do not apply generally to all residents and entities in the state.[100]

---

[99] Government Code section 17514, as added by Chapter 1459/84:

"Costs mandated by the state" means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution.

[100] Public schools are a Article XIII B, Section 6 "program," pursuant to Long Beach Unified School District v. State of California, (1990) 225 Cal.App.3d 155; 275

where project documents are available, including final plans and specifications, when a notice inviting formal bids includes a requirement for any type of mandatory prebid conference, site visit, or meeting.

1D) Pursuant to Public Contract Code Section 7104, subdivision (a), when any public works contract involves digging trenches or other excavations that extend deeper than four feet below the surface, including a clause which requires the contractor to promptly notify the district, in writing, of any:

(1) Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, and that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.

(2) Subsurface or latent physical conditions at the site differing from those indicated.

(3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

1E) Pursuant to Public Contract Code Section 7104, subdivision (b), when a notice is received from the contractor pursuant to subdivision (a), promptly investigating the conditions, and upon finding that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's

cost of, or the time required for, performance of any part of the work, issuing a change order under the procedures described in the contract.

1F) Pursuant to Public Contract Code Section 7104, subdivision (c), in the event that a dispute arises between the district and the contractor as to whether conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor's cost of, or time required for, performance of any part of the work, to respond to actions taken by the contractor to resolve disputes and protests between the contracting parties.

1G) Pursuant to Public Contract Code Section 7107, subdivision (c), releasing retentions withheld within 60 days after the completion of the work, and in the event of a dispute, withholding an amount not to exceed 150 percent of the disputed amount from the final payment. Pursuant to subdivision (f), paying a charge of 2 percent per month on any improperly withheld amounts and, in the event of litigation paying the contractor's attorney's fees and costs should he or she prevail.

1H) Pursuant to Public Contract Code Section 7109, subdivision (b), upon a determination that a project may be vulnerable to graffiti, the district shall do one or more of the following:

(1) Include a provision in the public works contract that specifies requirements for antigraffiti technology in the plans and specifications for the project.

(2) Establish a method to finance a graffiti abatement program.

(3) Establish a program to deter graffiti.

1I) Pursuant to Public Contract Code Section 9203, retaining no less 5 percent of the value of the actual work completed and of the value of material delivered on the ground or stored until final completion and acceptance of the project.

1J) Pursuant to Public Contract Code Section 10299, subdivision (b), acquiring information technology, goods, and services without further competitive bidding, by utilizing contracts, master agreements, multiple award schedules, cooperative agreements, or other types of agreements established by the department of general services.

1K) Pursuant to Public Contract Code Section 12109, complying with the terms and conditions of the Director of General Services for assisting the district in the acquisition of information technology goods or services.

1L) Pursuant to Business and Professions Code Section 7028.15, subdivision (e), unless one of certain exceptions applies, verifying that a contractor was properly licensed when the contractor submitted a bid with the district before awarding a contract or issuing a purchase order to that contractor.

1M) Pursuant to Public Contract Code Section 20101, subdivision (a), requiring each prospective bidder for a contract to complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's experience in

performing public works.

1N) Pursuant to Public Contract Code Section 20101, subdivision (a), maintaining the questionnaires and financial statements as confidential records not open to public inspection; however, records of the names of contractors applying for prequalification status shall be public records subject to disclosure.

1O) Pursuant to Public Contract Code Section 20101, subdivision (b), adopting and applying a uniform system of rating bidders on the basis of the completed questionnaires and financial statements in order to determine both the minimum requirements permitted for qualification to bid, and the type and size of the contracts upon which each bidder shall be deemed qualified to bid. The uniform system of rating prospective bidders shall be based on objective criteria.

1P) Pursuant to Public Contract Code Section 20101, subdivision (c), establishing a process for prequalifying prospective bidders on a quarterly basis.

1Q) Pursuant to Public Contract Code Section 20101, subdivision (d), establishing a process that will allow prospective bidders to dispute their proposed prequalification rating prior to the closing time for receipt of bids. The appeal process shall include the following:

(1) Upon request of the prospective bidder, providing notification to the prospective bidder, in writing, of the basis for disqualification and any supporting evidence that has been received from others or adduced as a result of an investigation by the district.

(2) Giving the prospective bidder an opportunity to rebut any evidence used as a basis for disqualification and to present evidence to the district as to why the prospective bidder should be found qualified.

(3) If the prospective bidder chooses not to avail itself of this process, adopting the proposed prequalification rating without further proceedings.

1R) Pursuant to Public Contract Code Section 20102, where plans and specifications have been prepared by a district, justifying with detailed specific reasons any change or changes and filing those change(s) and reasons in the project file before electing to perform the work by day's labor.

1S) Pursuant to Public Contract Code Section 20103.5, before making the first payment for work or material under any contract where federal funds are involved, verifying through the Registrar of Contractors that the contractor was properly licensed at the time the contract was awarded. Including a statement to that effect in the standard form of prequalification questionnaire and financial statement.

1T) Pursuant to Public Contract Code Section 20103.6, subdivision (a), in the procurement of architectural design services requiring an expenditure in excess of ten thousand dollars ($10,000), disclosing any contract provision that would require the contracting architect to indemnify and hold the local agency harmless

against any and all liability, whether or not caused by the activity of the contracting architect in any request for proposals for those services or invitations to bid.

1U) Pursuant to Public Contract Code Section 20103.6 subdivision (b), in the event a district fails to comply with subdivision (a), that district shall (1) be precluded from requiring the selected architect to agree to any contract provision requiring the selected architect to indemnify or hold harmless, (2) cease discussions with the selected architect and reopen the request for proposals or invitations to bid from a qualification list, or (3) mutually agree to an indemnity clause acceptable to both parties.

1V) Pursuant to Public Contract Code Section 20103.8, when a district requires a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted, specifying in the bid solicitation which one of the following methods will be used to determine the lowest bid. In the absence of such a specification, only the method provided by subdivision (a) will be used:

(a) The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

(b) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically

identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

(c) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items taken in order from a specifically identified list of those items that, when added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the local agency before the first bid is opened.

(d) The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders or proposed subcontractors or suppliers from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

1W) Pursuant to Public Contract Code Section 20104, subdivision (c), setting forth the provisions of Article 1.5 (Resolution of Construction Claims), or a summary thereof, in the plans and specifications for any work that may give rise to a claim under the Article.

1X) Pursuant to Public Contract Code Section 20104.2, subdivision (b), responding in writing within 45 days, subject to conditions for extension, upon receipt of any written claim of $50,000, or less, for (1) a time extension, (2) payment of money or damages arising from work done, (3) or an amount, the payment of which is

disputed by the district.

1Y) Pursuant to Public Contract Code Section 20104.2, subdivision (c), to respond in in writing within 60 days, subject to conditions for extension, upon receipt of any written claim of more than $50,000 and less than $375,000, for (1) a time extension, (2) payment of money or damages arising from work done, or (3) an amount, the payment of which is disputed by the district

1Z) Pursuant to Public Contract Code Section 20104.2, subdivision (d), to meet and confer, for settlement of issues in dispute, with a claimant who demands such a conference and who disputes the district's written response, or when a district fails to respond timely,

1AA) Pursuant to Public Contract Code Section 20104.2, subdivision (e), filing responsive pleadings and appearing and defending any civil action brought by a claimant if the claim or any portion thereof remains in dispute after the meet and confer conference.

1BB) Pursuant to Public Contract Code Section 20104.4, subdivision (a), appearing and defending in nonbinding mediation which may be ordered by the court, unless waived by all parties.

1CC) Pursuant to Public Contract Code Section 20104.4, subdivision (b), if the matter remains in dispute after mediation, appearing and defending in judicial arbitration as follows:

(1) Participate in discovery proceedings pursuant to the Civil Discovery Act of

1986 (commencing with Section 2016 of the Code of Civil Procedure);

(2) Paying one-half of the necessary and reasonable fees of the arbitrator; and

(3) Paying costs, fees and attorney's fees of the claimant when a more favorable result is not obtained after requesting a trial de novo.

1DD) Pursuant to Public Contract Code Section 20104.6, subdivision (b), paying interest at the legal rate on any arbitration award or judgment arising out of any suit filed pursuant to Section 20104.4.

1EE) Pursuant to Public Contract Code Section 20104.50, subdivision (b), paying interest to the contractor equivalent to the legal rate set forth in subdivision (a) of Section 685.010 of the Code of Civil Procedure when the district fails to make any progress payment within 30 days after receipt of an undisputed and properly submitted payment request from a contractor on a construction contract.

1FF) Pursuant to Public Contract Code Section 20104.50, subdivision (c), upon receipt of a payment request, acting in accordance with both of the following:

(1) Reviewing each payment request as soon as practicable after receipt for the purpose of determining that the payment request is a proper payment request.

(2) Returning any payment request determined not to be a proper payment request suitable for payment to the contractor as soon as practicable, but not later than seven days, after receipt. A request

returned pursuant to this provision shall be accompanied by a document setting forth in writing the reasons why the payment request is not proper.

Pursuant to subdivision (f), setting forth the terms of the article (or a summary thereof) in any contract subject to this article.

1GG) Pursuant to Public Contract Code Section 20107, requiring all bidders for construction work to present their bids under sealed cover and accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the school district.

(c) A certified check made payable to the school district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the school district.

1HH) Pursuant to Public Contract Code Section 20107, upon an award to the lowest bidder, returning the security of all unsuccessful bidders in a reasonable period of time, but in no event beyond 60 days from the time the award is made.

1II) Pursuant to Public Contract Code Section 22300, including a provision in any invitation for bid and in any contract documents permitting the substitution of securities for any moneys withheld by the district to ensure performance under a contract, except for certain federal contracts and, upon satisfactory completion of the contract, returning the securities to the contractor.

2. Laws Pertaining to School Districts

2A) Pursuant to the Local Agency Public Construction Act, Article 3 - School Districts (commencing with Public Contract Code Section 20110), to establish, periodically update and maintain policies and procedures to implement Article 3 of the Act.

2B) Pursuant to Public Contract Code Sections 2000, subdivision (a) and 20111, requiring that a contract be awarded to the lowest responsible bidder who also does either of the following:

(1) Meets goals and requirements established by the district relating to participation in the contract by minority business enterprises and women business enterprises. If the bidder does not meet the goals and requirements established by the district for that participation, to then evaluate the good faith effort of the bidder to comply with those goals and requirements as provided in paragraph (2).

(2) Makes a good faith effort, in accordance with the criteria established pursuant to subdivision (b), prior to the time bids are opened, to comply with the goals and requirements established by the district relating to participation in the contract by minority or women business enterprises.

2C) Pursuant to Public Contract Code Section 2000, subdivision (b), determining if a bidder made a good faith effort to comply with the district's goals and requirements relative to participation in the contract by minority business enterprises and women business enterprises by obtaining information relative to,

and analyzing, the following factors:

(1) Whether or not the bidder attended any presolicitation or prebid meetings that were scheduled by the district to inform all bidders of the minority and women business enterprise program requirements for the project for which the contract will be awarded. A district may waive this requirement if it determines that the bidder is informed as to those program requirements.

(2) Whether or not the bidder identified and selected specific items of the project which would be performed by minority or women business enterprises to provide an opportunity for participation by those enterprises.

(3) Whether or not the bidder advertised, not less than 10 calendar days before the date the bids were opened, in one or more daily or weekly newspapers, trade association publications, minority or trade oriented publications, trade journals, or other media, specified by the district for minority or women business enterprises that are interested in participating in the project.

(4) Whether or not the bidder provided written notice of his or her interest in bidding on the contract to the number of minority or women business enterprises required to be notified by the project specifications not less than 10 calendar days prior to the opening of bids. To the extent possible, for the district to make available to the bidder, not less than 15 calendar days prior to the date the bids are opened, a list or a source of lists of

enterprises which are certified by the district as minority or women business enterprises. If the district does not provide that list or source of lists to the bidder, whether or not the bidder utilized the list of certified minority or women business enterprises prepared by the Department of Transportation pursuant to Section 14030.5 of the Government Code for this purpose.

(5) Whether or not the bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested in performing specific items of the project.

(6) Whether or not the bidder provided interested minority and women business enterprises with information about the plans, specifications, and requirements for the selected subcontracting or material supply work.

(7) Whether or not the bidder requested assistance from minority and women community organizations, minority and women contractor groups, local, state, or federal minority and women business assistance offices, or other organizations that provide assistance in the recruitment and placement of minority or women business enterprises, if any are available.

(8) Whether or not the bidder negotiated in good faith with the minority or women business enterprises, and did not unjustifiably reject as unsatisfactory bids prepared by any minority or women business enterprises, as determined by the district.

(9) Whether or not, where applicable, the bidder advised and made efforts to assist interested minority and women business enterprises in obtaining bonds, lines of credit, or insurance required by the district or contractor.

(10) Whether or not the bidder's efforts to obtain minority and women business enterprise participation could reasonably be expected by the district to produce a level of participation sufficient to meet the goals and requirements of the district.

2D) Pursuant to Public Contract Code Section 2001, when requiring that contracts be awarded to the lowest responsible bidder meeting, or making a good faith effort to meet, participation goals for minority, women, or disabled veteran business enterprises, providing in the general conditions under which bids will be received that any person making a bid or offer to perform a contract shall, in his or her bid or offer, set forth the following information:

(1) The name and the location of the place of business of each subcontractor certified as a minority, women, or disabled veteran business enterprise who will perform work or labor or render service to the prime contractor in connection with the performance of the contract and who will be used by the prime contractor to fulfill minority, women, and disabled veteran business enterprise participation goals.

(2) The portion of work that will be done by each subcontractor under paragraph (1).

2E) Pursuant to Public Contract Code Section 20111, subdivision (a), letting all contracts involving an expenditure of more than fifty thousand dollars ($50,000) for any of the following:

(1) The purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district,

(2) Services, except construction services, or

(3) Repairs, including maintenance as defined in Section 20115, that are not a public project as defined in subdivision (c) of Section 22002,

to the lowest responsible bidder who shall give security as the board requires, or else reject all bids.

2F) Pursuant to Public Contract Code Section 20111, subdivision (b), letting all contracts involving an expenditure of more than fifty thousand dollars ($50,000) for any of the following:

(1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition or repair work involving any publicly owned, leased or operated facility, or

(2) Painting or repainting of any publicly owned, leased, or operated facility,

to the lowest responsible bidder who shall give security as the board requires, or else reject all bids.

2G) Pursuant to Public Contract Code Section 20111, subdivision (b), having all bidders for construction work present their bids under sealed cover and accompanied by one of the following forms of bidder's security:

(1) Cash.

(2) A cashier's check made payable to the school district.

(3) A certified check made payable to the school district.

(4) A bidder's bond executed by an admitted surety insurer, made payable to the school district.

2H) Pursuant to Public Contract Code Section 20111, subdivision (b), upon an award to the lowest bidder, returning the security of all unsuccessful bidders in a reasonable period of time, but in no event beyond 60 days from the time the award is made.

2I) Pursuant to Public Contract Code Section 20111.5, subdivision (a), requiring each prospective bidder for a contract, as described in Section 20111, to complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's financial ability and experience in performing public works.

2J) Pursuant to Public Contract Code Section 20111.5, subdivision (a), maintaining the questionnaires and financial statements confidential as public records not open to public inspection.

2K) Pursuant to Public Contract Code Section 20111.5, subdivision (b), adopting and

applying a uniform system of rating bidders on the basis of the completed questionnaires and financial statements in order to determine the size of contracts upon which each bidder shall be deemed qualified to bid.

2L) Pursuant to Public Contract Code Section 20111.5, subdivision (c), furnishing each prospective bidder with a standardized proposal form that, when completed and executed, shall be submitted to the district as his or her bid, and disregarding bids not presented on the forms furnished.

2M) Pursuant to Public Contract Code Section 20111.5, subdivision (e), establishing a process for prequalifying prospective bidders on a quarterly basis.

2N) Pursuant to Public Contract Code Section 20116, maintaining job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California School Accounting Manual for a period of not less than three years after completion of the project.

2O) Pursuant to Public Contract Code Section 20116, for the purpose of securing informal bids, publishing annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. Giving notice of all informal bid projects to all contractors included on the informal bidding list.

3. Laws Pertaining to Community College Districts

3A) Pursuant to the Local Agency Public Construction Act, Article 41 - Community College Districts (commencing with Public Contract Code Section 20650), to establish, periodically update and maintain policies and procedures to implement Article 41 of the Act.

3B) Pursuant to Public Contract Code Sections 2000, subdivision (a) and 20111, requiring that a contract be awarded to the lowest responsible bidder who also does either of the following:

(1) Meets goals and requirements established by the community college district relating to participation in the contract by minority business enterprises and women business enterprises. If the bidder does not meet the goals and requirements established by the community college district for that participation, to then evaluate the good faith effort of the bidder to comply with those goals and requirements as provided in paragraph (2).

(2) Makes a good faith effort, in accordance with the criteria established pursuant to subdivision (b), prior to the time bids are opened, to comply with the goals and requirements established by the community college district relating to participation in the contract by minority or women business enterprises.

3C) Pursuant to Public Contract Code Section 2000, subdivision (b), determining if a bidder made a good faith effort to comply with the community college district's goals and requirements relative to participation in the contract by minority

business enterprises and women business enterprises by obtaining information relative to and analysis of the following factors:

(1) Whether or not the bidder attended any presolicitation or prebid meetings that were scheduled by the community college district to inform all bidders of the minority and women business enterprise program requirements for the project for which the contract will be awarded. A community college district may waive this requirement if it determines that the bidder is informed as to those program requirements.

(2) Whether or not the bidder identified and selected specific items of the project which would be performed by minority or women business enterprises to provide an opportunity for participation by those enterprises.

(3) Whether or not the bidder advertised, not less than 10 calendar days before the date the bids were opened, in one or more daily or weekly newspapers, trade association publications, minority or trade oriented publications, trade journals, or other media, specified by the community college district for minority or women business enterprises that are interested in participating in the project.

(4) Whether or not the bidder provided written notice of his or her interest in bidding on the contract to the number of minority or women business enterprises required to be notified by the project specifications not less than 10 calendar days prior to the opening of bids. To the extent possible,

for the community college district to make available to the bidder, not less than 15 calendar days prior to the date the bids are opened, a list or a source of lists of enterprises which are certified by the community college district as minority or women business enterprises. If the community college district does not provide that list or source of lists to the bidder, whether or not the bidder utilized the list of certified minority or women business enterprises prepared by the Department of Transportation pursuant to Section 14030.5 of the Government Code for this purpose.

(5) Whether or not the bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested in performing specific items of the project.

(6) Whether or not the bidder provided interested minority and women business enterprises with information about the plans, specifications, and requirements for the selected subcontracting or material supply work.

(7) Whether or not the bidder requested assistance from minority and women community organizations, minority and women contractor groups, local, state, or federal minority and women business assistance offices, or other organizations that provide assistance in the recruitment and placement of minority or women business enterprises, if any are available.

(8) Whether or not the bidder negotiated in good faith with the minority or women business enterprises, and did not unjustifiably reject as

unsatisfactory bids prepared by any minority or women business enterprises, as determined by the community college district.

(9) Whether or not, where applicable, the bidder advised and made efforts to assist interested minority and women business enterprises in obtaining bonds, lines of credit, or insurance required by the community college district or contractor.

(10) Whether or not the bidder's efforts to obtain minority and women business enterprise participation could reasonably be expected by the community college district to produce a level of participation sufficient to meet the goals and requirements of the community college district.

3D) Pursuant to Public Contract Code Section 2001, when requiring that contracts be awarded to the lowest responsible bidder meeting, or making a good faith effort to meet, participation goals for minority, women, or disabled veteran business enterprises, providing in the general conditions under which bids will be received that any person making a bid or offer to perform a contract shall, in his or her bid or offer, set forth the following information:

(1) The name and the location of the place of business of each subcontractor certified as a minority, women, or disabled veteran business enterprise who will perform work or labor or render service to the prime contractor in connection with the performance of the contract and who will be used by the prime contractor to fulfill minority, women, and disabled veteran

business enterprise participation goals.

(2) The portion of work that will be done by each subcontractor under paragraph (1).

3E) Pursuant to Public Contract Code Section 20651, subdivision (a), letting all contracts involving an expenditure of more than fifty thousand dollars ($50,000) for any of the following:

(1) The purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district,

(2) Services, except construction services, or

(3) Repairs, including maintenance as defined in Section 20656, that are not a public project as defined in subdivision (c) of Section 22002,

to the lowest responsible bidder who shall give security as the board requires, or else reject all bids.

3F) Pursuant to Public Contract Code Section 20651, subdivision (b), having all bidders for construction work present their bids under sealed cover and accompanied by one of the following forms of bidder's security:

(1) Cash.

(2) A cashier's check made payable to the school district.

(3) A certified check made payable to the school district.

(4) A bidder's bond executed by an admitted surety insurer, made

payable to the school district.

3G) Pursuant to Public Contract Code Section 20651, subdivision (b), upon an award to the lowest bidder, returning the security of all unsuccessful bidders in a reasonable period of time, but in no event beyond 60 days from the time the award is made.

3H) Pursuant to Public Contract Code Section 20651.5, subdivision (a), maintaining the questionnaires and financial statements confidential as public records not open to public inspection.

3I) Pursuant to Public Contract Code Section 20651.5, subdivision (b), adopting and applying a uniform system of rating bidders on the basis of the completed questionnaires and financial statements in order to determine the size of contracts upon which each bidder shall be deemed qualified to bid.

3J) Pursuant to Public Contract Code Section 20651.5, subdivision (c), furnishing each prospective bidder with a standardized proposal form that, when completed and executed, shall be submitted to the community college district as his or her bid, and to reject bids not presented on the forms furnished.

3K) Pursuant to Public Contract Code Section 20657, maintaining job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California School Accounting Manual for a period of not less than three years after completion of the project.

3L) Pursuant to Public Contract Code Section 20657, for the purpose of securing informal bids, publishing annually in a newspaper of general circulation published in the community college district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. Giving notice of all informal bid projects to all contractors included on the informal bidding list.

3M) Pursuant to Public Contract Code Section 20659, specifying in writing all changes or alterations of a contract, and the costs thereof, which are ordered by the governing board of the community college district.

4. Minority, Women, and Disabled Veteran Business Enterprise Participation

4A) Pursuant to Subchapter 9 entitled "Minority, Women, and Disabled Veteran Business Enterprise Participation Goals for the California Community Colleges" (commencing with Title 5, California Code of Regulations, Section 59500), to establish, periodically update and maintain policies and procedures to implement the requirements of Subchapter 9 of the Regulations.

4B) Pursuant to Title 5, California Code of Regulations, Section 59500, subdivision (a), providing opportunities for minority, women, and disabled veteran business enterprise participation in the award of district contracts consistent with this subchapter. The statewide goal for such participation is not less than 15 percent minority business enterprise participation, not less than 5 percent women business enterprise participation, and not less than 3 percent disabled veteran

business enterprise participation of the dollar amount expended by all districts each year for construction, professional services, materials, supplies, equipment, alteration, repair, or improvement.

4C) Pursuant to Title 5, California Code of Regulations, Section 59504, undertaking appropriate efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises in district contracts, including providing vendor and service contractor orientation programs related to participating in district contracts or in understanding and complying with the provisions of the subchapter, and/or developing a listing of minority, women, and disabled veteran business enterprises potentially available as contractors or suppliers, and/or such other activities that may assist interested parties in being considered for participation in district contracts.

4D) Pursuant to Title 5, California Code of Regulations, Section 59504, undertaking efforts to contribute to achievement of the systemwide goals established in Section 59500 by seeking minority, women, and disabled veteran business enterprises as contractors for such contracts as the district may deem appropriate pursuant to Section 59505.

4E) Pursuant to Title 5, California Code of Regulations, Section 59505, subdivision (a), when electing to apply MBE/WBE/DVBE goals to any particular contract which is to be awarded to the lowest responsible bidder, including in bidding notices a statement that at the time of bid opening, bidders shall be considered

responsive only if they document to the satisfaction of the district that they meet or have made a good faith effort to meet minority, women, and disabled veteran business enterprise participation goals.

4F) Pursuant to Title 5, California Code of Regulations, Section 59505, subdivision (b), obtaining and verifying, as satisfactory, proffered evidence from bidders showing that efforts were made to seek out and consider minority, women, and disabled veteran business enterprises as potential subcontractors, materials and/or equipment suppliers, or both subcontractors and/or suppliers.

4G) Pursuant to Title 5, California Code of Regulations, Section 59505, subdivision (c), seeking minority, women and disabled veteran business enterprises to serve as contractors for any other contracts not covered by subsection (a).

4H) Pursuant to Title 5, California Code of Regulations, Section 59505, subdivision (d), assessing the status of each of its contractors to determine if the contractor is a certified or self-certified minority, women, and disabled veteran business enterprise subcontractor and/or supplier to the satisfaction of the district in order to include the actual dollar amount attributable to minority, women, and disabled veteran business enterprise participation in reporting its participation activity pursuant to Section 59509.

4I) Pursuant to Title 5, California Code of Regulations, Section 59506, subdivision (a), collecting and retaining certification information provided by a business enterprise claiming minority, women, and disabled veteran business enterprise

status.

4J) Pursuant to Title 5, California Code of Regulations, Section 59506, subdivision (b), including notification to responsive bidders subject to Section 59505(a) of the requirements for qualification as a responsive bidder.

4K) Pursuant to Title 5, California Code of Regulations, Section 59509, monitoring its participation as specified in the subchapter and reporting to the Chancellor, on forms prescribed by the Chancellor, the level of participation by minority, women, and disabled veteran business enterprises pursuant to the subchapter for the previously completed fiscal year. Even if a district elects not to apply minority, women, and disabled veteran business enterprise goals to one or more particular contract(s), all such contracts shall be reported to the Chancellor and shall be taken into account in determining whether the community college system as a whole has achieved the goals set forth in Section 59500.

SECTION 2. EXCEPTIONS TO MANDATE REIMBURSEMENT

None of the Government Code Section 17556[101] statutory exceptions to a finding

[101] Government Code section 17556, as last amended by Chapter 589, Statutes of 1989:

"The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

(a) The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a

of costs mandated by the state apply to this test claim. Note, that to the extent school districts may have previously performed functions similar to those mandated by the referenced code sections, such efforts did not establish a preexisting duty that would relieve the state of its constitutional requirement to later reimburse school districts when these activities became mandated.[102]

SECTION 3. FUNDING PROVIDED FOR THE MANDATED PROGRAM

---

letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.

(b) The statute or executive order affirmed for the state that which had been declared existing law or regulation by action of the courts.

(c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

(e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

(f) The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a statewide election.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."

[102] Government Code section 17565, added by Chapter 879, Statutes of 1986:

"If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

No funds are appropriated by the state for reimbursement of these costs mandated by the state and there is no other provision of law for recovery of costs from any other source.

PART IV. ADDITIONAL CLAIM REQUIREMENTS

The following elements of this claim are provided pursuant to Section 1183, Title 2, California Code of Regulations:

Exhibit 1: Declaration of William McGuire
Associate Superintendent Business Services
Clovis Unified School District

Declaration of Cheryl Miller
Associate Vice President Business Services
Santa Monica Community College District

Exhibit 2: Copies of Statutes Cited

Chapter 455, Statutes of 2002
Chapter 776, Statutes of 2000
Chapter 292, Statutes of 2000
Chapter 159, Statutes of 2000
Chapter 127, Statutes of 2000
Chapter 126, Statutes of 2000
Chapter 972, Statutes of 1999
Chapter 857, Statutes of 1998
Chapter 657, Statutes of 1998
Chapter 722, Statutes of 1997
Chapter 390, Statutes of 1997
Chapter 897, Statutes of 1995
Chapter 504, Statutes of 1995
Chapter 726, Statutes of 1994
Chapter 1195, Statutes of 1993
Chapter 1032, Statutes of 1993
Chapter 1042, Statutes of 1992
Chapter 799, Statutes of 1992
Chapter 294, Statutes of 1992

Chapter 933, Statutes of 1991
Chapter 785, Statutes of 1991
Chapter 1414, Statutes of 1990
Chapter 808, Statutes of 1990
Chapter 694, Statutes of 1990
Chapter 321, Statutes of 1990
Chapter 1163, Statutes of 1989
Chapter 863, Statutes of 1989
Chapter 330, Statutes of 1989
Chapter 1408, Statutes of 1988
Chapter 538, Statutes of 1988
Chapter 102, Statutes of 1987
Chapter 1060, Statutes of 1986
Chapter 886, Statutes of 1986
Chapter 1073, Statutes of 1985
Chapter 758, Statutes of 1984
Chapter 728, Statutes of 1984
Chapter 173, Statutes of 1984
Chapter 256, Statutes of 1983
Chapter 513, Statutes of 1982
Chapter 465, Statutes of 1982
Chapter 251, Statutes of 1982
Chapter 470, Statutes of 1981
Chapter 194, Statutes of 1981
Chapter 1255, Statutes of 1980
Chapter 631, Statutes of 1977
Chapter 36, Statutes of 1977
Chapter 921, Statutes of 1976

Exhibit 3: Copies of Code Sections Cited:

Public Contract Code Section 2000
Public Contract Code Section 2001
Public Contract Code Section 3300
Public Contract Code Section 6610
Public Contract Code Section 7104
Public Contract Code Section 7107
Public Contract Code Section 7109
Public Contract Code Section 9203
Public Contract Code Section 10299
Public Contract Code Section 12109

Public Contract Code Section 20100
Public Contract Code Section 20101
Public Contract Code Section 20102
Public Contract Code Section 20103.5
Public Contract Code Section 20103.6
Public Contract Code Section 20103.8
Public Contract Code Section 20104
Public Contract Code Section 20104.2
Public Contract Code Section 20104.4
Public Contract Code Section 20104.6
Public Contract Code Section 20104.50
Public Contract Code Section 20107
Public Contract Code Section 20110
Public Contract Code Section 20111
Public Contract Code Section 20111.5
Public Contract Code Section 20116
Public Contract Code Section 20650
Public Contract Code Section 20651
Public Contract Code Section 20651.5
Public Contract Code Section 20657
Public Contract Code Section 20659
Public Contract Code Section 22300

Business and Professions Code Section 7028.15

Exhibit 4: Title 5, California Code of Regulations Cited:

Title 5, California Code of Regulations, Section 59500
Title 5, California Code of Regulations, Section 59504
Title 5, California Code of Regulations, Section 59505
Title 5, California Code of Regulations, Section 59506
Title 5, California Code of Regulations, Section 59509

/

/

/

/

PART V. CERTIFICATION

I certify by my signature below, under penalty of perjury, that the statements made in this document are true and complete of my own knowledge or information and belief.

Executed on June 16, 2003, at Clovis, California by:

William McGuire
Associate Superintendent Business Services

Voice: (559) 327-9110
Fax: (559) 327-9129

PART VI. APPOINTMENT OF REPRESENTATIVE

Clovis School District appoints Keith B. Petersen, SixTen and Associates, as its representative for this test claim.

William McGuire
Associate Superintendent Business Services

6/16/2003
Date

PART V. CERTIFICATION

I certify by my signature below, under penalty of perjury, that the statements made in this document are true and complete of my own knowledge or information and belief.

Executed on June 18, 2003, at Santa Monica, California by:

Cheryl Miller
Associate Vice President Business Services

Voice: (310) 434-4224
Fax: (310) 434-3607

PART VI. APPOINTMENT OF REPRESENTATIVE

Clovis School District appoints Keith B. Petersen, SixTen and Associates, as its representative for this test claim.

Cheryl Miller
Cheryl Miller
Associate Vice President Business Services

June 18, 2003
Date

EXHIBIT 1
DECLARATIONS

DECLARATION OF WILLIAM McGUIRE

Clovis Unified School District

Test Claim of Clovis Unified School District
and Santa Monica Community College District

COSM No. _____

Chapter 455, Statutes of 2002
Chapter 776, Statutes of 2000
Chapter 292, Statutes of 2000
Chapter 159, Statutes of 2000
Chapter 127, Statutes of 2000
Chapter 126, Statutes of 2000
Chapter 972, Statutes of 1999
Chapter 857, Statutes of 1998
Chapter 657, Statutes of 1998
Chapter 722, Statutes of 1997
Chapter 390, Statutes of 1997
Chapter 897, Statutes of 1995
Chapter 504, Statutes of 1995
Chapter 726, Statutes of 1994
Chapter 1195, Statutes of 1993
Chapter 1032, Statutes of 1993
Chapter 1042, Statutes of 1992
Chapter 799, Statutes of 1992
Chapter 294, Statutes of 1992
Chapter 933, Statutes of 1991
Chapter 785, Statutes of 1991
Chapter 1414, Statutes of 1990
Chapter 808, Statutes of 1990
Chapter 694, Statutes of 1990
Chapter 321, Statutes of 1990
Chapter 1163, Statutes of 1989
Chapter 863, Statutes of 1989
Chapter 330, Statutes of 1989
Chapter 1408, Statutes of 1988
Chapter 538, Statutes of 1988
Chapter 102, Statutes of 1987
Chapter 1060, Statutes of 1986
Chapter 886, Statutes of 1986
Chapter 1073, Statutes of 1985
Chapter 758, Statutes of 1984
Chapter 728, Statutes of 1984
Chapter 173, Statutes of 1984
Chapter 256, Statutes of 1983
Chapter 513, Statutes of 1982
Chapter 465, Statutes of 1982
Chapter 251, Statutes of 1982
Chapter 470, Statutes of 1981
Chapter 194, Statutes of 1981
Chapter 1255, Statutes of 1980
Chapter 631, Statutes of 1977
Chapter 36, Statutes of 1977
Chapter 921, Statutes of 1976

Public Contract Code Section 2000
Public Contract Code Section 2001
Public Contract Code Section 3300
Public Contract Code Section 6610
Public Contract Code Section 7104
Public Contract Code Section 7107
Public Contract Code Section 7109
Public Contract Code Section 9203
Public Contract Code Section 10299
Public Contract Code Section 12109
Public Contract Code Section 20100
Public Contract Code Section 20101
Public Contract Code Section 20104.2
Public Contract Code Section 20104.4
Public Contract Code Section 20104.6
Public Contract Code Section 20104.50
Public Contract Code Section 20107
Public Contract Code Section 20110
Public Contract Code Section 20111
Public Contract Code Section 20111.5
Public Contract Code Section 20116
Public Contract Code Section 20650
Public Contract Code Section 20651

Public Contract Code Section 20102
Public Contract Code Section 20103.5
Public Contract Code Section 20103.6
Public Contract Code Section 20103.8
Public Contract Code Section 20104
Public Contract Code Section 20651.5
Public Contract Code Section 20657
Public Contract Code Section 20659
Public Contract Code Section 22300

Business and Professions Code Section 7028.15

Title 5, California Code of Regulations
Section 59500
Section 59504
Section 59505
Section 59506
Section 59509

Public Contracts (K-14)

I, William McGuire, Associate Superintendent Business Services, Clovis Unified School District, make the following declaration and statement.

In my capacity as Associate Superintendent Business Services, I am responsible for supervising the making of pubic contracts for the district. I am familiar with the provisions and requirements of the Statutes, Public Contract Code Sections, Business and Professions Code Section and Title 5 Regulations enumerated above.

These Statutes, Code sections and Regulations require the Clovis School District to:

Local Agency Public Construction Act

1A) Pursuant to the Local Agency Public Construction Act, Articles 1 and 2, (commencing with Public Contract Code Section 20100) and other sections cited above, to establish, periodically update and maintain policies and procedures to

implement the requirements of the laws pertaining to public contracts.

1B) Pursuant to Public Contract Code Section 3300, subdivision (a), specifying the classification of the license which a contractor shall possess at the time a contract is awarded, including that specification in any plans prepared for a public project and in any notice inviting bids.

1C) Pursuant to Public Contract Code Section 6610, when a notice inviting formal bids includes a requirement for any type of mandatory prebid conference, site visit, or meeting, including the time, date, and location of the mandatory prebid site visit, conference or meeting, and when and where project documents are available, including final plans and specifications.

1D) Pursuant to Public Contract Code Section 7104, subdivision (a), when any public works contract involves digging trenches or other excavations that extend deeper than four feet below the surface, including a clause which requires the contractor to promptly notify the district, in writing, of any:

(1) Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, and that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.

(2) Subsurface or latent physical conditions at the site differing from those indicated.

(3) Unknown physical conditions at the site of any unusual nature, different

materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

1E) Pursuant to Public Contract Code Section 7104, subdivision (b), when a notice is received from the contractor pursuant to subdivision (a), promptly investigating the conditions, and upon finding that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work, issuing a change order under the procedures described in the contract.

1F) Pursuant to Public Contract Code Section 7104, subdivision (c), in the event that a dispute arises between the district and the contractor as to whether conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor's cost of, or time required for, performance of any part of the work, to respond to actions taken by the contractor to resolve disputes and protests between the contracting parties.

1G) Pursuant to Public Contract Code Section 7107, subdivision (c), releasing retentions withheld within 60 days after the completion of the work, and in the event of a dispute, withholding an amount not to exceed 150 percent of the disputed amount from the final payment. Pursuant to subdivision (f), paying a charge of 2 percent per month on any improperly withheld amounts and, in the event of litigation paying the contractor's attorney's fees and costs should he or she prevail.

1H) Pursuant to Public Contract Code Section 7109, subdivision (b), upon a determination that a project may be vulnerable to graffiti, the district shall do one or more of the following:

(1) Include a provision in the public works contract that specifies requirements for antigraffiti technology in the plans and specifications for the project.

(2) Establish a method to finance a graffiti abatement program.

(3) Establish a program to deter graffiti.

1I) Pursuant to Public Contract Code Section 9203, retaining no less 5 percent of the actual work completed and of the value of material delivered on the ground or stored until final completion and acceptance of the project.

1J) Pursuant to Public Contract Code Section 10299, subdivision (b), acquiring information technology, goods, and services without further competitive bidding, by utilizing contracts, master agreements, multiple award schedules, cooperative agreements, or other types of agreements established by the department of general services.

1K) Pursuant to Public Contract Code Section 12109, complying with the terms and conditions of the Director of General Services for assisting the district in the acquisition of information technology goods or services."

1L) Pursuant to Business and Professions Code Section 7028.15, subdivision (e), unless one of certain exceptions applies, verifying that a contractor was properly licensed when the contractor submitted a bid with the district before awarding a

contract or issuing a purchase order to that contractor.

1M) Pursuant to Public Contract Code Section 20101, subdivision (a), requiring each prospective bidder for a contract to complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's experience in performing public works.

1N) Pursuant to Public Contract Code Section 20101, subdivision (a), maintaining the questionnaires and financial statements confidential as public records not open to public inspection; however, records of the names of contractors applying for prequalification status shall be public records subject to disclosure.

1O) Pursuant to Public Contract Code Section 20101, subdivision (b), adopting and applying a uniform system of rating bidders on the basis of the completed questionnaires and financial statements in order to determine both the minimum requirements permitted for qualification to bid, and the type and size of the contracts upon which each bidder shall be deemed qualified to bid. The uniform system of rating prospective bidders shall be based on objective criteria.

1P) Pursuant to Public Contract Code Section 20101, subdivision (c), establishing a process for prequalifying prospective bidders on a quarterly basis.

1Q) Pursuant to Public Contract Code Section 20101, subdivision (d), establishing a process that will allow prospective bidders to dispute their proposed prequalification rating prior to the closing time for receipt of bids. The appeal

process shall include the following:

(1) Upon request of the prospective bidder, providing notification to the prospective bidder, in writing, of the basis for disqualification and any supporting evidence that has been received from others or adduced as a result of an investigation by the district.

(2) Giving the prospective bidder an opportunity to rebut any evidence used as a basis for disqualification and to present evidence to the district as to why the prospective bidder should be found qualified.

(3) If the prospective bidder chooses not to avail itself of this process, adopting the proposed prequalification rating without further proceedings.

1R) Pursuant to Public Contract Code Section 20102, where plans and specifications have been prepared by a district, justifying with detailed specific reasons any change or changes and filing those change(s) and reasons in the project file before electing to perform the work by day's labor.

1S) Pursuant to Public Contract Code Section 20103.5, before making the first payment for work or material under any contract where federal funds are involved, verifying through the Registrar of Contractors that the contractor was properly licensed at the time the contract was awarded. Including a statement to that effect in the standard form of prequalification questionnaire and financial

statement.

1T) Pursuant to Public Contract Code Section 20103.6, subdivision (a), in the procurement of architectural design services requiring an expenditure in excess of ten thousand dollars ($10,000), disclosing any contract provision that would require the contracting architect to indemnify and hold the local agency harmless against any and all liability, whether or not caused by the activity of the contracting architect in any request for proposals for those services or invitations to bid.

1U) Pursuant to Public Contract Code Section 20103.6 subdivision (b), in the event a district fails to comply with subdivision (a), that district shall (1) be precluded from requiring the selected architect to agree to any contract provision requiring the selected architect to indemnify or hold harmless, (2) cease discussions with the selected architect and reopen the request for proposals or invitations to bid from a qualification list, or (3) mutually agree to an indemnity clause acceptable to both parties.

1V) Pursuant to Public Contract Code Section 20103.8, when a district requires a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted, specifying in the bid solicitation which one of the following methods will be used to determine the lowest bid. In the absence of such a specification, only the method provided by subdivision (a) will be used:

(a) The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

(b) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

(c) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items taken in order from a specifically identified list of those items that, when added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the local agency before the first bid is opened.

(d) The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders or proposed subcontractors or suppliers from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

1W) Pursuant to Public Contract Code Section 20104, subdivision (c), setting forth the provisions of Article 1.5 (Resolution of Construction Claims), or a summary thereof, in the plans and specifications for any work that may give rise to a claim

under the Article.

1X) Pursuant to Public Contract Code Section 20104.2, subdivision (b), responding in writing within 45 days, subject to conditions for extension, upon receipt of any written claim of $50,000, or less, for (1) a time extension, (2) payment of money or damages arising from work done, (3) or an amount, the payment of which is disputed by the district.

1Y) Pursuant to Public Contract Code Section 20104.2, subdivision (c), to respond in in writing within 60 days, subject to conditions for extension, upon receipt of any written claim of more than $50,000 and less than $375,000, for (1) a time extension, (2) payment of money or damages arising from work done, or (3) an amount, the payment of which is disputed by the district

1Z) Pursuant to Public Contract Code Section 20104.2, subdivision (d), to meet and confer, for settlement of issues in dispute, with a claimant who demands such a conference and who disputes the district's written response, or when a district fails to respond timely,

1AA) Pursuant to Public Contract Code Section 20104.2, subdivision (e), filing responsive pleadings and appearing and defending any civil action brought by a claimant if the claim or any portion thereof remains in dispute after the meet and confer conference.

1BB) Pursuant to Public Contract Code Section 20104.4, subdivision (a), appearing and defending in nonbinding mediation which may be ordered by the court, unless

waived by all parties.

1CC) Pursuant to Public Contract Code Section 20104.4, subdivision (b), if the matter remains in dispute after mediation, appearing and defending in judicial arbitration as follows:

(1) Participate in discovery proceedings pursuant to the Civil Discovery Act of 1986 (commencing with Section 2016 of the Code of Civil Procedure);

(2) Paying one-half of the necessary and reasonable fees of the arbitrator; and

(3) Paying costs, fees and attorney's fees of the claimant when a more favorable result is not obtained after requesting a trial de novo.

1DD) Pursuant to Public Contract Code Section 20104.6, subdivision (b), paying interest at the legal rate on any arbitration award or judgment arising out of any suit filed pursuant to Section 20104.4.

1EE) Pursuant to Public Contract Code Section 20104.50, subdivision (b), paying interest to the contractor equivalent to the legal rate set forth in subdivision (a) of Section 685.010 of the Code of Civil Procedure when the district fails to make any progress payment within 30 days after receipt of an undisputed and properly submitted payment request from a contractor on a construction contract.

1FF) Pursuant to Public Contract Code Section 20104.50, subdivision (c), upon receipt of a payment request, acting in accordance with both of the following:

(1) Reviewing each payment request as soon as practicable after

receipt for the purpose of determining that the payment request is a proper payment request.

(2) Returning any payment request determined not to be a proper payment request suitable for payment to the contractor as soon as practicable, but not later than seven days, after receipt. A request returned pursuant to this provision shall be accompanied by a document setting forth in writing the reasons why the payment request is not proper.

Pursuant to subdivision (f), setting forth the terms of the article (or a summary thereof) in any contract subject to this article.

1GG) Pursuant to Public Contract Code Section 20107, requiring all bidders for construction work to present their bids under sealed cover and accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the school district.

(c) A certified check made payable to the school district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the school district.

1HH) Pursuant to Public Contract Code Section 20107, upon an award to the lowest bidder, returning the security of all unsuccessful bidders in a reasonable period of time, but in no event beyond 60 days from the time the award is made.

1Il) Pursuant to Public Contract Code Section 22300, including a provision in any invitation for bid and in any contract documents permitting the substitution of securities for any moneys withheld by the district to ensure performance under a contract, except for certain federal contracts and, upon satisfactory completion of the contract, returning the securities to the contractor.

2. Laws Pertaining to School Districts

2A) Pursuant to the Local Agency Public Construction Act, Article 3 - School Districts (commencing with Public Contract Code Section 20110), to establish, periodically update and maintain policies and procedures to implement Article 3 of the Act.

2B) Pursuant to Public Contract Code Sections 2000, subdivision (a) and 20111, requiring that a contract be awarded to the lowest responsible bidder who also does either of the following:

(1) Meets goals and requirements established by the district relating to participation in the contract by minority business enterprises and women business enterprises. If the bidder does not meet the goals and requirements established by the district for that participation, to then evaluate the good faith effort of the bidder to comply with those goals and requirements as provided in paragraph (2).

(2) Makes a good faith effort, in accordance with the criteria established pursuant to subdivision (b), prior to the time bids are opened, to comply with the goals and requirements established by the district relating to

participation in the contract by minority or women business enterprises.

2C) Pursuant to Public Contract Code Section 2000, subdivision (b), determining if a bidder made a good faith effort to comply with the district's goals and requirements relative to participation in the contract by minority business enterprises and women business enterprises by obtaining information relative to, and analyzing, the following factors:

(1) Whether or not the bidder attended any presolicitation or prebid meetings that were scheduled by the district to inform all bidders of the minority and women business enterprise program requirements for the project for which the contract will be awarded. A district may waive this requirement if it determines that the bidder is informed as to those program requirements.

(2) Whether or not the bidder identified and selected specific items of the project which would be performed by minority or women business enterprises to provide an opportunity for participation by those enterprises.

(3) Whether or not the bidder advertised, not less than 10 calendar days before the date the bids were opened, in one or more daily or weekly newspapers, trade association publications, minority or trade oriented publications, trade journals, or other media, specified by the district for minority or women business enterprises that are interested in participating in the project.

(4) Whether or not the bidder provided written notice of his or her interest in

bidding on the contract to the number of minority or women business enterprises required to be notified by the project specifications not less than 10 calendar days prior to the opening of bids. To the extent possible, for the district to make available to the bidder, not less than 15 calendar days prior to the date the bids are opened, a list or a source of lists of enterprises which are certified by the district as minority or women business enterprises. If the district does not provide that list or source of lists to the bidder, whether or not the bidder utilized the list of certified minority or women business enterprises prepared by the Department of Transportation pursuant to Section 14030.5 of the Government Code for this purpose.

(5) Whether or not the bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested in performing specific items of the project.

(6) Whether or not the bidder provided interested minority and women business enterprises with information about the plans, specifications, and requirements for the selected subcontracting or material supply work.

(7) Whether or not the bidder requested assistance from minority and women community organizations, minority and women contractor groups, local, state, or federal minority and women business assistance offices, or other organizations that provide assistance in the recruitment and placement of

minority or women business enterprises, if any are available.

(8) Whether or not the bidder negotiated in good faith with the minority or women business enterprises, and did not unjustifiably reject as unsatisfactory bids prepared by any minority or women business enterprises, as determined by the district.

(9) Whether or not, where applicable, the bidder advised and made efforts to assist interested minority and women business enterprises in obtaining bonds, lines of credit, or insurance required by the district or contractor.

(10) Whether or not the bidder's efforts to obtain minority and women business enterprise participation could reasonably be expected by the district to produce a level of participation sufficient to meet the goals and requirements of the district.

2D) Pursuant to Public Contract Code Section 2001, when requiring that contracts be awarded to the lowest responsible bidder meeting, or making a good faith effort to meet, participation goals for minority, women, or disabled veteran business enterprises, providing in the general conditions under which bids will be received that any person making a bid or offer to perform a contract shall, in his or her bid or offer, set forth the following information:

(1) The name and the location of the place of business of each subcontractor certified as a minority, women, or disabled veteran business enterprise who will perform work or labor or render service to the prime contractor in

connection with the performance of the contract and who will be used by the prime contractor to fulfill minority, women, and disabled veteran business enterprise participation goals.

(2) The portion of work that will be done by each subcontractor under paragraph (1).

2E) Pursuant to Public Contract Code Section 20111, subdivision (a), letting all contracts involving an expenditure of more than fifty thousand dollars ($50,000) for any of the following:

(1) The purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district,

(2) Services, except construction services, or

(3) Repairs, including maintenance as defined in Section 20115, that are not a public project as defined in subdivision (c) of Section 22002,

to the lowest responsible bidder who shall give security as the board requires, or else reject all bids.

2F) Pursuant to Public Contract Code Section 20111, subdivision (b), letting all contracts involving an expenditure of more than fifty thousand dollars ($15,000) for any of the following:

(1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition or repair work involving any publicly

owned, leased or operated facility, or

(2) Painting or repainting of any publicly owned, leased, or operated facility,

to the lowest responsible bidder who shall give security as the board requires, or else reject all bids.

2G) Pursuant to Public Contract Code Section 20111, subdivision (b), having all bidders for construction work present their bids under sealed cover and accompanied by one of the following forms of bidder's security:

(1) Cash.

(2) A cashier's check made payable to the school district.

(3) A certified check made payable to the school district.

(4) A bidder's bond executed by an admitted surety insurer, made payable to the school district.

2H) Pursuant to Public Contract Code Section 20111, subdivision (b), upon an award to the lowest bidder, returning the security of all unsuccessful bidders in a reasonable period of time, but in no event beyond 60 days from the time the award is made.

2I) Pursuant to Public Contract Code Section 20111.5, subdivision (a), requiring each prospective bidder for a contract, as described in Section 20111, to complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the

prospective bidder's financial ability and experience in performing public works.

2J) Pursuant to Public Contract Code Section 20111.5, subdivision (a), maintaining the questionnaires and financial statements confidential as public records not open to public inspection.

2K) Pursuant to Public Contract Code Section 20111.5, subdivision (b), adopting and applying a uniform system of rating bidders on the basis of the completed questionnaires and financial statements in order to determine the size of contracts upon which each bidder shall be deemed qualified to bid.

2L) Pursuant to Public Contract Code Section 20111.5, subdivision (c), furnishing each prospective bidder with a standardized proposal form that, when completed and executed, shall be submitted to the district as his or her bid, and disregarding bids not presented on the forms furnished.

2M) Pursuant to Public Contract Code Section 20111.5, subdivision (e), establishing a process for prequalifying prospective bidders on a quarterly basis.

2N) Pursuant to Public Contract Code Section 20116, maintaining job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California School Accounting Manual for a period of not less than three years after completion of the project.

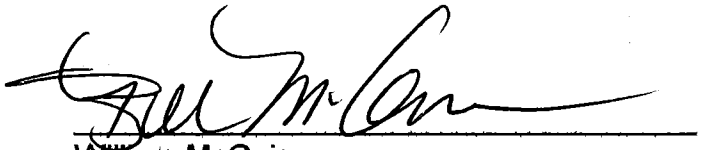
2O) Pursuant to Public Contract Code Section 20116, for the purpose of securing informal bids, publishing annually in a newspaper of general circulation published

in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. Giving notice of all informal bid projects to all contractors included on the informal bidding list.

It is estimated that the Clovis Unified School District incurred more than $1,000 in staffing and other costs in excess of any funding provided to school districts and the state for the period from July 1, 2001 through June 30, 2002 to implement these new duties mandated by the state for which the school district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

The foregoing facts are known to me personally and, if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

EXECUTED this 16 day of June, 2003, at Clovis, California



William McGuire
Associate Superintendent Business Services
Clovis Unified School District

DECLARATION OF CHERYL MILLER

Santa Monica Community College District

Test Claim of Clovis Unified School District
and Santa Monica Community College District

COSM No. _____

Chapter 455, Statutes of 2002
Chapter 776, Statutes of 2000
Chapter 292, Statutes of 2000
Chapter 159, Statutes of 2000
Chapter 127, Statutes of 2000
Chapter 126, Statutes of 2000
Chapter 972, Statutes of 1999
Chapter 857, Statutes of 1998
Chapter 657, Statutes of 1998
Chapter 722, Statutes of 1997
Chapter 390, Statutes of 1997
Chapter 897, Statutes of 1995
Chapter 504, Statutes of 1995
Chapter 726, Statutes of 1994
Chapter 1195, Statutes of 1993
Chapter 1032, Statutes of 1993
Chapter 1042, Statutes of 1992
Chapter 799, Statutes of 1992
Chapter 294, Statutes of 1992
Chapter 933, Statutes of 1991
Chapter 785, Statutes of 1991
Chapter 1414, Statutes of 1990
Chapter 808, Statutes of 1990
Chapter 694, Statutes of 1990
Chapter 321, Statutes of 1990
Chapter 1163, Statutes of 1989
Chapter 863, Statutes of 1989
Chapter 330, Statutes of 1989
Chapter 1408, Statutes of 1988
Chapter 538, Statutes of 1988
Chapter 102, Statutes of 1987
Chapter 1060, Statutes of 1986
Chapter 886, Statutes of 1986
Chapter 1073, Statutes of 1985
Chapter 758, Statutes of 1984
Chapter 728, Statutes of 1984
Chapter 173, Statutes of 1984
Chapter 256, Statutes of 1983
Chapter 513, Statutes of 1982
Chapter 465, Statutes of 1982
Chapter 251, Statutes of 1982
Chapter 470, Statutes of 1981
Chapter 194, Statutes of 1981
Chapter 1255, Statutes of 1980
Chapter 631, Statutes of 1977
Chapter 36, Statutes of 1977
Chapter 921, Statutes of 1976

Public Contract Code Section 2000
Public Contract Code Section 2001
Public Contract Code Section 3300
Public Contract Code Section 6610
Public Contract Code Section 7104
Public Contract Code Section 7107
Public Contract Code Section 7109
Public Contract Code Section 9203
Public Contract Code Section 10299
Public Contract Code Section 12109
Public Contract Code Section 20100
Public Contract Code Section 20101
Public Contract Code Section 20104.2
Public Contract Code Section 20104.4
Public Contract Code Section 20104.6
Public Contract Code Section 20104.50
Public Contract Code Section 20107
Public Contract Code Section 20110
Public Contract Code Section 20111
Public Contract Code Section 20111.5
Public Contract Code Section 20116
Public Contract Code Section 20650
Public Contract Code Section 20651

Public Contract Code Section 20102
Public Contract Code Section 20103.5
Public Contract Code Section 20103.6
Public Contract Code Section 20103.8
Public Contract Code Section 20104
Public Contract Code Section 20651.5
Public Contract Code Section 20657
Public Contract Code Section 20659
Public Contract Code Section 22300

Business and Professions Code Section 7028.15

Title 5, California Code of Regulations
Section 59500
Section 59504
Section 59505
Section 59506
Section 59509

Public Contracts

I, Cheryl Miller, Associate Vice President Business Services, Santa Monica Community College District, make the following declaration and statement.

In my capacity as Associate Vice President Business Services, I am responsible for supervising the making of pubic contracts for the district. I am familiar with the provisions and requirements of the Statutes, Public Contract Code Sections, Business and Professions Code Section and Title 5 Regulations enumerated above.

These Statutes, Code sections and Regulations require the Santa Monica Community College District to:

Local Agency Public Construction Act

1A) Pursuant to the Local Agency Public Construction Act, Articles 1 and 2, (commencing with Public Contract Code Section 20100) and other sections cited above, to establish, periodically update and maintain policies and procedures to

implement the requirements of the laws pertaining to public contracts.

1B) Pursuant to Public Contract Code Section 3300, subdivision (a), specifying the classification of the license which a contractor shall possess at the time a contract is awarded, including that specification in any plans prepared for a public project and in any notice inviting bids.

1C) Pursuant to Public Contract Code Section 6610, when a notice inviting formal bids includes a requirement for any type of mandatory prebid conference, site visit, or meeting, including the time, date, and location of the mandatory prebid site visit, conference or meeting, and when and where project documents are available, including final plans and specifications.

1D) Pursuant to Public Contract Code Section 7104, subdivision (a), when any public works contract involves digging trenches or other excavations that extend deeper than four feet below the surface, including a clause which requires the contractor to promptly notify the district, in writing, of any:

(1) Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, and that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.

(2) Subsurface or latent physical conditions at the site differing from those indicated.

(3) Unknown physical conditions at the site of any unusual nature, different

materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

1E) Pursuant to Public Contract Code Section 7104, subdivision (b), when a notice is received from the contractor pursuant to subdivision (a), promptly investigating the conditions, and upon finding that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work, issuing a change order under the procedures described in the contract.

1F) Pursuant to Public Contract Code Section 7104, subdivision (c), in the event that a dispute arises between the district and the contractor as to whether conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor's cost of, or time required for, performance of any part of the work, to respond to actions taken by the contractor to resolve disputes and protests between the contracting parties.

1G) Pursuant to Public Contract Code Section 7107, subdivision (c), releasing retentions withheld within 60 days after the completion of the work, and in the event of a dispute, withholding an amount not to exceed 150 percent of the disputed amount from the final payment. Pursuant to subdivision (f), paying a charge of 2 percent per month on any improperly withheld amounts and, in the event of litigation paying the contractor's attorney's fees and costs should he or she prevail.

1H) Pursuant to Public Contract Code Section 7109, subdivision (b), upon a determination that a project may be vulnerable to graffiti, the district shall do one or more of the following:

(1) Include a provision in the public works contract that specifies requirements for antigraffiti technology in the plans and specifications for the project.

(2) Establish a method to finance a graffiti abatement program.

(3) Establish a program to deter graffiti.

1I) Pursuant to Public Contract Code Section 9203, retaining no less 5 percent of the actual work completed and of the value of material delivered on the ground or stored until final completion and acceptance of the project.

1J) Pursuant to Public Contract Code Section 10299, subdivision (b), acquiring information technology, goods, and services without further competitive bidding, by utilizing contracts, master agreements, multiple award schedules, cooperative agreements, or other types of agreements established by the department of general services.

1K) Pursuant to Public Contract Code Section 12109, complying with the terms and conditions of the Director of General Services for assisting the district in the acquisition of information technology goods or services."

1L) Pursuant to Business and Professions Code Section 7028.15, subdivision (e), unless one of certain exceptions applies, verifying that a contractor was properly licensed when the contractor submitted a bid with the district before awarding a

contract or issuing a purchase order to that contractor.

1M) Pursuant to Public Contract Code Section 20101, subdivision (a), requiring each prospective bidder for a contract to complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's experience in performing public works.

1N) Pursuant to Public Contract Code Section 20101, subdivision (a), maintaining the questionnaires and financial statements confidential as public records not open to public inspection; however, records of the names of contractors applying for prequalification status shall be public records subject to disclosure.

1O) Pursuant to Public Contract Code Section 20101, subdivision (b), adopting and applying a uniform system of rating bidders on the basis of the completed questionnaires and financial statements in order to determine both the minimum requirements permitted for qualification to bid, and the type and size of the contracts upon which each bidder shall be deemed qualified to bid. The uniform system of rating prospective bidders shall be based on objective criteria.

1P) Pursuant to Public Contract Code Section 20101, subdivision (c), establishing a process for prequalifying prospective bidders on a quarterly basis.

1Q) Pursuant to Public Contract Code Section 20101, subdivision (d), establishing a process that will allow prospective bidders to dispute their proposed prequalification rating prior to the closing time for receipt of bids. The appeal

process shall include the following:

(1) Upon request of the prospective bidder, providing notification to the prospective bidder, in writing, of the basis for disqualification and any supporting evidence that has been received from others or adduced as a result of an investigation by the district.

(2) Giving the prospective bidder an opportunity to rebut any evidence used as a basis for disqualification and to present evidence to the district as to why the prospective bidder should be found qualified.

(3) If the prospective bidder chooses not to avail itself of this process, adopting the proposed prequalification rating without further proceedings.

1R) Pursuant to Public Contract Code Section 20102, where plans and specifications have been prepared by a district, justifying with detailed specific reasons any change or changes and filing those change(s) and reasons in the project file before electing to perform the work by day's labor.

1S) Pursuant to Public Contract Code Section 20103.5, before making the first payment for work or material under any contract where federal funds are involved, verifying through the Registrar of Contractors that the contractor was properly licensed at the time the contract was awarded. Including a statement to that effect in the standard form of prequalification questionnaire and financial

statement.

1T) Pursuant to Public Contract Code Section 20103.6, subdivision (a), in the procurement of architectural design services requiring an expenditure in excess of ten thousand dollars ($10,000), disclosing any contract provision that would require the contracting architect to indemnify and hold the local agency harmless against any and all liability, whether or not caused by the activity of the contracting architect in any request for proposals for those services or invitations to bid.

1U) Pursuant to Public Contract Code Section 20103.6 subdivision (b), in the event a district fails to comply with subdivision (a), that district shall (1) be precluded from requiring the selected architect to agree to any contract provision requiring the selected architect to indemnify or hold harmless, (2) cease discussions with the selected architect and reopen the request for proposals or invitations to bid from a qualification list, or (3) mutually agree to an indemnity clause acceptable to both parties.

1V) Pursuant to Public Contract Code Section 20103.8, when a district requires a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted, specifying in the bid solicitation which one of the following methods will be used to determine the lowest bid. In the absence of such a specification, only the method provided by subdivision (a) will be used:

(a) The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

(b) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

(c) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items taken in order from a specifically identified list of those items that, when added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the local agency before the first bid is opened.

(d) The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders or proposed subcontractors or suppliers from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

1W) Pursuant to Public Contract Code Section 20104, subdivision (c), setting forth the provisions of Article 1.5 (Resolution of Construction Claims), or a summary thereof, in the plans and specifications for any work that may give rise to a claim

under the Article.

1X) Pursuant to Public Contract Code Section 20104.2, subdivision (b), responding in writing within 45 days, subject to conditions for extension, upon receipt of any written claim of $50,000, or less, for (1) a time extension, (2) payment of money or damages arising from work done, (3) or an amount, the payment of which is disputed by the district.

1Y) Pursuant to Public Contract Code Section 20104.2, subdivision (c), to respond in in writing within 60 days, subject to conditions for extension, upon receipt of any written claim of more than $50,000 and less than $375,000, for (1) a time extension, (2) payment of money or damages arising from work done, or (3) an amount, the payment of which is disputed by the district

1Z) Pursuant to Public Contract Code Section 20104.2, subdivision (d), to meet and confer, for settlement of issues in dispute, with a claimant who demands such a conference and who disputes the district's written response, or when a district fails to respond timely,

1AA) Pursuant to Public Contract Code Section 20104.2, subdivision (e), filing responsive pleadings and appearing and defending any civil action brought by a claimant if the claim or any portion thereof remains in dispute after the meet and confer conference.

1BB) Pursuant to Public Contract Code Section 20104.4, subdivision (a), appearing and defending in nonbinding mediation which may be ordered by the court, unless

waived by all parties.

1CC) Pursuant to Public Contract Code Section 20104.4, subdivision (b), if the matter remains in dispute after mediation, appearing and defending in judicial arbitration as follows:

(1) Participate in discovery proceedings pursuant to the Civil Discovery Act of 1986 (commencing with Section 2016 of the Code of Civil Procedure);

(2) Paying one-half of the necessary and reasonable fees of the arbitrator; and

(3) Paying costs, fees and attorney's fees of the claimant when a more favorable result is not obtained after requesting a trial de novo.

1DD) Pursuant to Public Contract Code Section 20104.6, subdivision (b), paying interest at the legal rate on any arbitration award or judgment arising out of any suit filed pursuant to Section 20104.4.

1EE) Pursuant to Public Contract Code Section 20104.50, subdivision (b), paying interest to the contractor equivalent to the legal rate set forth in subdivision (a) of Section 685.010 of the Code of Civil Procedure when the district fails to make any progress payment within 30 days after receipt of an undisputed and properly submitted payment request from a contractor on a construction contract.

1FF) Pursuant to Public Contract Code Section 20104.50, subdivision (c), upon receipt of a payment request, acting in accordance with both of the following:

(1) Reviewing each payment request as soon as practicable after

receipt for the purpose of determining that the payment request is a proper payment request.

(2) Returning any payment request determined not to be a proper payment request suitable for payment to the contractor as soon as practicable, but not later than seven days, after receipt. A request returned pursuant to this provision shall be accompanied by a document setting forth in writing the reasons why the payment request is not proper.

Pursuant to subdivision (f), setting forth the terms of the article (or a summary thereof) in any contract subject to this article.

1GG) Pursuant to Public Contract Code Section 20107, requiring all bidders for construction work to present their bids under sealed cover and accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the school district.

(c) A certified check made payable to the school district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the school district.

1HH) Pursuant to Public Contract Code Section 20107, upon an award to the lowest bidder, returning the security of all unsuccessful bidders in a reasonable period of time, but in no event beyond 60 days from the time the award is made.

1Il) Pursuant to Public Contract Code Section 22300, including a provision in any invitation for bid and in any contract documents permitting the substitution of securities for any moneys withheld by the district to ensure performance under a contract, except for certain federal contracts and, upon satisfactory completion of the contract, returning the securities to the contractor.

Note: Section 2, Laws Pertaining to School Districts, omitted intentionally

Laws Pertaining to Community College Districts

3A) Pursuant to the Local Agency Public Construction Act, Article 41 - Community College Districts (commencing with Public Contract Code Section 20650), to establish, periodically update and maintain policies and procedures to implement Article 41 of the Act.

3B) Pursuant to Public Contract Code Sections 2000, subdivision (a) and 20111, requiring that a contract be awarded to the lowest responsible bidder who also does either of the following:

(1) Meets goals and requirements established by the community college district relating to participation in the contract by minority business enterprises and women business enterprises. If the bidder does not meet the goals and requirements established by the community college district for that participation, to then evaluate the good faith effort of the bidder to comply with those goals and requirements as provided in paragraph (2).

(2) Makes a good faith effort, in accordance with the criteria established

pursuant to subdivision (b), prior to the time bids are opened, to comply with the goals and requirements established by the community college district relating to participation in the contract by minority or women business enterprises.

3C) Pursuant to Public Contract Code Section 2000, subdivision (b), determining if a bidder made a good faith effort to comply with the community college district's goals and requirements relative to participation in the contract by minority business enterprises and women business enterprises by obtaining information relative to and analysis of the following factors:

(1) Whether or not the bidder attended any presolicitation or prebid meetings that were scheduled by the community college district to inform all bidders of the minority and women business enterprise program requirements for the project for which the contract will be awarded. A community college district may waive this requirement if it determines that the bidder is informed as to those program requirements.

(2) Whether or not the bidder identified and selected specific items of the project which would be performed by minority or women business enterprises to provide an opportunity for participation by those enterprises.

(3) Whether or not the bidder advertised, not less than 10 calendar days before the date the bids were opened, in one or more daily or weekly newspapers, trade association publications, minority or trade oriented

publications, trade journals, or other media, specified by the community college district for minority or women business enterprises that are interested in participating in the project.

(4) Whether or not the bidder provided written notice of his or her interest in bidding on the contract to the number of minority or women business enterprises required to be notified by the project specifications not less than 10 calendar days prior to the opening of bids. To the extent possible, for the community college district to make available to the bidder, not less than 15 calendar days prior to the date the bids are opened, a list or a source of lists of enterprises which are certified by the community college district as minority or women business enterprises. If the community college district does not provide that list or source of lists to the bidder, whether or not the bidder utilized the list of certified minority or women business enterprises prepared by the Department of Transportation pursuant to Section 14030.5 of the Government Code for this purpose.

(5) Whether or not the bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested in performing specific items of the project.

(6) Whether or not the bidder provided interested minority and women business enterprises with information about the plans, specifications, and requirements for the selected subcontracting or material supply work.

(7) Whether or not the bidder requested assistance from minority and women community organizations, minority and women contractor groups, local, state, or federal minority and women business assistance offices, or other organizations that provide assistance in the recruitment and placement of minority or women business enterprises, if any are available.

(8) Whether or not the bidder negotiated in good faith with the minority or women business enterprises, and did not unjustifiably reject as unsatisfactory bids prepared by any minority or women business enterprises, as determined by the community college district.

(9) Whether or not, where applicable, the bidder advised and made efforts to assist interested minority and women business enterprises in obtaining bonds, lines of credit, or insurance required by the community college district or contractor.

(10) Whether or not the bidder's efforts to obtain minority and women business enterprise participation could reasonably be expected by the community college district to produce a level of participation sufficient to meet the goals and requirements of the community college district.

3D) Pursuant to Public Contract Code Section 2001, when requiring that contracts be awarded to the lowest responsible bidder meeting, or making a good faith effort to meet, participation goals for minority, women, or disabled veteran business enterprises, providing in the general conditions under which bids will be received

that any person making a bid or offer to perform a contract shall, in his or her bid or offer, set forth the following information:

(1) The name and the location of the place of business of each subcontractor certified as a minority, women, or disabled veteran business enterprise who will perform work or labor or render service to the prime contractor in connection with the performance of the contract and who will be used by the prime contractor to fulfill minority, women, and disabled veteran business enterprise participation goals.

(2) The portion of work that will be done by each subcontractor under paragraph (1).

3E) Pursuant to Public Contract Code Section 20651, subdivision (a), letting all contracts involving an expenditure of more than fifty thousand dollars ($50,000) for any of the following:

(1) The purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district,

(2) Services, except construction services, or

(3) Repairs, including maintenance as defined in Section 20656, that are not a public project as defined in subdivision (c) of Section 22002,

to the lowest responsible bidder who shall give security as the board requires, or else reject all bids.

3F) Pursuant to Public Contract Code Section 20651, subdivision (b), having all bidders for construction work present their bids under sealed cover and accompanied by one of the following forms of bidder's security:

(1) Cash.

(2) A cashier's check made payable to the school district.

(3) A certified check made payable to the school district.

(4) A bidder's bond executed by an admitted surety insurer, made payable to the school district.

3G) Pursuant to Public Contract Code Section 20651, subdivision (b), upon an award to the lowest bidder, returning the security of all unsuccessful bidders in a reasonable period of time, but in no event beyond 60 days from the time the award is made.

3H) Pursuant to Public Contract Code Section 20651.5, subdivision (a), maintaining the questionnaires and financial statements confidential as public records not open to public inspection.

3I) Pursuant to Public Contract Code Section 20651.5, subdivision (b), adopting and applying a uniform system of rating bidders on the basis of the completed questionnaires and financial statements in order to determine the size of contracts upon which each bidder shall be deemed qualified to bid.

3J) Pursuant to Public Contract Code Section 20651.5, subdivision (c), furnishing each prospective bidder with a standardized proposal form that, when completed

and executed, shall be submitted to the community college district as his or her bid, and to reject bids not presented on the forms furnished.

3K) Pursuant to Public Contract Code Section 20657, maintaining job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California School Accounting Manual for a period of not less than three years after completion of the project.

3L) Pursuant to Public Contract Code Section 20657, for the purpose of securing informal bids, publishing annually in a newspaper of general circulation published in the community college district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. Giving notice of all informal bid projects to all contractors included on the informal bidding list.

3M) Pursuant to Public Contract Code Section 20659, specifying in writing all changes or alterations of a contract, and the costs thereof, which are ordered by the governing board of the community college district.

Minority, Women, and Disabled Veteran Business Enterprise Participation

4A) Pursuant to Subchapter 9 entitled "Minority, Women, and Disabled Veteran Business Enterprise Participation Goals for the California Community Colleges" (commencing with Title 5, California Code of Regulations, Section 59500), to establish, periodically update and maintain policies and procedures to implement

the requirements of Subchapter 9 of the Regulations.

4B) Pursuant to Title 5, California Code of Regulations, Section 59500, subdivision (a), providing opportunities for minority, women, and disabled veteran business enterprise participation in the award of district contracts consistent with this subchapter. The statewide goal for such participation is not less than 15 percent minority business enterprise participation, not less than 5 percent women business enterprise participation, and not less than 3 percent disabled veteran business enterprise participation of the dollar amount expended by all districts each year for construction, professional services, materials, supplies, equipment, alteration, repair, or improvement.

4C) Pursuant to Title 5, California Code of Regulations, Section 59504, undertaking appropriate efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises in district contracts, including providing vendor and service contractor orientation programs related to participating in district contracts or in understanding and complying with the provisions of the subchapter, and/or developing a listing of minority, women, and disabled veteran business enterprises potentially available as contractors or suppliers, and/or such other activities that may assist interested parties in being considered for participation in district contracts.

4D) Pursuant to Title 5, California Code of Regulations, Section 59504, undertaking efforts to contribute to achievement of the systemwide goals established in

Section 59500 by seeking minority, women, and disabled veteran business enterprises as contractors for such contracts as the district may deem appropriate pursuant to Section 59505.

4E) Pursuant to Title 5, California Code of Regulations, Section 59505, subdivision (a), when electing to apply MBE/WBE/DVBE/WBE/DVBE goals to any particular contract which is to be awarded to the lowest responsible bidder, including in bidding notices a statement that at the time of bid opening, bidders shall be considered responsive only if they document to the satisfaction of the district that they meet or have made a good faith effort to meet minority, women, and disabled veteran business enterprise participation goals.

4F) Pursuant to Title 5, California Code of Regulations, Section 59505, subdivision (b), obtaining and verifying, as satisfactory, proffered evidence from bidders showing that efforts were made to seek out and consider minority, women, and disabled veteran business enterprises as potential subcontractors, materials and/or equipment suppliers, or both subcontractors and/or suppliers.

4G) Pursuant to Title 5, California Code of Regulations, Section 59505, subdivision (c), seeking minority, women and disabled veteran business enterprises to serve as contractors for any other contracts not covered by subsection (a).

4H) Pursuant to Title 5, California Code of Regulations, Section 59505, subdivision (d), assessing the status of each of its contractors to determine if the contractor is a certified or self-certified minority, women, and disabled veteran business

enterprise subcontractor and/or supplier to the satisfaction of the district in order to include the actual dollar amount attributable to minority, women, and disabled veteran business enterprise participation in reporting its participation activity pursuant to Section 59509.

4I) Pursuant to Title 5, California Code of Regulations, Section 59506, subdivision (a), collecting and retaining certification information provided by a business enterprise claiming minority, women, and disabled veteran business enterprise status.

4J) Pursuant to Title 5, California Code of Regulations, Section 59506, subdivision (b), including notification to responsive bidders subject to Section 59505(a) of the requirements for qualification as a responsive bidder.

4K) Pursuant to Title 5, California Code of Regulations, Section 59509, monitoring its participation as specified in the subchapter and reporting to the Chancellor, on forms prescribed by the Chancellor, the level of participation by minority, women, and disabled veteran business enterprises pursuant to the subchapter for the previously completed fiscal year. Even if a district elects not to apply minority, women, and disabled veteran business enterprise goals to one or more particular contract(s), all such contracts shall be reported to the Chancellor and shall be taken into account in determining whether the community college system as a whole has achieved the goals set forth in Section 59500.

It is estimated that the Santa Monica Community College District incurred more

than $1,000 in staffing and other costs in excess of any funding provided to school districts and the state for the period from July 1, 2001 through June 30, 2002 to implement these new duties mandated by the state for which the school district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

The foregoing facts are known to me personally and, if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

EXECUTED this 18 day of June, 2003, at Sanat Monica, California.

Cheryl Miller

Cheryl Miller
Associate Vice President Business Services
Santa Monica Community College District

EXHIBIT 2
COPIES OF STATUTES CITED

CHAPTER 921

An act to add Section 15957.1 to the Education Code, relating to school contracts.

[Approved by Governor September 13, 1976. Filed with Secretary of State September 14, 1976.]

The people of the State of California do enact as follows:

SECTION 1. Section 15957.1 is added to the Education Code, to read:

15957.1. It shall be unlawful to split or separate into smaller work orders or projects any project for the purpose of evading the provisions of this article requiring work to be done by contract after competitive bidding.

SEC. 2. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be any appropriation made by this act because the Legislature recognizes that during any legislative session a variety of changes to laws relating to crimes and infractions may cause both increased and decreased costs to local government entities and school districts which, in the aggregate, do not result in significant identifiable cost changes.

CHAPTER 36

An act to amend Sections 40, 1042, 1330, 1891, 1904, 1908, 2104, 2502, 4200, 4210, 4321, 4364, 5012, 5016, 5018, 5204, 5454, 8203, 8210, 8211, 8212, 8240, 8242, 8245, 8246, 8248, 8250, 8250.1, 8251, 8252, 8254, 8321, 8326, 8327, 8329, 8330, 8360, 8361, 8362, 8363, 8364, 8365, 8366, 8367, 8368, 8369, 8383, 8395, 8500, 10101, 10103, 10104, 10106, 10601, 10602, 10603, 10604, 10606, 12516, 14002, 14003, 14020, 15104, 16035, 16040, 16044, 16057, 16058, 16063, 16192, 16250, 16310, 16343, 18383, 18535, 19422, 19423, 19424, 19510, 19511, 19512, 19515, 19521, 19522, 21107, 21108, 21110, 21111, 21112, 21180, 21183, 21189, 21192, 22112, 22114, 22122, 22127, 22142, 22401, 22716, 22802, 22809, 23006, 23100, 23108, 23401, 23506, 23702, 23703, 23704, 23800, 23803, 23804, 23811, 23900, 23903, 23909, 23910, 23918, 23919, 23920, 23921, 24100, 24200, 24203, 24600, 33332, 35041.5, 35101, 35174, 35214, 35300, 35330, 35511, 35512, 35515, 35518, 35704, 35705, 37220, 37228, 39002, 39140, 39143, 39149, 39210, 39214, 39227, 39230, 39321, 39363.5, 39440, 39602, 39651, 39674, 39830, 40000, 40013, 41015, 41020, 41201, 41301, 41372, 41601, 41700, 41718, 41761, 41762, 41840, 41856, 41857, 41859, 41863, 41886, 41888, 41915, 42238, 42244, 42245, 42603, 42631, 42633, 42635, 42636, 42639, 42643, 42831, 44008, 44009, 44228, 44263, 44274, 44335, 44346, 44853, 44909, 45023.5, 45057, 45203, 45205, 45207, 45250, 46010, 46111, 46300, 48011, 48200, 48265, 48412, 48414, 48938, 48980, 49061, 49063, 49065, 49068, 49069, 49070, 49075, 49076, 49077, 51226, 51767, 51872, 52002, 52012, 52015, 52113, 52309, 52315, 52317, 52321, 52324, 52372, 52500, 52506, 52517, 52570, 52612, 54002, 54006, 54123, 54125, 54665, 54666, 54669, 56336, 56601, 56717, 56811, 56829, 60014, 60101, 60201, 60202, 60204, 60222, 60223, 60261, 60640, 60643, 60664, 66602, 68014, 69273, 69274, 69511, 69532, 69536, 69538, 69565, 69566, 69582, 69583, 69584,

district advisory committee for the purposes of this section.

SEC. 449. Section 39617 is added to the Education Code as enacted by Chapter 1010 of the Statutes of 1976, to read:

39617. (a) The Legislature finds and declares that the quality of protective equipment worn by participants in high school interscholastic football is a significant factor in the occurrence of injuries to such participants and that it is therefore necessary to insure minimum standards of quality for the equipment in order to prevent unnecessary injuries to such participants.

(b) No football helmets shall be worn by participants in high school interscholastic football after the commencement of the 1980–81 school year, unless such equipment has been certified for use by the Department of Education. In determining the suitability of equipment for certification the department may accept the certification of the National Operating Committee on Standards for Athletic Equipment or any other recognized certifying agency in the field.

This section shall not be construed as relieving school districts from the duty of maintaining football protective equipment in a safe and serviceable condition.

SEC. 450. Section 39645.5 is added to the Education Code as enacted by Chapter 1010 of the Statutes of 1976, to read:

39645.5. In addition to utilizing the procedures specified in Article 14 (commencing with Section 39520) of Chapter 3 of this part, any school district or any county board of education may, by direct sale or otherwise, sell to a purchaser any electronic data-processing equipment owned by, or to be owned by, the school district or county board, if the purchaser agrees to lease the equipment back to the school district or county for use by the school district or county following the sale.

The approval by the governing board of the school district or of the county superintendent of schools of the sale and leaseback shall be given only if the governing board of the school district or the county superintendent of schools finds, by resolution, that the sale and leaseback is the most economical means for providing electronic data-processing equipment to the school district or county.

SEC. 451. Section 39646 is added to the Education Code as enacted by Chapter 1010 of the Statutes of 1976, to read:

39646. The governing board of a school district may contract for electromechanical or electronic data-processing work.

SEC. 452. Section 39649.5 is added to the Education Code as enacted by Chapter 1010 of the Statutes of 1976, to read:

39649.5. It shall be unlawful to split or separate into smaller work orders or projects any project for the purpose of evading the provisions of this article requiring work to be done by contract after competitive bidding.

SEC. 453. Section 41716.5 is added to the Education Code as enacted by Chapter 1010 of the Statutes of 1976, to read:

41716.5. For the fiscal year 1976–77, and each fiscal year thereafter

incorporate the changes made in the Education Code, in 1976, into the Education Code as enacted by Chapter 1010 of the Statutes of 1976. It is not the intent of the Legislature to make any substantive change in the law.

SEC. 1136. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The new reorganized Education Code, enacted by Chapter 1010 of the Statutes of 1976, will become operative on April 30, 1977, which is long before the effective date of ordinary statutes enacted in 1977 in the 1977–78 Regular Session of the Legislature. Other 1976 education legislation was directed to the Education Code as enacted by Chapter 2 of the Statutes of 1959. This bill would adapt such other education legislation enacted in 1976 to the reorganized Education Code as enacted by Chapter 1010 of the Statutes of 1976. In order that statutory continuity may be maintained and that administrative confusion may be avoided, such adaptation must become operative on the operative date of the new Education Code. It is, therefore, necessary that this act take effect immediately as an urgency statute.

CHAPTER 631

An act to amend Sections 39610.5, 39640 and 81640 of the Education Code, relating to school and community college contracts.

[Approved by Governor September 7, 1977. Filed with Secretary of State September 8, 1977.]

The people of the State of California do enact as follows:

SECTION 1. Section 39610.5 of the Education Code is amended to read:

39610.5. The governing board of a school district may construct a mobilehome site on the grounds of any district facility or facilities maintained by the district, including all necessary appurtenances and fixtures, and may pay the cost of utilities, insurance, and necessary services, for the purpose of enabling a responsible person or persons to install and occupy a mobilehome on such site. Such person or persons, who need not be classified as employees of the district, shall, in return for being permitted to install and occupy a mobilehome on the district facility site on terms and conditions acceptable to the governing board, agree to maintain any surveillance over the facility grounds as the school district governing board requires, and to report to district authorities illegal or suspicious activities that are observed.

SEC. 2. Section 39640 of the Education Code is amended to read:

39640. The governing board of any school district shall let any contracts involving an expenditure of more than eight thousand dollars ($8,000) for work to be done or more than twelve thousand dollars ($12,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.

SEC. 3. Section 81640 of the Education Code is amended to read:

81640. The governing board of any community college district shall let any contracts involving an expenditure of more than eight thousand dollars ($8,000) for work to be done or more than twelve thousand dollars ($12,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.

CHAPTER 1255

An act to amend Sections 39649, 39649.5, 81649, and 81649.5 of, and to add Sections 39649.1 and 81649.1 to, the Education Code, relating to school and community college districts.

[Approved by Governor September 28, 1980. Filed with Secretary of State September 29, 1980.]

The people of the State of California do enact as follows:

SECTION 1. Section 39649 of the Education Code is amended to read:

39649. In each school district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 39649.1 by day labor, or by force account, whenever the total cost of labor on the job does not exceed seven thousand five hundred dollars ($7,500), or the total number of hours on the job does not exceed 350 hours, whichever is greater, provided that in any school district having an average daily attendance of 35,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus or equipment, including painting or repainting, and perform maintenance as defined in Section 39649.1, by day labor or by force account whenever the total cost of labor on the job does not exceed fifteen thousand dollars ($15,000), or the total number of hours on the job does not exceed 750 hours, whichever is greater.

For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

SEC. 2. Section 39649.1 is added to the Education Code, to read:

39649.1. For purposes of Section 39649, "maintenance" means routine, recurring, and usual work for the preservation, protection, and keeping of any publicly owned or publicly operated facility for its intended purposes in a safe and continually useable condition for which it was designed, improved, constructed, altered, or repaired. "Facility" means any plant, building, structure, ground facility, utility system, or real property.

This definition of "maintenance" expressly includes, but is not limited to: carpentry, electrical, plumbing, glazing, and other craft work designed consistent with the definition set forth above to preserve the facility in a safe, efficient, and continually useable condition for which it was intended, including repairs, cleaning, and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

This definition does not include, among other types of work, janitorial or custodial services and protection of the sort provided by

guards or other security forces.

It is the intent of the Legislature that this definition does not include painting, repainting, or decorating other than touchup, but instead it is the intent of the Legislature that such activities be controlled directly by the provisions of Section 39649.

SEC. 3. Section 39649.5 of the Education Code is amended to read:

39649.5. It shall be unlawful to split or separate into smaller work orders or projects any project for the purpose of evading the provisions of this article requiring work to be done by contract after competitive bidding.

The district shall maintain job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California School Accounting Manual for a period of not less than three years after completion of the project.

Notwithstanding the provisions of Section 39640, informal bidding may be used on projects estimated by the district to cost up to and including the limits set forth in Section 39649. For the purpose of securing informal bids, the board shall publish annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. All contractors included on the informal bidding list shall be given notice of all informal bid projects in such manner as the district deems appropriate.

SEC. 4. Section 81649 of the Education Code is amended to read:

81649. In each community college district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 81649.1 by day labor, or by force account, whenever the total cost of labor on the job does not exceed seven thousand five hundred dollars ($7,500), or the total number of hours on the job does not exceed 350 hours, whichever is greater, provided that in any district having an average daily attendance of 15,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance as defined in Section 81649.1, by day labor or by force account whenever the total cost of labor on the job does not exceed fifteen thousand dollars ($15,000), or the total number of hours on the job does not exceed 750 hours, whichever is greater.

For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

SEC. 5. Section 81649.1 is added to the Education Code, to read:

81649.1. For purposes of Section 81649, "maintenance" means routine, recurring, and usual work for the preservation, protection

and keeping of any publicly owned or publicly operated facility for its intended purposes in a safe and continually useable condition for which it was designed, improved, constructed, altered or repaired. "Facility" means any plant, building, structure, ground facility, utility system, or real property.

This definition of "maintenance" expressly includes but is not limited to: carpentry, electrical, plumbing, glazing, and other craft work designed consistent with the definition set forth above to preserve the facility in a safe, efficient, and continually useable condition for which it was intended, including repairs, cleaning, and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

This definition does not include, among other types of work, janitorial or custodial services and protection of the sort provided by guards or other security forces.

It is the intent of the Legislature that this definition does not include painting, repainting, or decorating other than touchup, but instead it is the intent of the Legislature that such activities be controlled directly by the provisions of Section 81649.

SEC. 6. Section 81649.5 of the Education Code is amended to read:

81649.5. It shall be unlawful to split or separate into smaller work orders or projects any project for the purpose of evading the provisions of this article requiring work to be done by contract after competitive bidding.

The district shall maintain job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California Community College Budget and Accounting Manual for a period of not less than three years after completion of the project.

Notwithstanding the provisions of Section 81640, informal bidding may be used on projects estimated by the district to cost up to and including the limits set forth in Section 81649. For the purpose of securing informal bids, the board shall publish annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. All contractors included on the informal bidding list shall be given notice of all informal bid projects, in such manner as the district deems appropriate.

SEC. 7. Notwithstanding Section 2231 or 2234 of the Revenue and Taxation Code and Section 6 of Article XIII B of the California Constitution, no appropriation is made by this act pursuant to these sections. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 3 (commencing with Section 2201) of Part 4 of Division 1 of that code.

CHAPTER 194

An act to amend Sections 39640 and 81640 of the Education Code, relating to education.

[Approved by Governor July 14, 1981. Filed with Secretary of State July 14, 1981.]

The people of the State of California do enact as follows:

SECTION 1. Section 39640 of the Education Code is amended to read:

39640. The governing board of any school district shall let any contracts involving an expenditure of more than twelve thousand dollars ($12,000) for work to be done or more than sixteen thousand dollars ($16,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.

SEC. 2. Section 81640 of the Education Code is amended to read:

81640. The governing board of any community college district shall let any contracts involving an expenditure of more than twelve thousand dollars ($12,000) for work to be done or more than sixteen thousand dollars ($16,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.

CHAPTER 470

An act to amend Sections 1256, 1257, 1264, 1265, 1330, 2400, 2509, 10401, 10407, 32020, 32030, 32040, 32044, 32211, 66803, 71060, 72002, 72020, 72030, 72122, 72126, 72129, 72237, 72280, 72300, 72330, 72331, 72332, 72400, 72401, 72408, 72533, 72601, 72602, 72670, 72673, 72682, 76000, 76001, 76002, 76130, 76160, 78005, 78008, 78030, 78031, 78032, 78033, 78204, 78409, 78907, 79000, 79020, 79021, 79022, 79023, 79024, 79025, 79026, 79027.5, 79028, 79030, 79031, 81000, 81006, 81031, 81033, 81033.5, 81035, 81036, 81038, 81144, 81179, 81452, 81457, 81640, 81648, 81657, 81658, 81821, 82530, 82531, 82535, 82536, 82537, 82538, 82541, 82542, 82543, 82544, 84300, 84362, 84370, 84373, 84500, 84520, 84528, 85000, 85003, 85022, 85200, 85201, 85266, 85442, 87032, 87036, 87039, 87212, 87274, 87408.5, 87409, 87422, 87423, 87424, 87428, 87454, 87455, 87456, 87457, 87458, 87484, 87708, 87732, 87733, 87735, 87744, 87745, 87801, 87808, 87828, 88000, 88240, and 88242 of, to amend the heading of Chapter 8 (commencing with Section 79000) of Part 48 of, to add Sections 8085, 71029, 78002, 78200.5, 78270, 78460, 81130.5, 87406.5, 87408.6, 88008, and 88010.5 to, to add Article 2 (commencing with

the one thousand dollars ($1,000), the property may be sold at private sale without advertising, by any member or employee of the board empowered for that purpose by the majority vote of the board.

(b) If the board, by a unanimous vote of those members present, finds that the property is of insufficient value to defray the costs of arranging a sale, the property may be disposed of in the local public dump on order of any member or employee of the board empowered for that purpose by the majority vote of the board.

SEC. 242. Section 81457 of the Education Code is amended to read:

81457. The governing board of a community college district may authorize any officer or employee of the district to sell to any student personal property of the district which has been fabricated by such student, at the cost to the district of the materials furnished by the district and used therein.

SEC. 243. Section 81610 of the Education Code is repealed.

SEC. 244. Section 81612 of the Education Code is repealed.

SEC. 245. Section 81614 of the Education Code is repealed.

SEC. 246. Section 81615 of the Education Code is repealed.

SEC. 247. Section 81616 of the Education Code is repealed.

SEC. 248. Article 2 (commencing with Section 81630) of Chapter 3 of Part 49 of the Education Code is repealed.

SEC. 249. Section 81640 of the Education Code is amended to read:

81640. The governing board of any community college district shall let any contracts involving an expenditure of more than twelve thousand dollars ($12,000) for work to be done or more than eighteen thousand dollars ($18,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.

SEC. 250. Section 81648 of the Education Code is amended to read:

81648. In an emergency when any repairs, alterations, work or improvement is necessary to permit the continuance of existing college classes, or to avoid danger to life or property, the board may by unanimous vote, make a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing of materials or supplies for the purpose without advertising for or inviting bids.

SEC. 251. Section 81650 of the Education Code is repealed.

SEC. 252. Section 81652 of the Education Code is repealed.

SEC. 253. Section 81654 of the Education Code is repealed.

SEC. 254. Section 81657 of the Education Code is amended to read:

81657. The governing board of any community college district may by majority vote authorize its district superintendent, or such person as he or she may designate, to expend up to two hundred fifty

dollars ($250) per transaction for work done, compensation for employees or consultants, and purchases of equipment, supplies, or materials. Ratification by the governing board shall not be required with respect to transactions entered into pursuant to this section. In the event of malfeasance in office, the district official invested by the governing board with authority to act under this section shall be personally liable for any and all moneys of the district paid out as a result of such malfeasance.

SEC. 255. Section 81658 of the Education Code is amended to read:

81658. If any change or alteration of a contract governed by the provisions of this article is ordered by the governing board of the community college district, such change or alteration shall be specified in writing and the cost agreed upon between the governing board and the contractor. The board may authorize the contractor to proceed with performance of the change or alteration without the formality of securing bids, if the cost so agreed upon does not exceed the greater of:

(a) The amount specified in Section 81640 or 81649, whichever is applicable to the original contract; or

(b) Ten percent of the original contract price.

SEC. 256. Section 81821 of the Education Code is amended to read:

81821. The five-year plan for capital construction shall set out the estimated capital construction needs of the district with reference to elements including at least all of the following:

(a) The plans of the district concerning its future academic and student services programs, and the effect on estimated construction needs which may arise because of particular courses of instruction or subject matter areas or student services to be emphasized.

(b) The enrollment projections for each district formulated by the Department of Finance, expressed in terms of weekly student contact hours. The enrollment projections for each individual college and educational center within a district shall be made cooperatively by the Department of Finance and the community college district.

(c) The current enrollment capacity of the district expressed in terms of weekly student contact hours and based upon the space and utilization standards for community college classrooms and laboratories adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.

(d) District office, library, and supporting facility capacities as derived from the physical plant standards for office, library, and supporting facilities adopted by the board of governors in consultation with the California Postsecondary Education Commission and consistent with its standards.

(e) An annual inventory of all facilities and land of the district using standard definitions, forms, and instructions adopted by the board of governors.

are savings as well as costs in this act which, in the aggregate, do not result in additional net costs.

CHAPTER 251

An act to amend Sections 1260, 1510, 8366, 16010, 16191, 32341, 72401, 76001, 76160, 78030, 81033.5, 81137, 81332, 81640, 81648, 81676, 82305, 82305.6, 84850, 85260, 87009, 87010, 87011, 87446, 87732, 87821, 88006, 88020, and 88122 of, to add Sections 76470, 81670, and 87809 to, to add Chapter 5 (commencing with Section 81900) to Part 49 of, and to repeal Sections 79000.5, 81929, 81936, 81961, 81962, 81963, 81965, 81966, 87739, and 87739.5 of, the Education Code, relating to education, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor June 11, 1982. Filed with Secretary of State June 11, 1982.]

The people of the State of California do enact as follows:

SECTION 1. Section 1260 of the Education Code is amended to read:

1260. The county superintendent of schools, with the approval of the county board of education, may:

(a) Conduct studies through research and investigation as are determined by the county board to be required in connection with the future management, conditions, needs, and financial support of the schools within the county; or join with one or more school district

studies zone, for the construction of any building as defined in Section 81131 or, if the estimated cost exceeds twenty thousand dollars ($20,000), for the reconstruction or alteration of or addition to any such building for work which alters structural elements. The Department of General Services may require similar geological and soil engineering studies for the construction or alteration of any building on a site located outside of the boundaries of any special studies zone. No such studies need be made if the site under consideration has been the subject of adequate prior studies.

No building shall be constructed, reconstructed, or relocated on the trace of a geological fault along which surface rupture can reasonably be expected to occur within the life of the school building.

A copy of the report of each investigation conducted pursuant to this section shall be submitted to the Department of General Services pursuant to Article 7 (commencing with Section 81130) and to the chancellor's office of the California Community Colleges. The cost of geological and soil engineering studies and investigations conducted pursuant to this section may be treated as a capital expenditure.

SEC. 14. Section 81137 of the Education Code is amended to read:

81137. All fees shall be paid into the State Treasury and credited to the Division of Architecture Public Building Fund, which fund is continued in existence and is retitled the Architecture Public Building Fund, and are available without regard to fiscal years for the use of the Department of General Services, subject to approval of the Department of Finance, in carrying out the provisions of this article.

Adjustments in the amounts of the fees, as determined by the Department of General Services and approved by the Department of Finance, will be made within the limits set in Section 81136 in order to maintain a reasonable working balance in the fund.

SEC. 15. Section 81332 of the Education Code is amended to read:

81332. Before the governing board of a community college district enters into a lease or agreement pursuant to this article, it shall have available a site upon which a building to be used by the district may be constructed and shall have complied with the provisions of law relating to the selection and approval of sites, and it shall have prepared and shall have adopted plans and specifications for such building which have been approved pursuant to Article 7 (commencing with Section 81130) of Chapter 1 of Part 49. A district has a site available for the purposes of this section if it owns a site or if it has an option on a site which allows the community college district or the designee of the district to purchase the site. Any community college district may acquire and pay for an option containing such a provision.

SEC. 16. Section 81640 of the Education Code is amended to read:

81640. The governing board of any community college district shall let any contracts involving an expenditure of more than twelve thousand dollars ($12,000) for work to be done or more than eighteen thousand dollars ($18,000) for materials or supplies to be furnished,

sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.

SEC. 16.5. Section 81648 of the Education Code is amended to read:

81648. In an emergency when any repairs, alterations, work or improvement is necessary to permit the continuance of existing college classes, or to avoid danger to life or property, the board may by unanimous vote, with the approval of the county superintendent of schools, make a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing of materials or supplies for the purpose without advertising for or inviting bids.

SEC. 17. Section 81670 is added to the Education Code, to read:

81670. The governing board of any community college district may construct and maintain dormitories in connection with any community college within the district for use and occupancy by students in attendance at the community college, and shall fix the rates to be charged the students for quarters in the dormitories.

SEC. 18. Section 81676 of the Education Code is amended to read:

81676. The governing board of any community college district may establish a bookstore on district property for the purpose of offering for sale textbooks, supplementary textbooks, school supplies, stationery supplies, confectionary items, and related auxiliary school supplies and services.

Any person who is employed in a bookstore maintained by a community college pursuant to this section is a member of the classified service of the district in accordance with Section 88020. In the case of a person who, immediately preceding becoming a member of the classified service of a school district pursuant to this section, was employed, other than as a student or substitute employee, in a community college bookstore maintained by a student body organization, such prior service shall, for all purposes, be deemed service in the classified service of the employing community college district.

The disposition and accounting of revenue and expenditures of the bookstore operation shall be as prescribed by the California Community Colleges Budget and Accounting Manual. Net proceeds from the operation of a community college bookstore shall be used for the general benefit of the student body as determined by the governing board. Money may be expended for services and property, including, but not limited to, parking facilities, stadia, student centers, student unions, health centers, bookstores or auxiliary facilities for use of students or faculty members of the community college or employees of the district. Funds derived from the operation of a community college bookstore shall be subject to audit pursuant to Section 84040.

SEC. 19. Section 81929 of the Education Code, as amended by Section 1 of Chapter 333 of the Statutes of 1981, is repealed.

10 05

immediately.

CHAPTER 465

An act to repeal Sections 15711, 39640, 39641, 39648, 39649, 39649.1, and 39649.5 of the Education Code, to repeal Article 5 (commencing with Section 25450) of Chapter 5 of Division 2 of Title 3 of, Chapter 6 (commencing with Section 37900) of Division 3 of Title 4 of, and Sections 54113 and 54114 of, the Government Code, to add Part 3

(commencing with Section 20100) to Division 2 of the Public Contract Code, to amend Section 130258 of, and to repeal Sections 12845, 12846, and 16501 of, Article 3 (commencing with Section 25751) of Chapter 6 of Part 1 of Division 10 of, Sections 28990, 28991, and 28992 of, Article 3 (commencing with Section 30570) of Chapter 5 of Part 3 of Division 10 of, Article 3 (commencing with Section 40170) of Chapter 6 of Part 4 of, Article 3 (commencing with Section 50170) of Chapter 6 of Part 5 of, Article 3 (commencing with Section 70170) of Chapter 6 of Part 7 of, Article 3 (commencing with Section 90440) of Chapter 6 of Part 8 of, Article 3 (commencing with Section 96060) of Chapter 6 of Part 9 of, Article 3 (commencing with Section 98230) of Chapter 6 of Part 10 of, Section 100123 of, Article 3 (commencing with Section 101185) of Chapter 5 of Part 13 of, Sections 102223, 103224, 120224, and 125225 of, the Public Utilities Code, to repeal Sections 1071, 1072, 1073, 1074, 1075, 1076, 1076.1, 1188, 1320, 1325, 1325.5, 1326, 1327, 1328, 1329, 1331, and 1332 of, Chapter 8.5 (commencing with Section 5230), Chapter 9 (commencing with Section 5240), Chapter 10 (commencing with Section 5265), Chapter 11 (commencing with Section 5280), and Chapter 12 (commencing with Section 5290) of Part 3 of Division 7 of, Chapter 4 (commencing with Section 8175) of Part 2 of Division 9 of, Chapter 6 (commencing with Section 10500) of Division 12 of, Sections 18171, 18171.1, 18172, 18173, 18174, 18175, and 18176 of, Chapter 6 (commencing with Section 18420) of Part 2 of Division 14 of, Chapter 7 (commencing with Section 18760) of Part 3 of Division 14 of, Chapter 11 (commencing with Section 25250) of Part 1 of Division 16 of, Chapter 8 (commencing with Section 26140) of Part 2 of Division 16 of, the Streets and Highways Code, and to repeal Article 4 (commencing with Section 22300) of Chapter 2 of Part 5 of Division 11 of, Chapter 3 (commencing with Section 43300) of Part 6 of Division 14 of, Chapter 3 (commencing with Section 55350) of Part 3 of Division 16 of, and Sections 56056, 56057, and 56058 of, Article 2 (commencing with Section 70170) of Part 1 of Division 19 of, and Article 2 (commencing with Section 71740) of Chapter 5 of Part 5 of Division 20 of, the Water Code, and to repeal Article 3 (commencing with Section 6.10) of Chapter 1932 of the Statutes of 1961, and Section 8.1 of Chapter 104 of the Statutes of 1964, First Extraordinary Session, relating to public contracts.

[Approved by Governor July 9, 1982. Filed with Secretary of State July 9, 1982.]

The people of the State of California do enact as follows:

SECTION 1. Section 15711 of the Education Code is repealed.

SEC. 2. Section 39640 of the Education Code is repealed.

SEC. 3. Section 39641 of the Education Code is repealed.

SEC. 4. Section 39648 of the Education Code is repealed.

SEC. 5. Section 39649 of the Education Code is repealed.

SEC. 5.5. Section 39649.1 of the Education Code is repealed.

SEC. 6. Section 39649.5 of the Education Code is repealed.

SEC. 7. Article 5 (commencing with Section 25450) of Chapter 5 of Division 2 of Title 3 of the Government Code is repealed.

SEC. 8. Chapter 6 (commencing with Section 37900) of Division 3 of Title 4 of the Government Code is repealed.

SEC. 9. Section 54113 of the Government Code is repealed.

SEC. 10. Section 54114 of the Government Code is repealed.

SEC. 11. Part 3 (commencing with Section 20100) is added to Division 2 of the Public Contract Code, to read:

PART 3. CONTRACTING BY LOCAL AGENCIES

CHAPTER 1. LOCAL AGENCY PUBLIC CONSTRUCTION ACT

Article 1.

20100. This chapter may be cited as the Local Agency Public Construction Act.

Article 2.

20105. The provisions of this article shall apply to contracts subject to the State School Building Aid Law of 1949 provided for in Chapter 6 (commencing with Section 15700) of Part 10 of Division 1 of Title 1 of the Education Code.

20106. A school district shall not expend money apportioned under the State School Building Aid Law unless the contracts under which the funds are expended have been let after competitive bids pursuant to the Education Code.

Article 3.

20110. The provisions of this part shall apply to contracts awarded by school districts subject to Part 21 (commencing with Section 35000) of Division 3 of Title 2 of the Education Code.

20111. The governing board of any school district shall let any contracts involving an expenditure of more than twelve thousand dollars ($12,000) for work to be done or more than sixteen thousand dollars ($16,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.

20112. For the purpose of securing bids the board shall publish at least once a week for two weeks in some newspaper of general circulation published in the district, or if there is no such paper, then in some newspaper of general circulation, circulated in the county a notice calling for bids, stating the work to be done or materials or supplies to be furnished and the time when and the place where bids

will be opened. Whether or not bids are opened exactly at the time fixed in the public notice for opening bids, a bid shall not be received after that time.

20113. In an emergency when any repairs, alterations, work or improvement is necessary to permit the continuance of existing school classes, or to avoid danger to life or property, the board may by unanimous vote, with the approval of the county superintendent of schools, make a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing of materials or supplies for the purpose without advertising for or inviting bids.

20114. In each school district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 20115 by day labor, or by force account, whenever the total cost of labor on the job does not exceed seven thousand five hundred dollars ($7,500), or the total number of hours on the job does not exceed 350 hours, whichever is greater, provided that in any school district having an average daily attendance of 35,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus or equipment, including painting or repainting, and perform maintenance as defined in Section 20115, by day labor or by force account whenever the total cost of labor on the job does not exceed fifteen thousand dollars ($15,000), or the total number of hours on the job does not exceed 750 hours, whichever is greater.

For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

20115. For purposes of Section 20114, "maintenance" means routine, recurring, and usual work for the preservation, protection, and keeping of any publicly owned or publicly operated facility for its intended purposes in a safe and continually usable condition for which it was designed, improved, constructed, altered, or repaired. "Facility" means any plant, building, structure, ground facility, utility system, or real property.

This definition of "maintenance" expressly includes, but is not limited to: carpentry, electrical, plumbing, glazing, and other craftwork designed consistent with the definition set forth above to preserve the facility in a safe, efficient, and continually usable condition for which it was intended, including repairs, cleaning, and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

This definition does not include, among other types of work, janitorial or custodial services and protection of the sort provided by guards or other security forces.

It is the intent of the Legislature that this definition does not include painting, repainting, or decorating other than touchup, but instead it is the intent of the Legislature that such activities be

controlled directly by the provisions of Section 20114.

20116. It shall be unlawful to split or separate into smaller work orders or projects any project for the purpose of evading the provisions of this article requiring work to be done by contract after competitive bidding.

The district shall maintain job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California School Accounting Manual for a period of not less than three years after completion of the project.

Notwithstanding the provisions of Section 20111, informal bidding may be used on projects estimated by the district to cost up to and including the limits set forth in Section 20114. For the purpose of securing informal bids, the board shall publish annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. All contractors included on the informal bidding list shall be given notice of all informal bid projects in such manner as the district deems appropriate.

Article 3.5.

20120. The provisions of this article shall apply to contracts awarded by counties subject to Title 3 (commencing with Section 23000) of the Government Code.

20121. Whenever the estimated cost of construction of any wharf, chute, or other shipping facility, or of any hospital, almshouse, courthouse, jail, historical museum, aquarium, county free library building, branch library building, art gallery, art institute, exposition building, stadium, coliseum, sports arena or sports pavilion or other building for holding sports events, athletic contests, contests of skill, exhibitions, spectacles and other public meetings, or other public building or the cost of any painting, or repairs thereto exceeds the sum of four thousand dollars ($4,000), inclusive of the estimated costs of materials or supplies to be furnished pursuant to Section 20131, the work shall be done by contract. Any such contract not let pursuant to this article is void.

20122. In counties containing a population of 500,000 or over, the work referred to in Section 20121 need not be done by contract if the estimated cost thereof is less than six thousand five hundred dollars ($6,500), exclusive of the estimated cost of materials or supplies to be furnished pursuant to Section 20133.

20123. In counties containing a population of 2,000,000 or over, the provisions of Sections 20121 and 20122 do not apply to alteration or repair work upon county-owned buildings, if the cost of such work is under fifty thousand dollars ($50,000), and if before the work is authorized the board of supervisors determines that detailed plans for the existing building are obsolete or do not exist and that because

construction or repairs may be seen at the district office.

(b) A particular description of the construction or repair advertised if less than the whole construction or repair is advertised.

(c) A statement that the board will receive sealed bids for the construction or repairs advertised or any portion of them designated by the board.

(d) A statement that the contract or contracts for the construction or repair advertised will be awarded to the lowest responsible bidder or bidders, but that any and all bids may be rejected.

(e) A statement of the time and place for opening the bids.

20634. After opening the bids, and as convenient, the board shall award the contract or contracts for the construction or repair in portions, or as a whole, to the lowest responsible bidder or bidders, but the board may reject any and all bids and readvertise for proposals or may proceed to construct the works or any part thereof under its own superintendence.

20635. In case of emergency the board by unanimous vote of those present at any meeting may award a contract for construction or repair without advertising for bids.

Article 40.

20640. The provisions of this article shall apply to contracts by municipal water districts, as provided for in the Municipal Water District Law of 1911, Division 20 (commencing with Section 71000) of the Water Code.

20641. A district may prescribe methods for the construction of works and for the letting of contracts for any of the following purposes:

(a) The construction of works, structures or equipment.

(b) The performance or furnishing of labor, materials, or supplies, necessary or convenient for carrying out any of the purposes of this division.

(c) The acquisition or disposal of any real or personal property.

20642. When work is not to be done by the district itself by force account, and the amount involved is ten thousand dollars ($10,000), or more, any contract for the doing of such work shall be let to the lowest responsible bidder, after publication, in the manner prescribed by the board, of notices inviting bids therefor. However, the board may reject any and all proposals.

20643. Notwithstanding Section 20642, contracts, in writing or otherwise, for the acquisition or disposal of any real or personal property may be let without calling for competitive bids.

20644. The board may, from time to time, establish the manner of calling for bids and letting contracts, but except as such procedure so established by the board otherwise requires, all contracts may be entered into upon such terms and in such manner as the board may authorize.

SEC. 12. Section 12845 of the Public Utilities Code is repealed.

thousand dollars ($20,000) shall be awarded to the lowest responsible bidder submitting a responsible bid after competitive bidding, except in emergency declared by the vote of two-thirds of the membership of the board.

SEC. 80. If this bill and Senate Bill 1476 are both chaptered and become effective on or after January 1, 1983, and this bill is chaptered after Senate Bill 1476, Section 78 of this bill shall become effective and the portion of Section 11 of this bill which adds Section 20221 to the Public Contract Code is repealed.

If this bill and Senate Bill 1834 are both chaptered and become effective on or after January 1, 1983, and this bill is chaptered after Senate Bill 1834, Section 79 of this bill shall become effective and the portion of Section 11 of this bill which adds Section 20341 to the Public Contract Code is repealed.

CHAPTER 513

An act to amend Section 14790 of, to repeal Article 2.5 (commencing with Section 14816) of Chapter 6 of Part 5.5 of Division 3 of Title 2 of, the Government Code, and to add Chapter 3 (commencing with Section 12100) to Part 2 of Division 2 of the Public Contract Code, relating to public contracts.

[Approved by Governor August 13, 1982. Filed with Secretary of State August 15, 1982.]

The people of the State of California do enact as follows:

SECTION 1. Section 14790 of the Government Code, as amended by Section 7 of Chapter 867 of the Statutes of 1981, is amended to read:

14790. Purchases by the Regents of the University of California or the Trustees of the California State University are not subject to this article or to Chapter 3 (commencing with Section 12100) of Part 2 of Division 2 of the Public Contract Code. The Trustees of the California State University, however, shall comply with the competitive bidding requirements prescribed by law and shall follow the purchasing criteria published by the Department of General Services.

10 05

This section shall remain in effect only until January 1, 1987, and as of that date is repealed, unless a later enacted statute, which is chaptered before January 1, 1987, deletes or extends that date.

SEC. 2. Section 14790 of the Government Code, as added by Section 7.5 of Chapter 867 of the Statutes of 1981, is amended to read:

14790. Purchases by the Regents of the University of California are not subject to this article or to Chapter 3 (commencing with Section 12100) of Part 2 of Division 2 of the Public Contract Code. Notwithstanding any other provision of law, purchases by the Trustees of the California State University not exceeding one thousand dollars ($1,000) are exempt from this article and Chapter 3 (commencing with Section 12100) of Part 2 of Division 2 of the Public Contract Code.

This section shall become operative January 1, 1987.

SEC. 3. Article 2.5 (commencing with Section 14816) of Chapter 6 of Part 5.5 of Division 3 of Title 2 of the Government Code is repealed.

SEC. 4. Chapter 3 (commencing with Section 12100) is added to Part 2 of Division 2 of the Public Contract Code, to read:

CHAPTER 3. ACQUISITION OF ELECTRONIC DATA-PROCESSING GOODS AND SERVICES

12100. The Legislature finds that the unique aspects of electronic data-processing systems and the importance of such systems to state programs warrant a separate acquisition authority for electronic data-processing goods and services. The Legislature further finds that such separate authority should enable the timely acquisition of goods and services in order to meet the state's needs in the most cost-effective manner.

All contracts for the acquisition of electronic data-processing services and all contracts for the acquisition of electronic data-processing goods, whether by lease or purchase, shall be made by or under the supervision of the Department of General Services.

12101. It is the intent of the Legislature that policies developed by the Department of Finance and procedures developed by the Department of General Services in accordance with Section 12102 provide for:

(a) The expeditious and cost-effective acquisition of electronic data-processing systems to satisfy state requirements.

(b) The acquisition of electronic data-processing goods and services within a competitive framework.

(c) The delegation of authority by the Department of General Services to each state agency which has demonstrated to the department's satisfaction the ability to conduct cost-effective electronic data-processing goods and services acquisitions.

(d) The exclusion from state bid processes, at the state's option, of any vendor having failed to meet prior contractual requirements related to electronic data-processing goods and services.

10 010

(e) The review and resolution of protests submitted by a vendor or vendors with respect to any electronic data-processing goods and services acquisition.

Further, it is the intent of the Legislature that, if a state electronic data-processing advisory committee is established by the Governor or the Director of Finance, the policies and procedures developed by the Director of Finance and the Director of General Services in accordance with this chapter shall be submitted to such committee for review and comment, and that such comment be considered by both departments prior to the adoption of any such policy or procedure.

12102. The Department of Finance and the Department of General Services shall maintain in the State Administrative Manual, policies and procedures governing the acquisition and disposal of electronic data-processing goods and services. Such policies and procedures shall, in accordance with the intent of the Legislature as expressed in Section 12101, provide for the following:

(a) Acquisition of electronic data-processing goods and services shall be conducted through competitive means, except when the Director of General Services determines that (1) the goods and services proposed for acquisition are the only goods and services which can meet the state's need, or (2) the goods and services are needed in cases of emergency where immediate acquisition is necessary for the protection of the public health, welfare, or safety. The acquisition mode to be used and the procedure to be followed shall be approved by the Director of General Services. The Department of General Services shall maintain in the State Administrative Manual appropriate criteria and procedures to ensure compliance with the intent of this chapter. These criteria and procedures shall include acquisition and contracting guidelines to be followed by state agencies with respect to the acquisition of electronic data-processing goods and services. Such guidelines may be in the form of standard formats or model formats.

(b) Contract awards shall be based on the proposal which provides the most cost-effective solution to the state's requirements, as determined by the evaluation criteria contained in the solicitation document. Such evaluation procedures may provide for the selection of a vendor on a basis other than cost alone.

(c) Evaluation of bidders' proposals for the purpose of determining contract award shall provide for consideration of a bidder's best financing alternative unless the acquiring agency can demonstrate to the satisfaction of the Department of General Services that a particular financing alternative should not be so considered.

(d) Acquisition authority may be delegated by the Director of General Services to any state agency which has been determined by the Department of General Services to be capable of effective use of such authority. Such authority may be limited by the Department of General Services. Acquisitions conducted under delegated

authority shall be reviewed by the Department of General Services on a selective basis.

(e) To the extent practical, the solicitation documents shall provide for a contract to be written to enable acquisition of additional items to avoid essentially redundant acquisition processes when it can be determined that it is economical to do so.

(f) Protest procedures shall be developed to provide bidders an opportunity to protest formally with respect to any acquisition conducted in accordance with this chapter. Authority to protest may be limited to participating bidders. The Director of General Services, or a person designated by the director, is authorized to consider and decide on initial protests. A decision regarding an initial protest shall be final. If prior to making the award, any vendor who has submitted an offer files a protest with the department against the awarding of the contract or purchase order on the ground that his bid or proposal should have been selected in accordance with the selection criteria in the solicitation document, such contract or purchase order shall not be awarded until either the protest has been withdrawn or the State Board of Control has made a final decision as to the action to be taken relating to the protest. Within 10 calendar days after filing a protest, the protesting vendor shall file with the State Board of Control a full and complete written statement specifying in detail the grounds of the protest and the facts in support thereof.

(g) Electronic data-processing goods which have been determined to be surplus to state needs shall be disposed of in a manner which will best serve the interests of the state. Procedures governing the disposal of surplus goods may include auction or transfer to local governmental entities.

(h) A vendor may be excluded from bid processes if the vendor's performance with respect to a previously awarded contract has been unsatisfactory, as determined by the state in accordance with established procedures which shall be maintained in the State Administrative Manual. Such exclusion may not exceed 360 calendar days for any one determination of unsatisfactory performance. Any vendor excluded in accordance with this section shall be reinstated as a qualified vendor at any time during this 360-day period, upon demonstrating to the department's satisfaction that the problems which resulted in the vendor's exclusion have been corrected.

12103. In addition to the mandatory requirements enumerated in Section 12102 the acquisition policies developed and maintained by the Department of Finance and procedures developed and maintained by the Department of General Services in accordance with this chapter may provide for:

(a) Price negotiation with respect to contracts entered into in accordance with this chapter.

(b) System or equipment component performance, or availability standards, including an assessment of the added cost to the state to receive contractual guarantee of a level of performance.

(c) Requirement of a bond or assessment of a cost penalty with

respect to a contract or consideration of a contract offered by a vendor whose performance has been determined unsatisfactory in accordance with established procedures maintained in the State Administrative Manual as required by Section 12102.

12104. In any acquisition subject to this chapter involving the replacement of a computer central processing unit, if only one bid is received, and that bid is from the vendor whose equipment is being replaced, a notification of intent to award a contract to such sole bidder shall be submitted to the chairman of the committee in each house which considers appropriations and the Chairman of the Joint Legislative Budget Committee not less than 30 days prior to an award of contract. Such notification shall describe the rationale for the award and the measures taken by the state to elicit more than one bid.

12105. The Department of General Services and the Department of Finance shall coordinate in the development of policies and procedures which implement the intent of this chapter. The Department of Finance shall have the final authority in the determination of any such general policy and the Department of General Services shall have the final authority in the determination of any such procedure.

12106. The Department of General Services may, in addition to fulfilling the mandatory requirements enumerated in Section 12102, adopt such rules and regulations as are necessary for the purposes of this chapter.

12107. The Department of General Services shall report by January 15th of each year to the chairman of the committee in each house which considers appropriations and the Chairman of the Joint Legislative Budget Committee as to acquisitions accomplished in accordance with this chapter. Such reports shall address any significant problems encountered in the implementation and use of the authority provided in this chapter, measures taken to resolve such problems, and to the extent deemed necessary, recommended changes to this chapter or other statutes. The information to be provided regarding acquisitions may be summarized, but shall include such information as: (1) the number of noncompetitive awards and the reasons for each such award; (2) the extent to which acquisitions have been delegated, and to which departments; (3) information as to formal protests by bidders; and (4) such other information as will provide a meaningful accounting of acquisitions made in accordance with this chapter.

This section shall be operative until January 1, 1983, at which time it is repealed.

12108. Until such time as the Department of General Services has published in the State Administrative Manual the procedures required in accordance with Section 12102, acquisitions of electronic data-processing goods and services shall be accomplished in accordance with either existing State Administrative Manual procedures for the acquisition of electronic data-processing goods

and services, or Article 2 (commencing with Section 14790) of Chapter 6 of Part 5.5 of Division 3 of Title 2 of the Government Code, as determined by the Department of General Services.

12109. The Director of General Services may make the services of the department under this chapter available, upon such terms and conditions as may be deemed satisfactory, to any tax-supported public agency in the state, including a school district, for assisting the agency in the purchase or lease of electronic data-processing goods or services.

12110. The Department of General Services is authorized to make purchases or leases of electronic data-processing goods and services, other than printed material, on behalf of any city, county, city and county, district, or other local governmental body or corporation empowered to expend public funds for the acquisition of goods or services, upon written request of such local agency; provided that such purchase or lease can be made by the Department of General Services upon the same terms, conditions and specifications at a price lower than the local agency can obtain through its normal acquisition procedures. The state shall incur no financial responsibility in connection with purchases for local agencies under this section. No purchase or lease shall be for less than five hundred dollars ($500) and the local agency shall accept sole responsibility for payment to the vendor. All purchases and leases shall be subject to audit and inspection by the local agency for which made.

Purchases and leases under this section shall be subject to the provisions of this chapter.

A charge shall be made to each local agency availing itself of this service, such charge to be not less than the estimated cost to the department of rendering the service, including costs incurred by the department in preparation for a purchase or lease requested by a local agency in instances where such request is canceled or withdrawn by the local agency prior to award of the contract or purchase order by the department.

12111. The definitions pertaining to electronic data-processing as contained in Section 11700 of the Government Code and the State Administrative Manual shall apply to this chapter.

12112. Any contract for electronic data-processing goods or services, to be manufactured or performed by the contractor especially for the state and not suitable for sale to others in the ordinary course of the contractor's business may provide, on such terms and conditions as the department deems necessary to protect the state's interests, for progress payments for work performed and costs incurred at the contractor's shop or plant, provided that not less than 10 percent of the contract price is required to be withheld until final delivery and acceptance of the goods or services, and provided further, that the contractor is required to submit a faithful performance bond, acceptable to the department, in a sum not less than one-half of the total amount payable under the contract

securing the faithful performance of the contract by the contractor.

CHAPTER 256

An act to repeal Sections 81640, 81642, 81643, 81648, 81649, 81649.1, 81649.5, 81657, and 81658 of the Education Code, to repeal Sections 4380, 4381, 61600, 61620, 61625, 61626, 61626.5, and 61715 of, to repeal Chapter 3.5 (commencing with Section 4220) of Division 5 of Title 1 of, to repeal Article 9 (commencing with Section 25540) of Chapter 5 of Division 2 of Title 3 of, the Government Code, to repeal Sections 4080, 4081, 4082, 4083, 4084, 4085, 4131, 4137, 5820, 5900.5, 5900.6, 5900.7, 5910, 5950, 6075, 6077.5, 6080, 6272, 6273, 6274, 6295, 6301, 6302, 6303, 6304, 6862, 6863, 6864, 6865, 6895, 6901, 6902, 6903, 6904, 7149, 7153, 7154, 7155, 7156, and 7157 of the Harbors and Navigation Code, to repeal Sections 4602.4, 4602.5, 4627, 4634, 4636, 4636.8, 4741, 4742.2, 4755, 4865, 4885, 4888, 6407, 6512, 6515.1, 6515.2, 6515.3, 6515.5, 13852, 13867, and 13868 of the Health and Safety Code, to add Chapter 3 (commencing with Section 3400) to Part 1 of Division 2 of, Article 3.6 (commencing with Section 20150), Article 6 (commencing with Section 20202.1), Article 41 (commencing with Section 20650), Article 42 (commencing with Section 20670), Article 43 (commencing with Section 20680), Article 44 (commencing with Section 20690), Article 45 (commencing with Section 20710), Article 46 (commencing with Section 20720), Article 47 (commencing with

Section 20730), Article 48 (commencing with Section 20750), Article 49 (commencing with Section 20760), Article 50 (commencing with Section 20780), Article 51 (commencing with Section 20790), Article 52 (commencing with Section 20800), Article 53 (commencing with Section 20810), Article 54 (commencing with Section 20820), Article 55 (commencing with Section 20830), Article 56 (commencing with Section 20840), Article 57 (commencing with Section 20850), Article 58 (commencing with Section 20880), Article 59 (commencing with Section 20890), and Article 60 (commencing with Section 20910), to Chapter 1 of Part 3 of Division 2 of, the Public Contract Code, to repeal Sections 16406, 16461, 16463, 16464, 16465, 16466, 16502, 16503, 16504, 16505, 16506, 16507, 16508, 16532, 16533, 16534, 16535, 16536, 16537, 16538, 16539, 16540, 16541, 16542, 16543, and 16544 of the Public Utilities Code, and to repeal Sections 5820, 5834, 5834.1, 5835, 5835.1, 5835.2, 5835.3, 5896.1, 5896.2, 5896.9, 5896.10, 5896.11, 5896.12, 6760, 6764, 6765, 6766, 6767, 6768, 6769, 6770, 6771, 6772, 6780, 6781, 6782, 6783, 6784, 6785, 6786, 6787, 6788, 6789, 6790, 6791, 6792, 6793, 6794, 19002, 19150, 19165, 19165.1, 19166, 22006, 22110, 22111, 22112, 22675, 22676, 22677, 22678, 22679, 27164, 27170, 27173, 27173.5, 27173.6, 27173.7, 27173.9, and 27173.10 of the Streets and Highways Code, relating to public contracts.

[Approved by Governor July 14, 1983. Filed with Secretary of State July 14, 1983.]

The people of the State of California do enact as follows:

SECTION 1. Section 81640 of the Education Code is repealed.

SEC. 2. Section 81642 of the Education Code is repealed.

SEC. 3. Section 81643 of the Education Code is repealed.

SEC. 4. Section 81648 of the Education Code is repealed.

SEC. 5. Section 81649 of the Education Code is repealed.

SEC. 6. Section 81649.1 of the Education Code is repealed.

SEC. 7. Section 81649.5 of the Education Code is repealed.

SEC. 8. Section 81657 of the Education Code is repealed.

SEC. 9. Section 81658 of the Education Code is repealed.

SEC. 10. Chapter 3.5 (commencing with Section 4220) of Division 5 of Title 1 of the Government Code is repealed.

SEC. 11. Section 4380 of the Government Code is repealed.

SEC. 12. Section 4381 of the Government Code is repealed.

SEC. 13. Article 9 (commencing with Section 25540) of Chapter 5 of Division 2 of Title 3 of the Government Code is repealed.

SEC. 14. Section 61600 of the Government Code is repealed.

SEC. 15. Section 61620 of the Government Code is repealed.

SEC. 16. Section 61625 of the Government Code is repealed.

SEC. 17. Section 61626 of the Government Code is repealed.

SEC. 18. Section 61626.5 of the Government Code is repealed.

SEC. 19. Section 61715 of the Government Code is repealed.

SEC. 20. Section 4080 of the Harbors and Navigation Code is

this division or by the board.

20207.7. Unless the amount involved in the purchase at any one time of any articles for which no contract has been entered into exceeds four thousand dollars ($4,000), the board may purchase the articles without the necessity of advertising or letting contracts. Where the cost of any articles for which no contract has been entered into exceeds four thousand dollars ($4,000), the board shall advertise for sealed bids for furnishing the district such articles. In the matter of advertising, opening and accepting bids, and the letting of contracts, the board shall proceed in all respects in the manner and form provided in the case of contracts for annual supplies.

SEC. 84. Article 41 (commencing with Section 20650) is added to Chapter 1 of Part 3 of Division 2 of the Public Contract Code, to read:

Article 41.

20650. The provisions of this article shall apply to contracts by community college districts as provided for in Part 49 (commencing with Section 81000) of the Education Code.

20651. The governing board of any community college district shall let any contracts involving an expenditure of more than twelve thousand dollars ($12,000) for work to be done or more than eighteen thousand dollars ($18,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.

20652. Notwithstanding any other provisions of Sections 81640 to 81654, inclusive, of the Education Code, or of Sections 20651 to 20659, inclusive, of this code, the governing board of any community college district without advertising for bids may authorize by contract, lease, requisition or purchase order, any public corporation or agency within the county whose superintendent of schools has jurisdiction over such district, to lease data processing equipment, purchase materials, supplies, equipment, automotive vehicles, tractors and other personal property for the district in the manner in which such other public corporation or agency is authorized by law to make such leases or purchases. Upon receipt of any such personal property, provided the same complies with the specifications set forth in the contract, lease, requisition or purchase order, the community college district shall draw a warrant in favor of such other public corporation or agency for the amount of the approved invoice, including the reasonable costs to such other public corporation or agency for furnishing the services incidental to the lease or purchase of such personal property.

20653. Nothing in this code shall preclude the governing board of any community college district from purchasing materials, equipment or supplies through the Department of General Services pursuant to Section 14814 of the Government Code.

20654. In an emergency when any repairs, alterations, work or improvement is necessary to permit the continuance of existing college classes, or to avoid danger to life or property, the board may by unanimous vote, with the approval of the county superintendent of schools, make a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing of materials or supplies for the purpose without advertising for or inviting bids.

20655. In each community college district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 20656 by day labor, or by force account, whenever the total cost of labor on the job does not exceed seven thousand five hundred dollars ($7,500), or the total number of hours on the job does not exceed 350 hours, whichever is greater, provided that in any district having an average daily attendance of 15,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance as defined in Section 20656, by day labor or by force account whenever the total cost of labor on the job does not exceed fifteen thousand dollars ($15,000), or the total number of hours on the job does not exceed 750 hours, whichever is greater.

For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

20656. For purposes of Section 20655, "maintenance" means routine, recurring, and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility for its intended purposes in a safe and continually usable condition for which it was designed, improved, constructed, altered or repaired. "Facility" means any plant, building, structure, ground facility, utility system, or real property.

This definition of "maintenance" expressly includes, but is not limited to: carpentry, electrical, plumbing, glazing, and other craft work designed consistent with the definition set forth above to preserve the facility in a safe, efficient, and continually usable condition for which it was intended, including repairs, cleaning, and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

This definition does not include, among other types of work, janitorial or custodial services and protection of the sort provided by guards or other security forces.

It is the intent of the Legislature that this definition does not include painting, repainting, or decorating other than touchup, but instead it is the intent of the Legislature that such activities be controlled directly by the provisions of Section 20655.

20657. It shall be unlawful to split or separate into smaller work orders or projects any project for the purpose of evading the

provisions of this article requiring work to be done by contract after competitive bidding.

The district shall maintain job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California Community College Budget and Accounting Manual for a period of not less than three years after completion of the project.

Notwithstanding the provisions of Section 20651, informal bidding may be used on projects estimated by the district to cost up to and including the limits set forth in Section 20655. For the purpose of securing informal bids, the board shall publish annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. All contractors included on the informal bidding list shall be given notice of all informal bid projects, in such manner as the district deems appropriate.

20658. The governing board of any community college district may by majority vote authorize its district superintendent, or such person as he or she may designate, to expend up to two hundred fifty dollars ($250) per transaction for work done, compensation for employees or consultants, and purchases of equipment, supplies, or materials. Ratification by the governing board shall not be required with respect to transactions entered into pursuant to this section. In the event of malfeasance in office, the district official invested by the governing board with authority to act under this section shall be personally liable for any and all moneys of the district paid out as a result of such malfeasance.

20659. If any change or alteration of a contract governed by the provisions of this article is ordered by the governing board of the community college district, such change or alteration shall be specified in writing and the cost agreed upon between the governing board and the contractor. The board may authorize the contractor to proceed with performance of the change or alteration without the formality of securing bids, if the cost so agreed upon does not exceed the greater of:

(a) The amount specified in Section 20651 or 20655, whichever is applicable to the original contract; or

(b) Ten percent of the original contract price.

SEC. 85. Article 42 (commencing with Section 20670) is added to Chapter 1 of Part 3 of Division 2 of the Public Contract Code, to read:

Article 42.

20670. The provisions of this article shall apply to contracts by public entities as provided for in Division 5 (commencing with Section 4000) of the Government Code.

20671. As used in this chapter:

(a) "Public leaseback" means any lease by a public entity, as

CHAPTER 173

An act to amend Sections 81645 and 81645.5 of the Education Code, and to amend Sections 20111 and 20651 of the Public Contract Code, relating to schools.

[Approved by Governor June 8, 1984. Filed with Secretary of State June 8, 1984.]

The people of the State of California do enact as follows:

SECTION 1. Section 81645 of the Education Code is amended to read:

81645. The governing board of any community college district may contract with an acceptable party who is one of the three lowest responsible bidders for the procurement or maintenance, or both, of electronic data-processing systems and supporting software in any manner the board deems appropriate.

SEC. 2. Section 81645.5 of the Education Code is amended to read:

81645.5. In addition to utilizing the procedures specified in Article 9 (commencing with Section 81450) of Chapter 2, any community college district may, by direct sale or otherwise, sell to a purchaser any electronic data-processing equipment or other major items of equipment owned by, or to be owned by, the district, if the purchaser agrees to lease the equipment back to the district for use by the district following the sale.

The approval by the governing board of the district of the sale and leaseback shall be given only if the governing board finds, by resolution, that the equipment is data-processing equipment or

another major item of equipment within the meaning of this section and that the sale and leaseback is the most economical means for providing electronic data-processing equipment or other major items of equipment to the district.

SEC. 3. Section 20111 of the Public Contract Code is amended to read:

20111. The governing board of any school district shall let any contracts involving an expenditure of more than fifteen thousand dollars ($15,000) for work to be done or more than twenty-one thousand dollars ($21,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.

SEC. 4. Section 20651 of the Public Contract Code is amended to read:

20651. The governing board of any community college district shall let any contracts involving an expenditure of more than fifteen thousand dollars ($15,000) for work to be done or more than twenty-one thousand dollars ($21,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.

CHAPTER 728

An act to amend the heading of Chapter 3 (commencing with Section 12100) of Part 2 of Division 2 of, and to amend Sections 12100, 12101, 12102, 12108, 12109, 12110, and 12112 of, the Public Contract Code, relating to public contracts, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor August 23, 1984. Filed with Secretary of State August 24, 1984.]

The people of the State of California do enact as follows:

SECTION 1. The heading of Chapter 3 (commencing with Section 12100) of Part 2 of Division 2 of the Public Contract Code is amended to read:

CHAPTER 3. ACQUISITION OF ELECTRONIC DATA-PROCESSING AND TELECOMMUNICATIONS GOODS AND SERVICES

SEC. 2. Section 12100 of the Public Contract Code is amended to read:

12100. The Legislature finds that the unique aspects of electronic data-processing systems and telecommunications systems and the importance of such systems to state programs warrant a separate acquisition authority for electronic data-processing and telecommunications goods and services. The Legislature further finds that such separate authority should enable the timely acquisition of goods and services in order to meet the state's needs in the most cost-effective manner.

All contracts for the acquisition of electronic data-processing or telecommunications services and all contracts for the acquisition of electronic data-processing or telecommunications goods, whether by lease or purchase, shall be made by or under the supervision of the Department of General Services.

SEC. 3. Section 12101 of the Public Contract Code is amended to read:

12101. It is the intent of the Legislature that policies developed by the Department of Finance and procedures developed by the Department of General Services in accordance with Section 12102 provide for:

(a) The expeditious and cost-effective acquisition of electronic data-processing and telecommunications systems to satisfy state requirements.

(b) The acquisition of electronic data-processing and telecommunications goods and services within a competitive framework.

(c) The delegation of authority by the Department of General Services to each state agency which has demonstrated to the

unsatisfactory, as determined by the state in accordance with established procedures which shall be maintained in the State Administrative Manual. Such exclusion may not exceed 360 calendar days for any one determination of unsatisfactory performance. Any vendor excluded in accordance with this section shall be reinstated as a qualified vendor at any time during this 360-day period, upon demonstrating to the department's satisfaction that the problems which resulted in the vendor's exclusion have been corrected.

SEC. 5. Section 12108 of the Public Contract Code is amended to read:

12108. Until such time as the Department of General Services has published in the State Administrative Manual the procedures required in accordance with Section 12102, acquisitions of electronic data-processing and telecommunications goods and services shall be accomplished in accordance with either existing State Administrative Manual procedures for the acquisition of electronic data-processing goods and services, or Article 2 (commencing with Section 14790) of Chapter 6 of Part 5.5 of Division 3 of Title 2 of the Government Code, as determined by the Department of General Services.

SEC. 6. Section 12109 of the Public Contract Code is amended to read:

12109. The Director of General Services may make the services of the department under this chapter available, upon such terms and conditions as may be deemed satisfactory, to any tax-supported public agency in the state, including a school district, for assisting the agency in the purchase or lease of electronic data-processing or telecommunications goods or services.

SEC. 7. Section 12110 of the Public Contract Code is amended to read:

12110. (a) The Department of General Services is authorized to make purchases or leases of electronic data-processing or telecommunications goods and services, other than printed material, on behalf of any city, county, city and county, district, or other local governmental body or corporation empowered to expend public funds for the acquisition of goods or services, upon written request of such local agency; provided that such purchase or lease can be made by the Department of General Services upon the same terms, conditions and specifications at a price lower than the local agency can obtain through its normal acquisition procedures. The state shall incur no financial responsibility in connection with purchases for local agencies under this section. No purchase or lease shall be for less than five hundred dollars ($500) and the local agency shall accept sole responsibility for payment to the vendor. All purchases and leases shall be subject to audit and inspection by the local agency for which made.

(b) Purchases and leases under this section shall be subject to the provisions of this chapter.

(c) A charge shall be made to each local agency availing itself of

this service, the charge to be not less than the estimated cost to the department of rendering the service, including costs incurred by the department in preparation for a purchase or lease requested by a local agency in instances where the request is canceled or withdrawn by the local agency prior to award of the contract or purchase order by the department.

SEC. 8. Section 12112 of the Public Contract Code is amended to read:

12112. Any contract for electronic data-processing or telecommunications goods or services, to be manufactured or performed by the contractor especially for the state and not suitable for sale to others in the ordinary course of the contractor's business may provide, on such terms and conditions as the department deems necessary to protect the state's interests, for progress payments for work performed and costs incurred at the contractor's shop or plant, provided that not less than 10 percent of the contract price is required to be withheld until final delivery and acceptance of the goods or services, and provided further, that the contractor is required to submit a faithful performance bond, acceptable to the department, in a sum not less than one-half of the total amount payable under the contract securing the faithful performance of the contract by the contractor.

SEC. 9. Notwithstanding any other provision of law, the Newport-Mesa Unified School District may make payment, without compliance with any provisions of the law related to competitive bidding, for personal computers which it has heretofore received, at a price less than 50 percent of the retail price of said personal computers; provided, however, the total expenditures permitted by this act shall not exceed the sum of eighty thousand dollars ($80,000).

Due to the unique circumstances concerning the Newport-Mesa Unified School Distict, the Legislature finds and declares that a general statute cannot be made applicable within the meaning of Section 16 of Article IV of the Constitution.

SEC. 10. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

The Newport-Mesa Unified School District has received possession of personal computers at a price greatly under the market value and selling price of the computers. In order that the district may retain possession of such computers and make timely payment for them, it is necessary that this act take effect immediately.

CHAPTER 758

An act to amend Sections 21202, 21204, 21207, 21209, and 21213 of, to amend and repeal Section 10122 of, to add and repeal Section 20102 to, and to repeal and add Section 21206 of, the Public Contract Code, relating to public contracts.

[Approved by Governor August 24, 1984. Filed with Secretary of State August 27, 1984.]

The people of the State of California do enact as follows:

SECTION 1. Section 10122 of the Public Contract Code is amended to read:

10122. (a) Work on all projects shall be done under contract awarded to the lowest responsible bidder pursuant to this part, except that it may be done by day's labor under the direction of the department, by contract upon informal bids, or by a combination

10 05

thereof:

(1) In case of emergency due to the failure or threat of failure of any bridge or other highway structure.

(2) In case of emergency due to the failure or threat of failure of any dam, reservoir, aqueduct, or other water facility or facility appurtenant thereto.

(3) In case of emergency due to damage to a state-owned building or any other state-owned real property or improvements located thereon, by an act of God, including, but not limited to, damage by storm, flood, fire or earthquake, for work and remedial measures which are required immediately.

(4) At any time after the approval of plans, specifications and estimates of cost, if the director deems the advertising or award of a contract, the acceptance of any bid, or the acceptance of any further bids after the rejection of all submitted bids, is not in the best interests of the state.

(b) Where plans and specifications have been prepared for a public project to be put out for formal or informal bid, and subsequently the department elects to perform the work by day's labor, the department shall perform the work in strict accordance with these same plans and specifications. Revisions of the plans and specifications may be made once a justification detailing the specific reasons for the change or changes has been approved by the director of the awarding department.

This section shall remain in effect only until January 1, 1991, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1991, deletes or extends that date. If that date is not deleted or extended, then, on and after January 1, 1991, pursuant to Section 9611 of the Government Code, Section 10122 as added by Chapter 306 of the Statutes of 1981, shall have the same force and effect as if this temporary provision had not been enacted.

SEC. 2. Section 20102 is added to the Public Contract Code, to read:

20102. Notwithstanding any other provision of this part to the contrary, where plans and specifications have been prepared by a public agency, whose activities are subject to this part, in order for a public project to be put out for formal or informal bid, and, subsequently, the public agency elects to perform the work by day's labor, the public agency shall perform the work in strict accordance with these same plans and specifications.

Revisions of the plans and specifications may be made once a justification detailing the specific reasons for the change or changes has been approved by the public agency or its project director and a copy of the change and its justification is placed in the project file.

This section shall remain in effect only until January 1, 1991, and as of such date is repealed, unless a later enacted statute, which is chaptered on or before January 1, 1991, deletes or extends such date.

SEC. 3. Section 21202 of the Public Contract Code is amended to read:

21202. (a) Public projects of fifteen thousand dollars ($15,000) or less may be performed by the employees of a public agency by force account, by negotiated contract, or by purchase order.

(b) Public projects of fifty thousand dollars ($50,000) or less may be let to contract by informal procedures as set forth in this article.

(c) Public projects of more than fifty thousand dollars ($50,000) shall, except as otherwise provided in this article, be let to contract by formal bidding procedure.

SEC. 4. Section 21204 of the Public Contract Code is amended to read:

21204. Each public agency which elects to become subject to the uniform construction accounting procedures set forth in Article 2 (commencing with Section 21100), shall enact an informal bidding ordinance to govern the selection of contractors to perform public projects pursuant to subdivision (b) of Section 21202. The ordinance shall include all of the following:

(a) The public agency shall maintain a list of qualified contractors, identified according to categories of work. Minimum criteria for development and maintenance of the contractors list shall be determined by the commission.

(b) All contractors on the list for the category of work being bid and/or all construction trade journals specified in Section 21206 shall be mailed a notice inviting informal bids unless the product or service is proprietary.

(c) All mailing of notices to contractors and construction trade journals pursuant to subdivision (b) shall be completed not less than 10 calendar days before bids are due.

(d) The notice inviting informal bids shall describe the project in general terms, how to obtain more detailed information about the project, and state the time and place for the submission of bids.

(e) The governing body of the public agency may delegate the authority to award informal contracts to the public works director, general manager, purchasing agent, or other appropriate person.

SEC. 5. Section 21206 of the Public Contract Code is repealed.

SEC. 6. Section 21206 is added to the Public Contract Code, to read:

21206. The commission shall determine, on a county-by-county basis, the appropriate construction trade journals which shall receive mailed notice of all informal and formal construction contracts being bid for work within the specified county.

SEC. 7. Section 21207 of the Public Contract Code is amended to read:

21207. Notice inviting formal bids shall state the time and place for the receiving and opening of sealed bids and distinctly describe the project. The notice shall be published at least 14 calendar days before the date of opening the bids in a newspaper of general circulation, printed and published in the jurisdiction of the public agency; or, if there is no newspaper printed and published within the jurisdiction of the public agency, in a newspaper of general

circulation which is circulated within the jurisdiction of the public agency, or, if there is no newspaper which is circulated within the jurisdiction of the public agency, publication shall be by posting the notice in at least three places within the jurisdiction of the public agency as have been designated by ordinance or regulation of the public agency as places for the posting of its notices. The notice inviting formal bids shall also be mailed to all construction trade journals specified in Section 21206. The notice shall be mailed at least 30 calendar days before the date of opening the bids. In addition to notice required by this section, the public agency may give such other notice as it deems proper.

SEC. 8. Section 21209 of the Public Contract Code is amended to read:

21209. The governing body of the public agency shall adopt plans, specifications, and working details for all public projects of more than fifty thousand dollars ($50,000).

SEC. 9. Section 21213 of the Public Contract Code is amended to read:

21213. In those circumstances as set forth in subdivision (a) of Section 21212, a request for commission review shall be in writing, sent by certified or registered mail received by the commission postmarked not later than five business days from the date the public agency has rejected all bids. In those circumstances set forth in subdivision (b) or (c) of Section 21212, a request for commission review shall be by letter received by the commission not later than five days from the date an interested party formally complains to the public agency. The commission review shall commence immediately and conclude within 30 days from the receipt of the request for commission review. During the review of a project that falls within subdivision (a) of Section 21212, the agency shall not proceed on the project until a final decision is received by the commission.

SEC. 10. Notwithstanding Section 6 of Article XIII B of the California Constitution and Section 2231 or 2234 of the Revenue and Taxation Code, no appropriation is made by this act for the purpose of making reimbursement pursuant to these sections. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 3 (commencing with Section 2201) of Part 4 of Division 1 of that code.

CHAPTER 1073

An act to add Article 3 (commencing with Section 3300) to Chapter 3 of Part 1 of Division 2 of the Public Contract Code, relating to public contracts.

[Approved by Governor September 27, 1985. Filed with Secretary of State September 27, 1985.]

The people of the State of California do enact as follows:

SECTION 1. It is the intent of the Legislature that this act shall apply only to contractors who contract directly with public entities pursuant to the Public Contract Code.

SEC. 2. Article 3 (commencing with Section 3300) is added to Chapter 3 of Part 1 of Division 2 of the Public Contract Code, to read:

Article 3. Bidders

3300. (a) Any public entity, as defined in Section 1100, the University of California, and the California State University shall specify the classification of the contractor's license which a contractor shall possess at the time a contract is awarded. The specification shall be included in any plans prepared for a public project and in any notice inviting bids required pursuant to this code.

This requirement shall apply only with respect to contractors who contract directly with the public entity.

(b) A contractor who is not awarded a public contract because of

the failure of an entity, as defined in subdivision (a), to comply with that subdivision shall not receive damages for the loss of the contract.

CHAPTER 886

An act to amend Sections 17708, 17714, 17736, 17740, 17742, 17742.5, 17747, 39015, 39140, 39246, 39305, and 39381, of, to amend and renumber Sections 17717.6 and 17717.7 of, to add Sections 17708.3, 17719.5, 17721.3, 17722.7, 17740.1, 17740.3, 17742.2, 17742.3, 17742.7, 17746.7, 17788.5, 39619.2, and 42250.3 to, to repeal Chapter 23 (commencing with Section 17760) of Part 10 of, and to repeal and add Section 17749 of, the Education Code, to add Section 33445.5 to the Health and Safety Code, and to add Section 20111.5 to the Public Contract Code, relating to school facilities, and making an appropriation therefor.

[Approved by Governor September 18, 1986. Filed with Secretary of State September 18, 1986.]

The people of the State of California do enact as follows:

SECTION 1. This act shall be known and may be cited as the Greene-Hughes School Facilities Act of 1986.

SEC. 2. Section 17708 of the Education Code is amended to read:

17708. A fund is hereby created in the State Treasury to be known as the State School Building Lease-Purchase Fund. All money in the State School Building Lease-Purchase Fund, including any money deposited in that fund from any source whatsoever, and notwithstanding Section 13340 of the Government Code, is hereby continuously appropriated for expenditure pursuant to this chapter.

The State Allocation Board may apportion funds to school districts for the purposes of this chapter from funds transferred to the State School Building Lease-Purchase Fund from any source.

SEC. 3. Section 17708.3 is added to the Education Code, to read:

17708.3. (a) The board may establish a revolving loan account within the State School Building Lease-Purchase Fund, and may allocate from the fund to that account those amounts it determines to be necessary for the purposes of this section.

(b) The board may apportion to any school district that submits to the board a statement of its intent to subsequently file a project application under this chapter, a loan for the purpose of advance planning and related administrative costs pursuant to the preparation of that application. The loan amount shall not exceed 3 percent of the estimated project cost, as determined pursuant to the building cost standards established under this chapter.

(c) If, within a period of 24 months following the receipt of any loan amounts under this section, the project for which those advance planning funds were provided has not been found by the board to

board may transmit a written copy of those findings, together with supporting information, materials, and documents, to the redevelopment agency. The redevelopment agency shall conduct a public hearing within 45 days after receiving the findings to receive public testimony identifying the effects of the redevelopment plan on the impacted attendance area or areas and suggesting revisions to the plan as adopted or amended by the legislative body that would alleviate or eliminate the overcrowding in the attendance area or areas caused by the implementation of the redevelopment plan. The redevelopment agency shall send written notice of the public hearing to, and at the hearing receive public testimony from, any affected taxing entity. After receiving that testimony at the hearing, the agency shall consider amendments of the plan necessary to alleviate or eliminate that overcrowding and may recommend those amendments for adoption by the legislative body.

(b) Section 33353 does not apply to an amendment of the plan proposed pursuant to subdivision (a) when both of the following occur:

(1) The amendment proposes only to add significant additional capital improvement projects to alleviate or eliminate the overcrowding in the attendance area or areas caused by the implementation of the plan.

(2) The amendment will delete capital improvement projects that are equivalent in financial impact on any affected taxing entity or otherwise modify the plan in a way that the agency finds there will be no additional financial impact or any affected taxing entity as a result of the amendment.

(c) Any funds received by a school district from a redevelopment agency to alleviate or eliminate the overcrowding in the attendance area or areas caused by implementation of a redevelopment plan as the result of a public hearing conducted pursuant to subdivision (a) shall be used only for capital expenditures.

(d) The governing body of a school district shall not make the findings permitted by subdivision (a) with respect to any project area more than once.

(e) This section applies only to redevelopment plans adopted prior to January 1, 1984.

SEC. 33. Section 20111.5 is added to the Public Contract Code, to read:

20111.5. The following procedures shall apply to any contracts entered into by any school district pursuant to the funding approval of any district project under Chapter 22 (commencing with Section 17700) of Part 10 of the Education Code:

(a) The governing board of the district may require that each prospective bidder for a contract, as described under Section 20111, complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's financial ability and experience in performing public works. The questionnaire and

financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaires and financial statements shall not be public records and shall not be open to public inspection.

(b) Any school district requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine the size of the contracts upon which each bidder shall be deemed qualified to bid.

(c) Each prospective bidder on any contract described under Section 20111 for a project funded under Chapter 22 (commencing with Section 17700) of Part 10 of the Education Code shall be furnished by the school district letting the contract with a standardized proposal form that, when completed and executed, shall be submitted as his or her bid. Bids not presented on the forms so furnished shall be disregarded. A proposal form shall not be accepted from any person or other entity who is required to submit a completed questionnaire and financial statement for prequalification pursuant to subdivision (a), but has not done so at least five days prior to the date fixed for the public opening of sealed bids or has not been prequalified, pursuant to subdivision (b), for at least one day prior to that date.

SEC. 34. The Legislative Analyst shall report to the Legislature on or before January 1, 1990, regarding the value of year-round education incentive funding pursuant to this act in reducing the need for school facility construction.

SEC. 35. The amendments to Section 39305 of the Education Code set forth in Section 28 do not constitute a change in, but are declaratory of the existing law.

SEC. 36. The State Allocation Board shall review the funding priorities it has established pursuant to Chapter 22 (commencing with Section 17700) to reflect the changes to that chapter by this act.

Applications for state funding filed with the State Allocation Board on or before January 1, 1987, shall take priority over applications submitted after that date under revised standards.

SEC. 37. (a) The sum of one hundred fifty thousand dollars ($150,000) is hereby appropriated from the State School Building Lease-Purchase Fund to the Department of General Services, Office of Local Assistance, for the purpose of contracting with the Office of the Legislative Analyst. The Office of the Legislative Analyst, in consultation with the Office of Local Assistance and the State Department of Education, shall contract with an individual, group of individuals, firm or organization deemed qualified and competent to study and develop recommendations to simplify and shorten the time to complete the administrative processes related to state funding for school facilities. The study shall include, but need not be limited to, an assessment of the feasibility and desirability of all of the following:

(1) Allocating funding with less state involvement and eligibility has been determined.

(2) Allocating funding on the basis of availability of teaching spaces as opposed to total square footage.

(3) Exploring the possibility of the use of self-certification on documents submitted by applicant districts with the intent of limiting steps in the current process.

(4) Improving enrollment project methods, including more efficient and timely use of California Basic Education Data System (CBEDS) information.

(5) Establishing regional school facility planning units through the county offices of education.

(6) Such other recommendations as the contractor may suggest to improve the efficiency of the administrative processes related to state funding for school facilities.

(7) Making greater use of automation in the application process.

For any improvements to the current process determined to be both feasible and desirable, the contractor shall propose specific implementation methods, time tables, and costs or savings. The contractor shall submit a preliminary report on or before August 1, 1987, and a final report on or before January 10, 1988.

The Department of General Services, Office of Local Assistance, shall report to the Office of the Legislative Analyst on or before November 1, 1988, on the status of implementation of the recommendations made by the study contractor.

SEC. 38. Sections 1 to 37, inclusive, of this act shall become operative only if Assembly Bill 2926 is enacted and becomes effective on January 1, 1987.

SEC. 39. Reimbursement to local agencies and school districts for costs mandated by the state pursuant to this act shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code and, if the statewide cost of the claim for reimbursement does not exceed five hundred thousand dollars ($500,000), shall be made from the State Mandates Claims Fund.

CHAPTER 1060

An act to add Section 14030.5 to the Government Code, and to add Chapter 2 (commencing with Section 2000) to Part 1 of Division 2 of the Public Contract Code, relating to contracts.

[Approved by Governor September 23, 1986. Filed with Secretary of State September 24, 1986.]

The people of the State of California do enact as follows:

SECTION 1. Section 14030.5 is added to the Government Code, to read:

14030.5. (a) As used in this section, the following terms have the following meanings:

(1) "Socially and economically disadvantaged business concern"

means a business that meets both of the following criteria:

(A) A business that is at least 51 percent owned by one or more socially and economically disadvantaged persons or one or more socially or economically disadvantaged persons or, in the case of any business whose stock is publicly held, at least 51 percent of the stock is owned by one or more of those persons.

(B) A business whose management and daily business operations are controlled by one or more socially and economically disadvantaged persons or one or more socially or economically disadvantaged persons.

(2) "Socially and economically disadvantaged persons" and "socially or economically disadvantaged persons" include women, Black Americans, Hispanic Americans, Native Americans (including American Indians, Eskimos, Aleuts, and Native Hawaiians), Asian-Pacific Americans (including persons whose origins are from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the United States Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, and Taiwan), and other minorities or any other group of natural persons determined by the director to be so disadvantaged.

(b) The department shall certify socially and economically disadvantaged business concerns, as defined by subdivision (a). All state agencies shall, and any local agency may, accept the certification of a socially and economically disadvantaged business concern by the department as valid status of that business when awarding contracts to socially and economically disadvantaged business concerns. No state agency shall require the business to comply with any other certification process for certifying socially and economically disadvantaged business concerns.

SEC. 2. Chapter 2 (commencing with Section 2000) is added to Part 1 of Division 2 of the Public Contract Code, to read:

CHAPTER 2. RESPONSIVE BIDDERS

2000. (a) Notwithstanding any other provision of law requiring a local agency to award contracts to the lowest responsible bidder, any local agency may require that a contract be awarded to the lowest responsible bidder who also does either of the following:

(1) Meets goals and requirements established by the local agency relating to participation in the contract by minority business enterprises and women business enterprises. If the bidder does not meet the goals and requirements established by the local agency for that participation, the local agency shall evaluate the good faith effort of the bidder to comply with those goals and requirements as provided in paragraph (2).

(2) Makes a good faith effort, in accordance with the criteria established pursuant to subdivision (b), prior to the time bids are opened, to comply with the goals and requirements established by the local agency relating to participation in the contract by minority

or women business enterprises.

(b) (1) The bidder attended any presolicitation or prebid meetings that were scheduled by the local agency to inform all bidders of the minority and women business enterprise program requirements for the project for which the contract will be awarded. A local agency may waive this requirement if it determines that the bidder is informed as to those program requirements.

(2) The bidder identified and selected specific items of the project for which the contract will be awarded to be performed by minority or women business enterprises to provide an opportunity for participation by those enterprises.

(3) The bidder advertised, not less than 10 calendar days before the date the bids are opened, in one or more daily or weekly newspapers, trade association publications, minority or trade oriented publications, trade journals, or other media, specified by the local agency for minority or women business enterprises that are interested in participating in the project. This paragraph applies only if the local agency gave public notice of the project not less than 15 calendar days prior to the date the bids are opened.

(4) The bidder provided written notice of his or her interest in bidding on the contract to the number of minority or women business enterprises required to be notified by the project specifications not less than 10 calendar days prior to the opening of bids. To the extent possible, the local agency shall make available to the bidder not less than 15 calendar days prior to the date the bids are opened a list or a source of lists of enterprises which are certified by the local agency as minority or women business enterprises. If the local agency does not provide that list or source of lists to the bidder, the bidder may utilize the list of certified minority or women business enterprises prepared by the Department of Transportation pursuant to Section 14030.5 of the Government Code for this purpose.

(5) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested in performing specific items of the project.

(6) The bidder provided interested minority and women business enterprises with information about the plans, specifications, and requirements for the selected subcontracting or material supply work.

(7) The bidder requested assistance from minority and women community organizations; minority and women contractor groups; local, state, or federal minority and women business assistance offices; or other organizations that provide assistance in the recruitment and placement of minority or women business enterprises, if any are available.

(8) The bidder negotiated in good faith with the minority or women business enterprises, and did not unjustifiably reject as unsatisfactory bids prepared by any minority or women business

enterprises, as determined by the local agency.

(9) Where applicable, the bidder advised and made efforts to assist interested minority and women business enterprises in obtaining bonds, lines of credit, or insurance required by the local agency or contractor.

(10) The bidder's efforts to obtain minority and women business enterprise participation could reasonably be expected by the local agency to produce a level of participation sufficient to meet the goals and requirements of the local agency.

(c) The performance by a bidder of all of the criteria specified in subdivision (b) shall create a rebuttable presumption, affecting the burden of producing evidence, that a bidder has made a good faith effort to comply with the goals and requirements relating to participation by minority and women business enterprises established pursuant to subdivision (a).

(d) "Local agency," as used in this section, means a county or city, whether general law or chartered, city and county, or district. "District," as used in this section, means an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.

(e) "Minority or women business enterprise," as used in this section, means a business enterprise that meets both of the following criteria:

(1) A business that is at least 51 percent owned by one or more minority persons or women or, in the case of any business whose stock is publicly held, at least 51 percent of the stock is owned by one or more minority persons or women.

(2) A business whose management and daily business operations are controlled by one or more minority persons or women.

(f) "Minority person," for purposes of this section, means Black Americans, Hispanic Americans, Native Americans (including American Indians, Eskimos, Aleuts, and Native Hawaiians), Asian-Pacific Americans (including persons whose origins are from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the United States Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, and Taiwan), or any other group of natural persons identified as minorities in the project specifications by the local agency.

(g) This section does not apply to any of the following:

(1) Any contract, funded in whole or in part by the federal government, to the extent of any conflict between the requirements imposed by this section and any requirements imposed by the federal government relating to participation in a contract by a minority or women business enterprise as a condition of receipt of the federal funds.

(2) The San Francisco Bay Area Rapid Transit District, the Los Angeles County Transportation Commission, or any other local agency that has authority to facilitate the participation of minority

or women business enterprises substantially similar to the authority granted to the San Francisco Bay Area Rapid Transit District pursuant to Section 20229 of this code or the Los Angeles County Transportation Commission pursuant to Section 130239 of the Public Utilities Code.

SEC. 3. The Legislature finds and declares that existing statutes requiring that contracts be let to the "lowest responsible bidder" have prevented many local agencies from considering the responsiveness of a bidder to affirmative action or minority or women business enterprise requirements. The Legislature further finds and declares that it is necessary to establish uniformity in determining whether or not bidders on public works contracts have made a good faith effort to meet the goals and requirements established by a local agency regarding the participation in the contract by minority business enterprises and women business enterprises. The Legislature further finds and declares that the encouragement of, and participation by, minority and women business enterprises in public works contracts is a matter of statewide concern.

SEC. 4. It is the intention of the Legislature through the enactment of Sections 2 and 3 of this act to occupy the whole field of the regulation of procedures for determining good faith efforts by bidders on public works contracts. Thus, if a local agency determines to exercise the authority granted by subdivision (a) of Section 2000 of the Public Contract Code, the requirements imposed by that section shall, except as otherwise provided in subdivision (g) of that section, be the exclusive procedure for determining whether bidders have made a good faith effort to meet the goals and requirements established by the local agency regarding participation in contracts by minority business enterprises and women business enterprises. Section 2 of this act prevails, to the extent of any conflict, over any provision of any charter of a chartered city establishing requirements and procedures for determining whether bidders have made a good faith effort to comply with the goals and requirements established by the local agency relating to participation in the contract by minority or women business enterprises.

SEC. 5. Sections 2 and 3 of this act apply to projects for which a public notice of invitation to bid on a project is published or disseminated in the manner otherwise prescribed by law on or after January 1, 1987.

CHAPTER 102

An act to amend Section 20111.5 of the Public Contract Code, relating to public contracts.

[Approved by Governor July 2, 1987. Filed with Secretary of State July 2, 1987.]

The people of the State of California do enact as follows:

SECTION 1. Section 20111.5 of the Public Contract Code is amended to read:

20111.5. (a) The governing board of the district may require that each prospective bidder for a contract, as described under Section 20111, complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's financial ability and experience in performing public works. The questionnaire and financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaires and financial statements shall not be public records and shall not be open to public inspection.

(b) Any school district requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine the size of the contracts upon which each bidder shall be deemed qualified to bid.

(c) Each prospective bidder on any contract described under Section 20111 shall be furnished by the school district letting the contract with a standardized proposal form that, when completed and executed, shall be submitted as his or her bid. Bids not presented on the forms so furnished shall be disregarded. A proposal form shall not be accepted from any person or other entity who is required to submit a completed questionnaire and financial statement for prequalification pursuant to subdivision (a), but has not done so at least five days prior to the date fixed for the public opening of sealed bids or has not been prequalified, pursuant to subdivision (b), for at least one day prior to that date.

CHAPTER 538

An act to amend Sections 2000 and 20111 of the Public Contract Code, relating to public contracts.

[Approved by Governor August 23, 1988. Filed with Secretary of State August 24, 1988.]

The people of the State of California do enact as follows:

SECTION 1. Section 2000 of the Public Contract Code is amended to read:

2000. (a) Notwithstanding any other provision of law requiring a local agency to award contracts to the lowest responsible bidder, any local agency may require that a contract be awarded to the lowest responsible bidder who also does either of the following:

(1) Meets goals and requirements established by the local agency relating to participation in the contract by minority business enterprises and women business enterprises. If the bidder does not meet the goals and requirements established by the local agency for that participation, the local agency shall evaluate the good faith effort of the bidder to comply with those goals and requirements as provided in paragraph (2).

(2) Makes a good faith effort, in accordance with the criteria established pursuant to subdivision (b), prior to the time bids are opened, to comply with the goals and requirements established by the local agency relating to participation in the contract by minority or women business enterprises.

(b) (1) The bidder attended any presolicitation or prebid meetings that were scheduled by the local agency to inform all bidders of the minority and women business enterprise program requirements for the project for which the contract will be awarded. A local agency may waive this requirement if it determines that the bidder is informed as to those program requirements.

(2) The bidder identified and selected specific items of the project for which the contract will be awarded to be performed by minority or women business enterprises to provide an opportunity

for participation by those enterprises.

(3) The bidder advertised, not less than 10 calendar days before the date the bids are opened, in one or more daily or weekly newspapers, trade association publications, minority or trade oriented publications, trade journals, or other media, specified by the local agency for minority or women business enterprises that are interested in participating in the project. This paragraph applies only if the local agency gave public notice of the project not less than 15 calendar days prior to the date the bids are opened.

(4) The bidder provided written notice of his or her interest in bidding on the contract to the number of minority or women business enterprises required to be notified by the project specifications not less than 10 calendar days prior to the opening of bids. To the extent possible, the local agency shall make available to the bidder not less than 15 calendar days prior to the date the bids are opened a list or a source of lists of enterprises which are certified by the local agency as minority or women business enterprises. If the local agency does not provide that list or source of lists to the bidder, the bidder may utilize the list of certified minority or women business enterprises prepared by the Department of Transportation pursuant to Section 14030.5 of the Government Code for this purpose.

(5) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested in performing specific items of the project.

(6) The bidder provided interested minority and women business enterprises with information about the plans, specifications, and requirements for the selected subcontracting or material supply work.

(7) The bidder requested assistance from minority and women community organizations; minority and women contractor groups; local, state, or federal minority and women business assistance offices; or other organizations that provide assistance in the recruitment and placement of minority or women business enterprises, if any are available.

(8) The bidder negotiated in good faith with the minority or women business enterprises, and did not unjustifiably reject as unsatisfactory bids prepared by any minority or women business enterprises, as determined by the local agency.

(9) Where applicable, the bidder advised and made efforts to assist interested minority and women business enterprises in obtaining bonds, lines of credit, or insurance required by the local agency or contractor.

(10) The bidder's efforts to obtain minority and women business enterprise participation could reasonably be expected by the local agency to produce a level of participation sufficient to meet the goals and requirements of the local agency.

(c) The performance by a bidder of all of the criteria specified in

subdivision (b) shall create a rebuttable presumption, affecting the burden of producing evidence, that a bidder has made a good faith effort to comply with the goals and requirements relating to participation by minority and women business enterprises established pursuant to subdivision (a).

(d) "Local agency," as used in this section, means a county or city, whether general law or chartered, city and county, school district, or other district. "District," as used in this section, means an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.

(e) "Minority or women business enterprise," as used in this section, means a business enterprise that meets both of the following criteria:

(1) A business that is at least 51 percent owned by one or more minority persons or women or, in the case of any business whose stock is publicly held, at least 51 percent of the stock is owned by one or more minority persons or women.

(2) A business whose management and daily business operations are controlled by one or more minority persons or women.

(f) "Minority person," for purposes of this section, means Black Americans, Hispanic Americans, Native Americans (including American Indians, Eskimos, Aleuts, and Native Hawaiians), Asian-Pacific Americans (including persons whose origins are from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the United States Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, and Taiwan), or any other group of natural persons identified as minorities in the project specifications by the local agency.

(g) This section does not apply to any of the following:

(1) Any contract, funded in whole or in part by the federal government, to the extent of any conflict between the requirements imposed by this section and any requirements imposed by the federal government relating to participation in a contract by a minority or women business enterprise as a condition of receipt of the federal funds.

(2) The San Francisco Bay Area Rapid Transit District, the Los Angeles County Transportation Commission, or any other local agency that has authority to facilitate the participation of minority or women business enterprises substantially similar to the authority granted to the San Francisco Bay Area Rapid Transit District pursuant to Section 20229 of this code or the Los Angeles County Transportation Commission pursuant to Section 130239 of the Public Utilities Code.

SEC. 2. Section 20111 of the Public Contract Code is amended to read:

20111. The governing board of any school district, in accordance with any requirement established by that governing board pursuant to subdivision (a) of Section 2000, shall let any contracts involving an

expenditure of more than fifteen thousand dollars ($15,000) for work to be done or more than twenty-one thousand dollars ($21,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.

CHAPTER 1408

An act to amend Sections 65858, 66435, 66435.1, 66443, 66452.5, and 66484 of, and to repeal Section 65858 of, and to repeal Chapter 13 (commencing with Section 4590) and Chapter 14 (commencing with Section 4600) of Division 5 of Title 1 of, the Government Code, and to add Part 4 (commencing with Section 22200) to, and to add and repeal Part 5 (commencing with Section 22300) of, Division 2 of, the Public Contract Code, relating to government.

[Approved by Governor September 26, 1988. Filed with Secretary of State September 27, 1988.]

The people of the State of California do enact as follows:

SECTION 1. Chapter 13 (commencing with Section 4590) of Division 5 of Title 1 of the Government Code is repealed.

SEC. 2. Chapter 14 (commencing with Section 4600) of Division 5 of Title 1 of the Government Code is repealed.

SEC. 3. Section 65858 of the Government Code as amended by Section 24 of Chapter 1009 of the Statutes of 1984, is amended to read:

65858. (a) Without following the procedures otherwise required prior to the adoption of a zoning ordinance, the legislative body, to protect the public safety, health and welfare, may adopt as an urgency measure an interim ordinance prohibiting any uses which may be in conflict with a contemplated general plan, specific plan, or zoning proposal which the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time. That urgency measure shall require a four-fifths vote of the legislative body for adoption. The interim ordinance shall be of no further force and effect 45 days from its date of adoption. After notice pursuant to Section 65090 and public hearing, the legislative body may extend the interim ordinance for 10 months and 15 days and subsequently extend the interim ordinance for one year. Any extension shall also require a four-fifths vote for adoption. Not more than two extensions may be adopted.

(b) Alternatively, an interim ordinance may be adopted by a four-fifths vote following notice pursuant to Section 65090 and public hearing, in which case it shall be of no further force and effect 45 days from its date of adoption. After notice pursuant to Section 65090 and public hearing, the legislative body may by a four-fifths vote extend the interim ordinance for 22 months and 15 days.

(c) The legislative body shall not adopt or extend any interim ordinance pursuant to this section unless the ordinance contains a finding that there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional subdivisions, use permits, variances, building permits, or any other applicable entitlement for use which is required in order to comply with a zoning ordinance would result in a threat to public health,

(k) Nothing in this section precludes a county or city from providing funds for the construction of bridge facilities or major thoroughfares to defray costs not allocated to the area of benefit.

SEC. 10. Part 4 (commencing with Section 22200) is added to Division 2 of the Public Contract Code, to read:

PART 4. ARBITRATION OF PUBLIC WORKS CONTRACT CLAIMS

22200. As used in this part:

(a) "Public works contract" means, except for a contract awarded pursuant to the State Contract Act (Part 2 (commencing with Section 10100)), a contract awarded through competitive bids or otherwise by the state, any of its political subdivisions or public agencies for the erection, construction, alteration, repair, or improvement of any kind upon real property.

(b) "Claim" means a demand for monetary compensation or damages, arising under or relating to the performance of any public works contract.

22201. Unless otherwise prohibited by law, the terms of any public works contract may include at the time of bidding and of award a provision for arbitration of any claim pursuant to Article 7.1 (commencing with Section 10240) of Chapter 1 of Part 2.

SEC. 11. Part 5 (commencing with Section 22300) is added to Division 2 of the Public Contract Code, to read:

PART 5. WITHHELD CONTRACT FUNDS

22300. Provisions shall be included in any invitation for bid and in any contract documents to permit the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract, provided that substitution of securities provisions shall not be required in contracts in which there will be financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. Sec. 1921 et seq.), and where federal regulations or policies, or both, do not allow the substitution of securities. At the request and expense of the contractor, securities equivalent to the amount withheld shall be deposited with the public agency, or with a state or federally chartered bank as the escrow agent, who shall then pay such moneys to the contractor. Upon satisfactory completion of the contract, the securities shall be returned to the contractor.

Securities eligible for investment under this section shall include those listed in Section 16430 of the Government Code, bank or savings and loan certificates of deposit, interest bearing demand deposit accounts, standby letters of credit, or any other security mutually agreed to by the contractor and the public agency.

The contractor shall be the beneficial owner of any securities

substituted for moneys withheld and shall receive any interest thereon.

Failure to include these provisions in bid and contract documents shall void any provisions for performance retentions in a public agency contract.

For purposes of this section, the term "public agency" shall include, but shall not be limited to, chartered cities.

The Legislature hereby declares that the provisions of this section are of statewide concern and are necessary to encourage full participation by contractors in public contract procedures.

The escrow agreement used hereunder shall be null, void, and unenforceable unless it is substantially similar to the following form:

ESCROW AGREEMENT FOR
SECURITY DEPOSITS IN LIEU OF RETENTION

This Escrow Agreement is made and entered into by and between _____ whose address is _____ _____ hereinafter called "Owner," _____ whose address is _____ _____ hereinafter called "Contractor" and _____ whose address is _____ _____ hereinafter called "Escrow Agent."

For the consideration hereinafter set forth, the Owner, Contractor, and Escrow Agent agree as follows:

(1) Pursuant to Section 22200 of the Public Contract Code of the State of California, Contractor has the option to deposit securities with Escrow Agent as a substitute for retention earnings required to be withheld by Owner pursuant to the Construction Contract entered into between the Owner and Contractor for _____ in the amount of _____ dated _____ (hereinafter referred to as the "Contract"). When Contractor deposits the securities as a substitute for Contract earnings, the Escrow Agent shall notify the Owner within 10 days of the deposit. The market value of the securities at the time of the substitution shall be at least equal to the cash amount then required to be withheld as retention under the terms of the Contract between the Owner and Contractor. Securities shall be held in the name of _____, and shall designate the Contractor as the beneficial owner.

(2) The Owner shall make progress payments to the Contractor for such funds which otherwise would be withheld from progress payments pursuant to the Contract provisions, provided that the Escrow Agent holds securities in the form and amount specified above.

(3) Alternatively, the Owner may make payments directly to Escrow Agent in the amount of retention for the benefit of the Owner until such time as the escrow created hereunder is

terminated.

(4) Contractor shall be responsible for paying all fees for the expenses incurred by Escrow Agent in administering the escrow account. These expenses and payment terms shall be determined by the Contractor and Escrow Agent.

(5) The interest earned on the securities or the money market accounts held in escrow and all interest earned on that interest shall be for the sole account of Contractor and shall be subject to withdrawal by Contractor at any time and from time to time without notice to the Owner.

(6) Contractor shall have the right to withdraw all or any part of the principal in the Escrow Account only by written notice to Escrow Agent accompanied by written authorization from Owner to the Escrow Agent that Owner consents to the withdrawal of the amount sought to be withdrawn by Contractor.

(7) The Owner shall have a right to draw upon the securities in the event of default by the contractor. Upon seven days' written notice to the escrow agent from the owner of the default, the escrow agent shall immediately convert the securities to cash and shall distribute the cash as instructed by the Owner.

(8) Upon receipt of written notification from the Owner certifying that the Contract is final and complete, and that the Contractor has complied with all requirements and procedures applicable to the Contract, Escrow Agent shall release to Contractor all securities and interest on deposit less escrow fees and charges of the Escrow Account. The escrow shall be closed immediately upon disbursement of all moneys and securities on deposit and payments of fees and charges.

(9) Escrow Agent shall rely on the written notifications from the Owner and the Contractor pursuant to Sections (4) to (6), inclusive, of this agreement and the Owner and Contractor shall hold Escrow Agent harmless from Escrow Agent's release and disbursement of the securities and interest as set forth above.

(10) The names of the persons who are authorized to give written notice or to receive written notice on behalf of the Owner and on behalf of Contractor in connection with the foregoing, and exemplars of their respective signatures are as follows:

On behalf of Owner:	On behalf of Contractor:
Title	Title
Name	Name
Signature	Signature
Address	Address

139590

On behalf of Escrow Agent:

Title

Name

Signature

Address

At the time the Escrow Account is opened, the Owner and Contractor shall deliver to the Escrow Agent a fully executed counterpart of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement by their proper officers on the date first set forth above.

Owner	Contractor
Title	Title
Name	Name
Signature	Signature

This part shall remain in effect only until January 1, 1992, and as of that date is repealed, unless a later enacted statute, which is chaptered on or before January 1, 1992, deletes or extends that date.

SEC. 12. The transfer of provisions of law from the Government Code to the Public Contract Code made by Sections 1, 2, 10, and 11 of this act does not constitute a change in, but is declaratory of, the existing law.

SEC. 13. The Legislature finds and declares that unique circumstances exist in the unincorporated area of San Diego County which require a different definition of "construction" in Section 66484 of the Government Code amended by Section 9 of this act and that a general statute cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitution.

SEC. 14. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because self-financing authority is provided in Section 66451.2 of the Government Code and because this act affirms for the state that which has been declared existing law or regulated by action of the courts to cover any costs that may be incurred in carrying on any program or performing any service required to be carried on or performed by this act.

139660

CHAPTER 330

An act to add Section 7104 to the Public Contract Code, relating to public works.

[Approved by Governor September 8, 1989. Filed with Secretary of State September 8, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 7104 is added to the Public Contract Code, to read:

7104. Any public works contract of a local public entity which involves digging trenches or other excavations that extend deeper than four feet below the surface shall contain a clause which provides the following:

(a) That the contractor shall promptly, and before the following conditions are disturbed, notify the public entity, in writing, of any:

(1) Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.

(2) Subsurface or latent physical conditions at the site differing from those indicated.

(3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

(b) That the public entity shall promptly investigate the

conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work shall issue a change order under the procedures described in the contract.

(c) That, in the event that a dispute arises between the public entity and the contractor whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor's cost of, or time required for, performance of any part of the work, the contractor shall not be excused from any scheduled completion date provided for by the contract, but shall proceed with all work to be performed under the contract. The contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties.

CHAPTER 863

An act to add Section 7028.15 to the Business and Professions Code, relating to contractors.

[Approved by Governor September 25, 1989. Filed with Secretary of State September 26, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 7028.15 is added to the Business and Professions Code, to read:

7028.15. (a) It is a misdemeanor for any person to submit a bid to a public agency in order to engage in the business or act in the capacity of a contractor within this state without having a license therefor, except in any of the following cases:

(1) The person is particularly exempted from the provisions of this chapter.

(2) The bid is submitted on a state project governed by Section 10164 of the Public Contract Code.

(b) If a person has been previously convicted of the offense described in this section, the court shall impose a fine of 20 percent of the price of the contract under which the unlicensed person performed contracting work, or four thousand five hundred dollars ($4,500), whichever is greater, or imprisonment in the county jail for not less than 10 days nor more than six months, or both.

In the event the person performing the contracting work has agreed to furnish materials and labor on an hourly basis, "the price of the contract" for the purposes of this subdivision means the aggregate sum of the cost of materials and labor furnished and the

cost of completing the work to be performed.

(c) This section shall not apply to a joint venture license, as required by Section 7029.1. However, at the time of making a bid as a joint venture, each person submitting the bid shall be subject to this section with respect to his or her individual licensure.

(d) This section shall not affect the right or ability of a licensed architect or registered professional engineer to form joint ventures with licensed contractors to render services within the scope of their respective practices.

(e) A licensed contractor shall not submit a bid to a public agency unless his or her contractor's license number appears clearly on the bid, the license expiration date is stated, and the bid contains a statement that the representations made therein are made under penalty of perjury. Any bid not containing this information, or a bid containing information which is subsequently proven false, shall be considered nonresponsive and shall be rejected by the public agency.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

CHAPTER 1163

An act to amend Sections 20111, 20129, 20192, and 20405 of, to add Sections 20107, 20189, 20201.5, 20204.3, 20214, 20224.5, 20234, 20242, 20251.5, 20262, 20274, 20284, 20294, 20302, 20314, 20322, 20332, 20342, 20352, 20374, 20392.5, 20471.5, 20522, 20551.5, 20564.5, 20584.5, 20602.5, 20624, 20633.5, 20642.5, 20651.5, 20685.5, 20688.25, 20694.5, 20724, 20737, 20752.2, 20761.5, 20784, 20804.5, 20832.5, 20843.5, 20893.5, and 20916.5 to, to add Article 60.5 (commencing with Section 20920) to Chapter 1.5 of Part 3 of Division 2 of, and to repeal and add Sections 20413, 20483, 20501, 20512, 20532, 20674, and 20867 of, the Public Contract Code, and to amend Section 130232 of the Public Utilities Code, relating to public contracts.

[Approved by Governor September 29, 1989. Filed with Secretary of State September 30, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 20107 is added to the Public Contract Code, to read:

20107. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the school district.

(c) A certified check made payable to the school district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the school district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the school district beyond 60 days from the time the award is made.

SEC. 2. Section 20111 of the Public Contract Code is amended to read:

20111. (a) The governing board of any school district, in accordance with any requirement established by that governing board pursuant to subdivision (a) of Section 2000, shall let any contracts involving an expenditure of more than fifteen thousand dollars ($15,000) for work to be done or more than twenty-one thousand dollars ($21,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give security as the board requires, or else reject all bids.

(b) All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(1) Cash.

(2) A cashier's check made payable to the school district.

(3) A certified check made payable to the school district.

(4) A bidder's bond executed by an admitted surety insurer, made payable to the school district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the school district beyond 60 days from the time the award is made.

(c) This section applies to all materials and supplies whether patented or otherwise.

SEC. 3. Section 20129 of the Public Contract Code is amended to read:

20129. (a) All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(1) Cash.

(2) A cashier's check made payable to the county.

(3) A certified check made payable to the county.

(4) A bidder's bond executed by an admitted surety insurer, made payable to the county.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the county beyond 60 days from the time the award is made.

(b) The person to whom the contract is awarded shall execute a bond to be approved by the board for the faithful performance of the contract.

SEC. 4. Section 20189 is added to the Public Contract Code, to read:

20189. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the local agency.

(c) A certified check made payable to the local agency.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the local agency.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the local agency beyond 60 days from the time the award is made.

SEC. 5. Section 20192 of the Public Contract Code is amended to read:

20192. (a) Whenever the cost of construction of any office building, warehouse, or garage of the district constructed under Section 20191 exceeds the sum of two thousand dollars ($2,000), the district shall adopt plans and specifications and working details, as may be proper, and shall advertise for bids for the work in accordance with the plans and specifications so adopted. All bidders shall be afforded an opportunity to examine the plans and specifications and the district shall award the contract to the lowest responsible bidder.

(b) All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(1) Cash.
(2) A cashier's check made payable to the district.
(3) A certified check made payable to the district.
(4) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

(c) The person or corporation to whom the contract is awarded shall be required to execute a bond for the faithful performance of the contract. The form of the bond shall be approved by the board of directors. In cases of great emergency and when necessary to protect life and property, the board of directors, by unanimous vote of all members present, may without advertising for bids therefor, have the work done by day labor.

SEC. 6. Section 20201.5 is added to the Public Contract Code, to read:

20201.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.
(b) A cashier's check made payable to the district.
(c) A certified check made payable to the district.
(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 7. Section 20204.3 is added to the Public Contract Code, to read:

20204.3. All bids submitted pursuant to this article shall be presented under sealed cover and shall be accompanied by one of the following forms of security:

(a) Cash.
(b) A cashier's check made payable to the district.
(c) A certified check made payable to the district.
(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 8. Section 20214 is added to the Public Contract Code, to read:

20214. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.
(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 9. Section 20224.5 is added to the Public Contract Code, to read:

20224.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 10. Section 20234 is added to the Public Contract Code, to read:

20234. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 11. Section 20242 is added to the Public Contract Code, to read:

20242. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 12. Section 20251.5 is added to the Public Contract Code, to read:

20251.5. All bids shall be presented under sealed cover and shall

be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 13. Section 20262 is added to the Public Contract Code, to read:

20262. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 14. Section 20274 is added to the Public Contract Code, to read:

20274. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 15. Section 20284 is added to the Public Contract Code, to read:

20284. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 16. Section 20294 is added to the Public Contract Code, to read:

20294. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 17. Section 20302 is added to the Public Contract Code, to read:

20302. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 18. Section 20314 is added to the Public Contract Code, to read:

20314. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 19. Section 20322 is added to the Public Contract Code, to read:

20322. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful

bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 20. Section 20332 is added to the Public Contract Code, to read:

20332. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 21. Section 20342 is added to the Public Contract Code, to read:

20342. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the board.

(c) A certified check made payable to the board.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the board.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the board beyond 60 days from the time the award is made.

SEC. 22. Section 20352 is added to the Public Contract Code, to read:

20352. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the board.

(c) A certified check made payable to the board.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the board.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the board beyond 60 days from the time the award is made.

SEC. 23. Section 20374 is added to the Public Contract Code, to read:

20374. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 24. Section 20392.5 is added to the Public Contract Code, to read:

20392.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the county.

(c) A certified check made payable to the county.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the county.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the county beyond 60 days from the time the award is made.

SEC. 25. Section 20405 of the Public Contract Code is amended to read:

20405. (a) The board shall afford all bidders an opportunity to examine the plans, specifications, and working details, and shall award the contract to the lowest responsible bidder. The board may provide by resolution that the bids be opened, examined, and declared by an officer designated in the resolution. The resolution shall require that the bids be opened at a public meeting called by the officer and that the results of the bidding be reported to the board at a subsequent regular board meeting. The notice inviting bids shall state the time and place of the public meeting and the name of the designated officer.

(b) All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(1) Cash.

(2) A cashier's check made payable to the county.

(3) A certified check made payable to the county.

(4) A bidder's bond executed by an admitted surety insurer, made payable to the county.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the county beyond 60 days from the time the award is made.

(c) The person to whom the contract is awarded shall execute a bond, approved by the board for the faithful performance of the contract. The person shall perform the work in accordance with the plans, specifications, and working details, unless all or any of them are modified by a four-fifths vote of the members of the board. In that case, if the cost of the work is reduced by reason of the modification, the person to whom the contract is awarded shall make

an allowance on the contract price to the extent of the reduction.

SEC. 26. Section 20413 of the Public Contract Code is repealed.

SEC. 27. Section 20413 is added to the Public Contract Code, to read:

20413. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the city.

(c) A certified check made payable to the city.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the city.

The security shall be in an amount equal to at least 10 percent of the amount of the bid. No bid shall be considered unless one of the forms of bidder's security is enclosed with it.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the city beyond 60 days from the time the award is made.

SEC. 28. Section 20471.5 is added to the Public Contract Code, to read:

20471.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidders security:

(a) Cash.

(b) A cashier check made payable to the commission.

(c) A certified check made payable to the commission.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the commission.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the commission beyond 60 days from the time the award is made.

SEC. 29. Section 20483 of the Public Contract Code is repealed.

SEC. 30. Section 20483 is added to the Public Contract Code, to read:

20483. (a) All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security which amounts to 10 percent of the bid:

(1) Cash.

(2) A cashier's check made payable to the legislative body.

(3) A certified check made payable to the legislative body.

(4) A bidder's bond executed by an admitted surety insurer, made payable to the legislative body.

The amount so posted shall be forfeited to the municipality if the bidder does not, within 15 days after written notice that the contract has been awarded to the bidder, enter into a contract with the municipality for the work. Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the legislative body beyond 60 days from the time the award is made.

(b) The faithful performance of the contract shall be secured by an undertaking in that penal sum as the legislative body requires, but not less than 25 percent of the contract price, satisfactory to the legislative body. When the proceedings include the acquisition or construction of works, appliances, or improvements to be owned, managed or controlled by a public agency other than the municipality making the acquisitions or ordering the work done, the legislative body of the municipality may require that the undertaking also inure to the benefit of the public agency to the extent of its interest in the entire project. The contractor shall also furnish a labor and material bond as required by law in a sum not less than 50 percent of the contract price.

SEC. 31. Section 20501 of the Public Contract Code is repealed.

SEC. 32. Section 20501 is added to the Public Contract Code, to read:

20501. (a) The city council shall, within 10 days after the establishment of the district, invite bids for the making of the improvement by ordering a notice of the invitation to be published by two successive insertions in a daily or weekly newspaper published or circulated in the city and designated by the city council for that purpose. However, if the city council determines that there is only one contractor practically capable of serving the street lighting system to be improved in the manner provided in the plans and specifications contained in the report provided for in Chapter 3 (commencing with Section 18040) of Part 1 of Division 14 of the Streets and Highways Code and that the contractor is subject to the jurisdiction of the Public Utilities Commission of the State of California, the city council may, in its discretion, without competitive bidding, order the improvement to be carried out by the contractor in accordance with rates and rules filed by it from time to time with the Public Utilities Commission.

(b) All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security which amounts to 10 percent of the bid:

(1) Cash.

(2) A cashier's check made payable to the city.

(3) A certified check made payable to the city.

(4) A bidder's bond executed by an admitted surety insurer, made payable to the city.

The security shall be forfeited to the city in case the bidder depositing it does not, within 15 days after the notice that the contract has been awarded to him or her, enter into a contract with the city for making the improvement, the faithful performance of which shall be secured by an undertaking in those penal sums as the city council shall require, with sureties satisfactory to that body. In any case where competitive bidding is required, the contract shall be awarded to the lowest responsible bidder. Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that

security be held by the city beyond 60 days from the time the award is made.

SEC. 33. Section 20512 of the Public Contract Code is repealed.

SEC. 34. Section 20512 is added to the Public Contract Code, to read:

20512. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security which amounts to 10 percent of the bid:

(a) Cash.

(b) A cashier's check made payable to the city.

(c) A certified check made payable to the city.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the city.

The check or bond shall be forfeited to the city if the bidder depositing it does not within 10 days after the publication of a notice of award of the contract to him or her, enter into the necessary contract with the city. Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the city beyond 60 days from the time the award is made.

SEC. 35. Section 20522 is added to the Public Contract Code, to read:

20522. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessul bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 36. Section 20532 of the Public Contract is repealed.

SEC. 37. Section 20532 is added to the Public Contract Code, to read:

20532. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 38. Section 20551.5 is added to the Public Contract Code, to read:

20551.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 39. Section 20564.5 is added to the Public Contract Code, to read:

20564.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 40. Section 20584.5 is added to the Public Contract Code, to read:

20584.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 41. Section 20602.5 is added to the Public Contract Code, to read:

20602.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from

the time the award is made.

SEC. 42. Section 20624 is added to the Public Contract Code, to read:

20624. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 43. Section 20633.5 is added to the Public Contract Code, to read:

20633.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 44. Section 20642.5 is added to the Public Contract Code, to read:

20642.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 45. Section 20651.5 is added to the Public Contract Code, to read:

20651.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 46. Section 20674 of the Public Contract Code is repealed.

SEC. 47. Section 20674 is added to the Public Contract Code, to read:

20674. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the public entity.

(c) A certified check made payable to the public entity.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the public entity.

Any bid may be withdrawn at any time prior to the time fixed in the public notice for the opening of bids by written request for the withdrawal of the bid filed with the public leaseback corporation. The request shall be executed by the bidder or the bidder's duly authorized representative. The withdrawal of a bid does not prejudice the right of the bidder to submit a new bid. Whether or not bids are opened exactly at the time fixed in the public notice for opening bids, a bid shall not be received after that time.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the public entity beyond 60 days from the time the award is made.

SEC. 48. Section 20685.5 is added to the Public Contract Code, to read:

20685.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 49. Section 20688.25 is added to the Public Contract Code, to read:

20688.25. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the local agency.

(c) A certified check made payable to the local agency.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the agency.

Upon an award to the lowest bidder, the security of an unsuccessful

bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the local agency beyond 60 days from the time the award is made.

SEC. 50. Section 20694.5 is added to the Public Contract Code, to read:

20694.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the commission.

(c) A certified check made payable to the commission.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the commission.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the commission beyond 60 days from the time the award is made.

SEC. 51. Section 20724 is added to the Public Contract Code, to read:

20724. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 52. Section 20737 is added to the Public Contract Code, to read:

20737. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 53. Section 20752.2 is added to the Public Contract Code, to read:

20752.2. Notwithstanding Section 20751, all bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 54. Section 20761.5 is added to the Public Contract Code, to read:

20761.5. Notwithstanding Section 20761, all bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 55. Section 20784 is added to the Public Contract Code, to read:

20784. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 56. Section 20804.5 is added to the Public Contract Code, to read:

20804.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 57. Section 20832.5 is added to the Public Contract Code, to read:

20832.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 58. Section 20843.5 is added to the Public Contract Code, to read:

20843.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 59. Section 20867 of the Public Contract Code is repealed.

SEC. 60. Section 20867 is added to the Public Contract Code, to read:

20867. The legislative body shall award the contract for doing the work to the lowest responsible bidder. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the public entity.

(c) A certified check made payable to the public entity.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the public entity.

The bids shall be delivered, opened, and award of contract made, all as provided by Chapter 9 (commencing with Section 5240) of Part 3 of Division 7 of the Streets and Highways Code, except that no notice of award shall be published. Upon the award being made, the superintendent of streets shall enter into a contract with the person to whom the contract was awarded for doing the work described in the notice inviting bids, and at the price stated in the bid. The contractor shall execute a bond in the manner required by Section 5254 of the Streets and Highways Code.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the public entity beyond 60 days from the time the award is made.

SEC. 61. Section 20893.5 is added to the Public Contract Code, to read:

20893.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the local agency.

(c) A certified check made payable to the local agency.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the local agency.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the local agency beyond 60 days from the time the award is made.

SEC. 62. Section 20916.5 is added to the Public Contract Code, to read:

20916.5. All bids shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the district.

(c) A certified check made payable to the district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

SEC. 63. Article 60.5 (commencing with Section 20920) is added to Chapter 1.5 of Part 3 of Division 2 of the Public Contract Code, to read:

Article 60.5. Water District Contract Bids

20920. All bids requested by an agency or district covered by this chapter shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the agency or district.

(c) A certified check made payable to the agency or district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the agency or district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the agency or district beyond 60 days from the time the award is made.

SEC. 64. Section 130232 of the Public Utilities Code is amended to read:

130232. (a) The purchase of all supplies, equipment, and materials, and the construction of all facilities and works, when the expenditure required exceeds twenty-five thousand dollars

($25,000), shall be by contract let to the lowest responsible bidder. Notice requesting bids shall be published at least once in a newspaper of general circulation. The publication shall be made at least 10 days before the date for the receipt of the bids. The commission, at its discretion, may reject any and all bids and readvertise.

(b) Whenever the expected expenditure required exceeds one thousand dollars ($1,000), but not twenty-five thousand dollars ($25,000), the commission shall obtain a minimum of three quotations, either written or oral, which permit prices and terms to be compared.

(c) Where the expenditure required by the bid price is less than fifty thousand dollars ($50,000), the executive director may act for the commission.

(d) All bids submitted pursuant to this section shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(1) Cash.

(2) A cashier's check made payable to the commission.

(3) A certified check made payable to the commission.

(4) A bidder's bond executed by an admitted surety insurer, made payable to the commission.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the commission beyond 60 days from the time the award is made.

SEC. 65. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

CHAPTER 321

An act to amend Section 7028.15 of the Business and Professions Code, and to add Section 20104 to the Public Contract Code, relating to contractors, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor July 16, 1990. Filed with Secretary of State July 17, 1990.]

The people of the State of California do enact as follows:

SECTION 1. Section 7028.15 of the Business and Professions Code is amended to read:

7028.15. (a) It is a misdemeanor for any person to submit a bid to a public agency in order to engage in the business or act in the capacity of a contractor within this state without having a license therefor, except in any of the following cases:

(1) The person is particularly exempted from this chapter.

(2) The bid is submitted on a state project governed by Section 10164 of the Public Contract Code or on any local agency project governed by Section 20104 of the Public Contract Code.

(b) If a person has been previously convicted of the offense described in this section, the court shall impose a fine of 20 percent of the price of the contract under which the unlicensed person performed contracting work, or four thousand five hundred dollars ($4,500), whichever is greater, or imprisonment in the county jail for not less than 10 days nor more than six months, or both.

In the event the person performing the contracting work has agreed to furnish materials and labor on an hourly basis, "the price of the contract" for the purposes of this subdivision means the aggregate sum of the cost of materials and labor furnished and the cost of completing the work to be performed.

(c) This section shall not apply to a joint venture license, as required by Section 7029.1. However, at the time of making a bid as a joint venture, each person submitting the bid shall be subject to this section with respect to his or her individual licensure.

(d) This section shall not affect the right or ability of a licensed architect or registered professional engineer to form joint ventures with licensed contractors to render services within the scope of their

respective practices.

(e) Unless one of the foregoing exceptions applies, a bid submitted to a public agency by a contractor who is not licensed in accordance with this chapter shall be considered nonresponsive and shall be rejected by the public agency. Unless one of the foregoing exceptions applies, a local public agency shall, before awarding a bid, verify that the contractor was properly licensed when the contractor submitted the bid.

(f) Any compliance or noncompliance with subdivision (e) of this section, as added by Chapter 863 of the Statutes of 1989, shall not invalidate any contract or bid awarded by a public agency during which time that subdivision was in effect.

SEC. 2. Section 20104 is added to the Public Contract Code, to read:

20104. In all contracts subject to this part where federal funds are involved, no bid submitted shall be invalidated by the failure of the bidder to be licensed in accordance with the laws of this state. However, at the time the contract is awarded, the contractor shall be properly licensed in accordance with the laws of this state. The first payment for work or material under any contract shall not be made unless and until the Registrar of Contractors verifies to the agency that the records of the Contractors' State License Board indicate that the contractor was properly licensed at the time the contract was awarded. Any bidder or contractor not so licensed shall be subject to all legal penalties imposed by law, including, but not limited to, any appropriate disciplinary action by the Contractors' State License Board. The agency shall include a statement to that effect in the standard form of prequalification questionnaire and financial statement. Failure of the bidder to obtain proper and adequate licensing for an award of a contract shall constitute a failure to execute the contract and shall result in the forfeiture of the security of the bidder.

SEC. 3. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to avoid the continued disruption of the process of bidding

for public works contracts, it is necessary for this act to take effect immediately.

CHAPTER 694

An act to amend Section 4550 of, to repeal Sections 980, and 4551 of, and to repeal Chapter 2.5 (commencing with Section 4150) of Division 5 of Title 1 of, the Government Code, and to amend Sections 20102, 20150.10, 20341, 22038, and 22039 of, to add Sections 7103, 7104, 9202, and 9203 to, and to repeal Section 20103 of, the Public Contract Code, relating to public projects.

[Approved by Governor September 10, 1990. Filed with Secretary of State September 12, 1990.]

The people of the State of California do enact as follows:

SECTION 1. Section 980 of the Government Code is repealed.

SEC. 2. Chapter 2.5 (commencing with Section 4150) of Division 5 of Title 1 of the Government Code is repealed.

SEC. 3. Section 4550 of the Government Code is amended to read:

4550. As used in this chapter:

(a) "Public purchase" means a purchase by means of competitive bids of goods, services, or materials by the state or any of its political subdivisions or public agencies on whose behalf the Attorney General may bring an action pursuant to subdivision (c) of Section 16750 of the Business and Professions Code.

(b) "Public purchasing body" means the state or the subdivision or agency making a public purchase.

SEC. 4. Section 4551 of the Government Code is repealed.

SEC. 5. Section 7103 is added to the Public Contract Code, to read:

7103. (a) As used in this section:

(1) "Public works contract" means a contract awarded through competitive bids by the state or any of its political subdivisions or public agencies, on whose behalf the Attorney General may bring an action pursuant to subdivision (c) of Section 16750 of the Business and Professions Code, for the erection, construction, alteration, repair, or improvement of any structure, building, road, or other improvement of any kind.

(2) "Awarding body" means the state or the subdivision or agency awarding a public works contract.

(b) In entering into a public works contract or a subcontract to supply goods, services, or materials pursuant to a public works contract, the contractor or subcontractor offers and agrees to assign to the awarding body all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, services, or materials pursuant to the public works contract or the subcontract. This assignment shall be made and become effective at the time the awarding body tenders final payment to the contractor, without further acknowledgment by the parties.

(c) The provisions of subdivision (b) shall be included in full in the specifications for the public works contract or in the general provisions incorporated therein and shall be included in full in the public works contract or in the general provisions incorporated therein.

SEC. 6. Section 7104 is added to the Public Contract Code, to read:

7104. (a) Construction contracts of public agencies shall not require the contractor to be responsible for the cost of repairing or

provision providing for the termination.

(3) Contracts of public agencies may include provisions for termination for environmental considerations at the discretion of the public agencies.

SEC. 7. Section 9202 is added to the Public Contract Code, to read:

9202. (a) Whenever a request for payment from the state or a local entity pursuant to the terms of a contract for the construction of a public works project, as defined in Section 1720 of the Labor Code, is properly filed and the validity of the claim is not disputed or has been settled or agreed upon, payment of the claim by the disbursing officer of the state or local public entity shall include interest at the legal rate of 7 percent per annum commencing on the date upon which the claim was submitted if payment has not been made by the 60th day after the proper submission of the claim.

(b) If a request for payment has not been properly filed at an earlier date, then the request shall be deemed to be properly filed on the next business day after the contractor provides written notification to the public entity's designated jobsite representative that the contractor accepts the proposed final estimate as prepared by the public entity. This subdivision shall not apply to the California State University.

SEC. 8. Section 9203 is added to the Public Contract Code, to read:

9203. Payment on any contract with a local agency for the creation, construction, alteration, repair, or improvement of any public structure, building, road, or other improvement, of any kind which will exceed in cost a total of five thousand dollars ($5,000), shall be made as the legislative body prescribes upon estimates approved by the legislative body, but progress payments shall not be made in excess of 95 percent of the percentage of actual work completed plus a like percentage of the value of material delivered on the ground or stored subject to, or under the control of, the local agency, and unused. The local agency shall withhold not less than 5 percent of the contract price until final completion and acceptance of the project. However, at any time after 50 percent of the work has been completed, if the legislative body finds that satisfactory progress is being made, it may make any of the remaining progress payments in full for actual work completed.

SEC. 9. Section 20102 of the Public Contract Code is amended to read:

20102. Notwithstanding any other provision of this part to the contrary, where plans and specifications have been prepared by a public agency, whose activities are subject to this part, in order for a public project to be put out for formal or informal bid, and, subsequently, the public agency elects to perform the work by day's labor, the public agency shall perform the work in strict accordance with these same plans and specifications.

Revisions of the plans and specifications may be made once a

justification detailing the specific reasons for the change or changes has been approved by the public agency or its project director and a copy of the change and its justification is placed in the project file.

SEC. 10. Section 20103 of the Public Contract Code is repealed.

SEC. 11. Section 20341 of the Public Contract Code is amended to read:

20341. (a) Contracts for construction in excess of twenty thousand dollars ($20,000) shall be awarded to the lowest responsible bidder submitting a responsive bid after competitive bidding, except in emergency declared by the vote of two-thirds of the membership of the board. When the expected construction contract exceeds one thousand dollars ($1,000) and does not exceed twenty thousand dollars ($20,000), the board shall seek a minimum of three quotations, either written or oral, which permit prices and other terms to be compared.

(b) If no bids are received, the project may be performed by a negotiated contract.

SEC. 12. Section 20150.10 of the Public Contract Code is amended to read:

20150.10. Notwithstanding the provisions of Section 20150.9, on any project which is less than seventy-five thousand dollars ($75,000), if, after the first invitation for bids, all bids are rejected, the county may, after reevaluating its cost estimates of the project, pass a resolution by a four-fifths vote of its board of supervisors declaring that the project can be performed more economically by county personnel, or that in its opinion a contract to perform the project can be negotiated with the original bidders at a lower price than that in any of the bids, or the materials or supplies furnished at a lower price in the open market. Upon adoption of the resolution, it may have the project done in the manner stated without further complying with this article.

SEC. 13. Section 22038 of the Public Contract Code is amended to read:

22038. (a) In its discretion, the public agency may reject any bids presented. If after the first invitation of bids all bids are rejected, after reevaluating its cost estimates of the project, the public agency shall have the option of either of the following:

(1) Abandoning the project or readvertising for bids in the manner described by this article.

(2) By passage of a resolution by a four-fifths vote of its governing body declaring that the project can be performed more economically by the employees of the public agency, may have the project done by force account without further complying with this article.

(b) If a contract is awarded, it shall be awarded to the lowest responsible bidder. If two or more bids are the same and the lowest, the public agency may accept the one it chooses.

(c) If no bids are received through the formal or informal procedure, the project may be performed by the employees of the public agency by force account, or negotiated contract without

further complying with this article.

This section shall become operative on January 1, 1991.

SEC. 14. Section 22039 of the Public Contract Code is amended to read:

22039. The governing body of the public agency shall adopt plans, specifications, and working details for all public projects exceeding the amount specified in subdivision (c) of Section 22032.

SEC. 15. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

CHAPTER 808

An act to amend Sections 20107, 20111, 20129, 20189, 20192, 20201.5, 20204.3, 20214, 20224.5, 20234, 20242, 20251.5, 20262, 20274, 20284, 20294, 20302, 20314, 20322, 20332, 20342, 20352, 20374, 20392.5, 20405, 20413, 20471.5, 20483, 20501, 20512, 20522, 20532, 20551.5, 20564.5, 20584.5, 20602.5, 20624, 20633.5, 20642.5, 20651.5, 20674, 20685.5, 20688.25, 20694.5, 20724, 20737, 20752.2, 20761.5, 20784, 20804.5, 20832.5, 20843.5, 20867, 20893.5, 20916.5, and 20920 of the Public Contract Code, and to amend Section 130232 of the Public Utilities Code, relating to public contracts.

[Approved by Governor September 12, 1990. Filed with Secretary of State September 14, 1990.]

The people of the State of California do enact as follows:

SECTION 1. Section 20107 of the Public Contract Code is amended to read:

20107. All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the school district.

(c) A certified check made payable to the school district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the school district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the school district beyond 60 days from the time the award is made.

SEC. 4. Section 20111 of the Public Contract Code is amended to read:

20111. (a) The governing board of any school district, in accordance with any requirement established by that governing board pursuant to subdivision (a) of Section 2000, shall let any contracts involving an expenditure of more than fifteen thousand dollars ($15,000) for work to be done or more than twenty-one thousand dollars ($21,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give security as the board requires, or else reject all bids.

(b) All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(1) Cash.

(2) A cashier's check made payable to the school district.
(3) A certified check made payable to the school district.
(4) A bidder's bond executed by an admitted surety insurer, made payable to the school district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the school district beyond 60 days from the time the award is made.

(c) This section applies to all materials and supplies whether patented or otherwise.

SEC. 5. Section 20129 of the Public Contract Code is amended to read:

20129. (a) All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:
(1) Cash.
(2) A cashier's check made payable to the county.
(3) A certified check made payable to the county.
(4) A bidder's bond executed by an admitted surety insurer, made payable to the county.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the county beyond 60 days from the time the award is made.

(b) The person to whom the contract is awarded shall execute a bond to be approved by the board for the faithful performance of the contract.

SEC. 6. Section 20189 of the Public Contract Code is amended to read:

20189. All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:
(a) Cash.
(b) A cashier's check made payable to the local agency.
(c) A certified check made payable to the local agency.
(d) A bidder's bond executed by an admitted surety insurer, made payable to the local agency.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the local agency beyond 60 days from the time the award is made.

SEC. 7. Section 20192 of the Public Contract Code is amended to read:

20192. (a) Whenever the cost of construction of any office building, warehouse, or garage of the district constructed under Section 20191 exceeds the sum of two thousand dollars ($2,000), the district shall adopt plans and specifications and working details, as may be proper, and shall advertise for bids for the work in accordance with the plans and specifications so adopted. All bidders

be compared.

(c) Where the expenditure required by the bid price is less than fifty thousand dollars ($50,000), the executive director may act for the commission.

(d) All bids for construction work submitted pursuant to this section shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(1) Cash.

(2) A cashier's check made payable to the commission.

(3) A certified check made payable to the commission.

(4) A bidder's bond executed by an admitted surety insurer, made payable to the commission.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the commission beyond 60 days from the time the award is made.

CHAPTER 1414

An act to amend Section 20207.7 of, to amend and renumber Section 20104 of, and to add and repeal Article 1.5 (commencing with Section 20104) of Chapter 1 of Part 3 of Division 2 of, the Public Contract Code, relating to public construction.

[Approved by Governor September 27, 1990. Filed with Secretary of State September 28, 1990.]

The people of the State of California do enact as follows:

SECTION 1. Section 20104 of the Public Contract Code is amended and renumbered to read:

20103.5. In all contracts subject to this part where federal funds are involved, no bid submitted shall be invalidated by the failure of the bidder to be licensed in accordance with the laws of this state. However, at the time the contract is awarded, the contractor shall

be properly licensed in accordance with the laws of this state. The first payment for work or material under any contract shall not be made unless and until the Registrar of Contractors verifies to the agency that the records of the Contractors' State License Board indicate that the contractor was properly licensed at the time the contract was awarded. Any bidder or contractor not so licensed shall be subject to all legal penalties imposed by law, including, but not limited to, any appropriate disciplinary action by the Contractors' State License Board. The agency shall include a statement to that effect in the standard form of prequalification questionnaire and financial statement. Failure of the bidder to obtain proper and adequate licensing for an award of a contract shall constitute a failure to execute the contract and shall result in the forfeiture of the security of the bidder.

SEC. 2. Article 1.5 (commencing with Section 20104) is added to Chapter 1 of Part 3 of the Public Contract Code, to read:

Article 1.5. Resolution of Construction Claims

20104. (a) (1) This article applies to all public works claims of three hundred seventy-five thousand dollars ($375,000) or less which arise between a contractor and a local agency.

(2) This article shall not apply to any claims resulting from a contract between a contractor and a public agency when the public agency has elected to resolve any disputes pursuant to Article 7.1 (commencing with Section 10240) of Chapter 1 of Part 2.

(b) (1) "Public work" has the same meaning as in Sections 3100 and 3106 of the Civil Code, except that "public work" does not include any work or improvement contracted for by the state or the Regents of the University of California.

(2) "Claim" means a separate demand by the contractor for (A) a time extension, (B) payment of money or damages arising from work done by or on behalf of the contractor pursuant to the contract for a public work and payment of which is not otherwise expressly provided for or the claimant is not otherwise entitled to, or (C) an amount the payment of which is disputed by the local agency.

(c) The provisions of this article or a summary thereof shall be set forth in the plans or specifications for any work which may give rise to a claim under this article.

(d) This article applies only to contracts entered into on or after January 1, 1991.

20104.2. For any claim subject to this article, the following requirements apply:

(a) The claim shall be in writing and include the documents necessary to substantiate the claim. Claims must be filed on or before the date of final payment. Nothing in this subdivision is intended to extend the time limit or supersede notice requirements otherwise provided by contract for the filing of claims.

(b) (1) For claims of less than fifty thousand dollars ($50,000), the

local agency shall respond in writing to any written claim within 45 days of receipt of the claim, or may request, in writing, within 30 days of receipt of the claim, any additional documentation supporting the claim or relating to defenses or claims the local agency may have against the claimant.

(2) If additional information is thereafter required, it shall be requested and provided pursuant to this subdivision, upon mutual agreement of the local agency and the claimant.

(3) The local agency's written response to the claim, as further documented, shall be submitted to the claimant within 15 days after receipt of the further documentation or within a period of time no greater than that taken by the claimant in producing the additional information, whichever is greater.

(c) (1) For claims of over fifty thousand dollars ($50,000) and less than or equal to three hundred seventy-five thousand dollars ($375,000), the local agency shall respond in writing to all written claims within 60 days of receipt of the claim, or may request, in writing, within 30 days of receipt of the claim, any additional documentation supporting the claim or relating to defenses or claims the local agency may have against the claimant.

(2) If additional information is thereafter required, it shall be requested and provided pursuant to this subdivision, upon mutual agreement of the local agency and the claimant.

(3) The local agency's written response to the claim, as further documented, shall be submitted to the claimant within 30 days after receipt of the further documentation, or within a period of time no greater than that taken by the claimant in producing the additional information or requested documentation, whichever is greater.

(d) If the claimant disputes the local agency's written response, or the local agency fails to respond within the time prescribed, the claimant may so notify the local agency, in writing, either within 15 days of receipt of the local agency's response or within 15 days of the local agency's failure to respond within the time prescribed, respectively, and demand an informal conference to meet and confer for settlement of the issues in dispute. Upon a demand, the local agency shall schedule a meet and confer conference within 30 days for settlement of the dispute.

(e) If following the meet and confer conference the claim or any portion remains in dispute, the claimant may file a claim pursuant to Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of Division 3.6 of Title 1 of the Government Code. For purposes of those provisions, the running of the period of time within which a claim must be filed shall be tolled from the time the claimant submits his or her written claim pursuant to subdivision (a) until the time the claim is denied, including any period of time utilized by the meet and confer conference.

20104.4. The following procedures are established for all civil actions filed to resolve claims subject to this article:

(a) Within 60 days, but no earlier than 30 days, following the filing or responsive pleadings, the court shall submit the matter to nonbinding mediation unless waived by mutual stipulation of both parties. The mediation process shall provide for the selection within 15 days by both parties of a disinterested third person as mediator, shall be commenced within 30 days of the submittal, and shall be concluded within 15 days from the commencement of the mediation unless a time requirement is extended upon a good cause showing to the court.

(b) (1) If the matter remains in dispute, the case shall be submitted to judicial arbitration pursuant to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, notwithstanding Section 1141.11 of that code. The Civil Discovery Act of 1986 (Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure) shall apply to any proceeding brought under this subdivision consistent with the rules pertaining to judicial arbitration.

(2) In addition to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, (A) arbitrators shall, when possible, be experienced in construction law, and (B) any party appealing an arbitration award who does not obtain a more favorable judgment shall, in addition to payment of costs and fees under that chapter, also pay the attorney's fees on appeal of the other party.

20104.6. (a) No local agency shall fail to pay money as to any portion of a claim which is undisputed except as otherwise provided in the contract.

(b) In any suit filed under Section 20104.4, the local agency shall pay interest at the legal rate on any arbitration award or judgment. The interest shall begin to accrue on the date the suit is filed in a court of law.

20104.8. (a) This article shall remain in effect only until January 1, 1994, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1994, deletes or extends that date.

(b) As stated in subdivision (c) of Section 20104, any contract entered into between January 1, 1991, and January 1, 1994, which is subject to this article shall incorporate this article. To that end, these contracts shall be subject to this article even if this article is repealed pursuant to subdivision (a).

SEC. 3. Section 20207.7 of the Public Contract Code is amended to read:

20207.7. Unless the amount involved in the purchase at any one time of any articles for which no contract has been entered into exceeds ten thousand dollars ($10,000), the board may purchase the articles without the necessity of advertising or letting contracts. Where the cost of any articles for which no contract has been entered into exceeds ten thousand dollars ($10,000), the board shall advertise for sealed bids for furnishing the district the articles. In the matter of advertising, opening and accepting bids, and the letting of

contracts, the board shall proceed in all respects in the manner and form provided in the case of contracts for annual supplies.

SEC. 4. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

CHAPTER 785

An act to amend Sections 7028.7 and 7028.15 of the Business and Professions Code, relating to contractors, and making an appropriation therefor.

[Approved by Governor October 9, 1991. Filed with Secretary of State October 10, 1991.]

The people of the State of California do enact as follows:

SECTION 1. Section 7028.7 of the Business and Professions Code is amended to read:

7028.7. If upon inspection or investigation, either upon complaint or otherwise, the registrar has probable cause to believe that a person is acting in the capacity of or engaging in the business of a contractor within this state without having a license in good standing to so act or engage, and the person is not otherwise exempted from this chapter, the registrar shall issue a citation to that person. Within 72 hours of receiving notice that a public entity is intending to award, or has awarded, a contract to an unlicensed contractor, the registrar shall give written notice to the public entity that a citation may be issued if a contract is awarded to an unlicensed contractor. If after receiving the written notice from the registrar the public entity has awarded or awards the contract to an unlicensed contractor the registrar may issue a citation to the responsible officer or employee of the public entity as specified in Section 7028.15. Each citation shall be in writing and shall describe with particularity the basis of the citation. Each citation shall contain an order of abatement and an assessment of a civil penalty in an amount not less than two hundred dollars ($200) nor more than four thousand five hundred dollars ($4,500). With the approval of the Contractors' State License Board the registrar shall prescribe procedures for the issuance of a citation under this section. The Contractors' State License Board shall adopt regulations covering the assessment of a civil penalty which shall give due consideration to the gravity of the violation, and any history of previous violations. The sanctions authorized under this section shall be separate from, and in addition to, all other remedies either civil or criminal.

SEC. 2. Section 7028.15 of the Business and Professions Code is amended to read:

7028.15. (a) It is a misdemeanor for any person to submit a bid to a public agency in order to engage in the business or act in the capacity of a contractor within this state without having a license therefor, except in any of the following cases:

(1) The person is particularly exempted from this chapter.

(2) The bid is submitted on a state project governed by Section 10164 of the Public Contract Code or on any local agency project governed by Section 20104 of the Public Contract Code.

(b) If a person has been previously convicted of the offense described in this section, the court shall impose a fine of 20 percent of the price of the contract under which the unlicensed person performed contracting work, or four thousand five hundred dollars ($4,500), whichever is greater, or imprisonment in the county jail for not less than 10 days nor more than six months, or both.

In the event the person performing the contracting work has agreed to furnish materials and labor on an hourly basis, "the price of the contract" for the purposes of this subdivision means the aggregate sum of the cost of materials and labor furnished and the cost of completing the work to be performed.

(c) This section shall not apply to a joint venture license, as required by Section 7029.1. However, at the time of making a bid as a joint venture, each person submitting the bid shall be subject to this section with respect to his or her individual licensure.

(d) This section shall not affect the right or ability of a licensed architect, land surveyor, or registered professional engineer to form joint ventures with licensed contractors to render services within the scope of their respective practices.

(e) Unless one of the foregoing exceptions applies, a bid submitted to a public agency by a contractor who is not licensed in accordance with this chapter shall be considered nonresponsive and shall be rejected by the public agency. Unless one of the foregoing exceptions applies, a local public agency shall, before awarding a contract or issuing a purchase order, verify that the contractor was properly licensed when the contractor submitted the bid. Notwithstanding any other provision of law, unless one of the foregoing exceptions applies, the registrar may issue a citation to any public officer or employee of a public entity who knowingly awards a contract or issues a purchase order to a contractor who is not licensed pursuant to this chapter. The amount of civil penalties, appeal, and finality of such citations shall be subject to Sections 7028.7 to 7028.13, inclusive. Any contract awarded to, or any purchase order issued to, a contractor who is not licensed pursuant to this chapter is void.

(f) Any compliance or noncompliance with subdivision (e) of this section, as added by Chapter 863 of the Statutes of 1989, shall not invalidate any contract or bid awarded by a public agency during which time that subdivision was in effect.

(g) A public employee or officer shall not be subject to a citation pursuant to this section if the public employee, officer, or employing agency made an inquiry to the board for the purposes of verifying the license status of any person or contractor and the board failed to respond to the inquiry within three business days. For purposes of this section, a telephone response by the board shall be deemed sufficient.

CHAPTER 933

An act to amend Section 22300 of the Public Contract Code, relating to public contracts.

[Approved by Governor October 13, 1991. Filed with Secretary of State October 14, 1991.]

The people of the State of California do enact as follows:

SECTION 1. Section 22300 of the Public Contract Code is amended to read:

22300. (a) Provisions shall be included in any invitation for bid and in any contract documents to permit the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract, provided that substitution of securities provisions shall not be required in contracts in which there will be financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. Sec. 1921 et seq.), and where federal regulations or policies, or both, do not allow the substitution of securities. At the request and expense of the contractor, securities equivalent to the amount withheld shall be deposited with the public agency, or with a state or federally chartered bank in California as the escrow agent, who shall then pay such moneys to the contractor. Upon satisfactory completion of the contract, the securities shall be returned to the contractor.

(b) Alternatively, the contractor may request and the owner shall make payment of retentions earned directly to the escrow agent at the expense of the contractor. At the expense of the contractor, the contractor may direct the investment of the payments into securities and the contractor shall receive the interest earned on the investments upon the same terms provided for in this section for securities deposited by the contractor. Upon satisfactory completion of the contract, the contractor shall receive from the escrow agent all securities, interest, and payments received by the escrow agent from the owner, pursuant to the terms of this section. The contractor shall pay to each subcontractor, not later than 20 days of receipt of the payment, the respective amount of interest earned, net of costs attributed to retention withheld from each subcontractor, on the amount of retention withheld to insure the performance of the contractor.

(c) Securities eligible for investment under this section shall include those listed in Section 16430 of the Government Code, bank or savings and loan certificates of deposit, interest bearing demand deposit accounts, standby letters of credit, or any other security mutually agreed to by the contractor and the public agency.

The contractor shall be the beneficial owner of any securities substituted for moneys withheld and shall receive any interest

thereon.

Failure to include these provisions in bid and contract documents shall void any provisions for performance retentions in a public agency contract.

For purposes of this section, the term "public agency" shall include, but shall not be limited to, chartered cities.

(d) The Legislature hereby declares that the provisions of this section are of statewide concern and are necessary to encourage full participation by contractors in public contract procedures.

(e) The escrow agreement used hereunder shall be null, void, and unenforceable unless it is substantially similar to the following form:

ESCROW AGREEMENT FOR
SECURITY DEPOSITS IN LIEU OF RETENTION

This Escrow Agreement is made and entered into by and between _____ whose address is _____ _____ hereinafter called "Owner," _____ whose address is _____ _____ hereinafter called "Contractor" and _____ whose address is _____ _____ hereinafter called "Escrow Agent."

For the consideration hereinafter set forth, the Owner, Contractor, and Escrow Agent agree as follows:

(1) Pursuant to Section 22200 of the Public Contract Code of the State of California, Contractor has the option to deposit securities with Escrow Agent as a substitute for retention earnings required to be withheld by Owner pursuant to the Construction Contract entered into between the Owner and Contractor for _____ in the amount of _____ dated _____ (hereinafter referred to as the "Contract"). Alternatively, on written request of the contractor, the owner shall make payments of the retention earnings directly to the escrow agent. When Contractor deposits the securities as a substitute for Contract earnings, the Escrow Agent shall notify the Owner within 10 days of the deposit. The market value of the securities at the time of the substitution shall be at least equal to the cash amount then required to be withheld as retention under the terms of the Contract between the Owner and Contractor. Securities shall be held in the name of _____, and shall designate the Contractor as the beneficial owner.

(2) The Owner shall make progress payments to the Contractor for such funds which otherwise would be withheld from progress payments pursuant to the Contract provisions, provided that the Escrow Agent holds securities in the form and amount specified above.

(3) When the owner makes payment of retentions earned directly

to the escrow agent, the escrow agent shall hold them for the benefit of the contractor until such time as the escrow created under this contract is terminated. The contractor may direct the investment of the payments into securities. All terms and conditions of this agreement and the rights and responsibilities of the parties shall be equally applicable and binding when the owner pays the escrow agent directly.

(4) Contractor shall be responsible for paying all fees for the expenses incurred by Escrow Agent in administering the Escrow Account and all expenses of the Owner. These expenses and payment terms shall be determined by the Owner, Contractor and Escrow Agent.

(5) The interest earned on the securities or the money market accounts held in escrow and all interest earned on that interest shall be for the sole account of Contractor and shall be subject to withdrawal by Contractor at any time and from time to time without notice to the Owner.

(6) Contractor shall have the right to withdraw all or any part of the principal in the Escrow Account only by written notice to Escrow Agent accompanied by written authorization from the Owner to the Escrow Agent that Owner consents to the withdrawal of the amount sought to be withdrawn by Contractor.

(7) The Owner shall have a right to draw upon the securities in the event of default by the Contractor. Upon seven days' written notice to the Escrow Agent from the owner of the default, the Escrow Agent shall immediately convert the securities to cash and shall distribute the cash as instructed by the Owner.

(8) Upon receipt of written notification from the Owner certifying that the Contract is final and complete, and that the Contractor has complied with all requirements and procedures applicable to the Contract, Escrow Agent shall release to Contractor all securities and interest on deposit less escrow fees and charges of the Escrow Account. The escrow shall be closed immediately upon disbursement of all moneys and securities on deposit and payments of fees and charges.

(9) Escrow Agent shall rely on the written notifications from the Owner and the Contractor pursuant to Sections (4) to (6), inclusive, of this agreement and the Owner and Contractor shall hold Escrow Agent harmless from Escrow Agent's release and disbursement of the securities and interest as set forth above.

(10) The names of the persons who are authorized to give written notice or to receive written notice on behalf of the Owner and on behalf of Contractor in connection with the foregoing, and exemplars of their respective signatures are as follows:

On behalf of Owner:

Title

Name

Signature

Address

On behalf of Contractor:

Title

Name

Signature

Address

On behalf of Escrow Agent:

Title

Name

Signature

Address

At the time the Escrow Account is opened, the Owner and Contractor shall deliver to the Escrow Agent a fully executed counterpart of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement by their proper officers on the date first set forth above.

Owner

Title

Name

Signature

Contractor

Title

Name

Signature

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

140030

CHAPTER 294

An act to amend Sections 7028.15, 7071.8, 7099.10, and 7099.11 of the Business and Professions Code, relating to contractors.

[Approved by Governor July 22, 1992. Filed with Secretary of State July 23, 1992.]

The people of the State of California do enact as follows:

SECTION 1. Section 7028.15 of the Business and Professions Code is amended to read:

7028.15. (a) It is a misdemeanor for any person to submit a bid to a public agency in order to engage in the business or act in the capacity of a contractor within this state without having a license therefor, except in any of the following cases:

(1) The person is particularly exempted from this chapter.

(2) The bid is submitted on a state project governed by Section 10164 of the Public Contract Code or on any local agency project governed by Section 20103.5 of the Public Contract Code.

(b) If a person has been previously convicted of the offense described in this section, the court shall impose a fine of 20 percent of the price of the contract under which the unlicensed person performed contracting work, or four thousand five hundred dollars ($4,500), whichever is greater, or imprisonment in the county jail for not less than 10 days nor more than six months, or both.

In the event the person performing the contracting work has agreed to furnish materials and labor on an hourly basis, "the price of the contract" for the purposes of this subdivision means the aggregate sum of the cost of materials and labor furnished and the cost of completing the work to be performed.

42410

(c) This section shall not apply to a joint venture license, as required by Section 7029.1. However, at the time of making a bid as a joint venture, each person submitting the bid shall be subject to this section with respect to his or her individual licensure.

(d) This section shall not affect the right or ability of a licensed architect, land surveyor, or registered professional engineer to form joint ventures with licensed contractors to render services within the scope of their respective practices.

(e) Unless one of the foregoing exceptions applies, a bid submitted to a public agency by a contractor who is not licensed in accordance with this chapter shall be considered nonresponsive and shall be rejected by the public agency. Unless one of the foregoing exceptions applies, a local public agency shall, before awarding a contract or issuing a purchase order, verify that the contractor was properly licensed when the contractor submitted the bid. Notwithstanding any other provision of law, unless one of the foregoing exceptions applies, the registrar may issue a citation to any public officer or employee of a public entity who knowingly awards a contract or issues a purchase order to a contractor who is not licensed pursuant to this chapter. The amount of civil penalties, appeal, and finality of such citations shall be subject to Sections 7028.7 to 7028.13, inclusive. Any contract awarded to, or any purchase order issued to, a contractor who is not licensed pursuant to this chapter is void.

(f) Any compliance or noncompliance with subdivision (e) of this section, as added by Chapter 863 of the Statutes of 1989, shall not invalidate any contract or bid awarded by a public agency during which time that subdivision was in effect.

(g) A public employee or officer shall not be subject to a citation pursuant to this section if the public employee, officer, or employing agency made an inquiry to the board for the purposes of verifying the license status of any person or contractor and the board failed to respond to the inquiry within three business days. For purposes of this section, a telephone response by the board shall be deemed sufficient.

SEC. 2. Section 7071.8 of the Business and Professions Code is amended to read:

7071.8. (a) This section applies to an application for a license, for restoration of a license, or for continued valid use of a license which has been disciplined, whether or not the disciplinary action has been stayed, made by any of the following persons or firms:

(1) Any person whose license has been suspended or revoked as a result of disciplinary action, or any person who was a qualifying individual for a licensee at any time during which cause for disciplinary action occurred resulting in suspension or revocation of the licensee's license, whether or not the qualifying individual had knowledge or participated in the prohibited act or omission.

(2) Any person who was an officer, director, member, or partner of a licensee at any time during which cause for disciplinary action

occurred resulting in suspension or revocation of the licensee's license and who had knowledge of or participated in the act or omission which was the cause for the disciplinary action.

(3) Any partnership, corporation, firm or association of which any officer, director, member, partner or qualifying person has had the license suspended or revoked as a result of disciplinary action.

(4) Any partnership, corporation, firm or association of which any officer, director, member, or partner or qualifying person was a member, officer, director, or partner of a licensee at any time during which cause for disciplinary action occurred resulting in suspension or revocation of the license, and who had knowledge of or participated in the act or omission which was the cause for the disciplinary action.

(b) The board shall require as a condition precedent to the issuance, reissuance or restoration of a license to the applicant, or removal of suspension, or to the continued valid use of a license which has been suspended or revoked, but which suspension or revocation has been stayed, that the applicant or licensee file or have on file a contractor's bond in a sum to be fixed by the registrar based upon the seriousness of the violation, but which sum shall not be less than fifteen thousand dollars ($15,000) nor more than 10 times that amount required by Section 7071.6.

(c) The bond is in addition to, may not be combined with, and does not replace any other type of bond required by this chapter. The bond shall remain on file with the registrar for a period of at least two years and for such additional time as the registrar may determine. The bond period shall run only while the license is current, active, and in good standing, and shall be extended until such time as the license has been current, active, and in good standing for the required period. Each applicant or licensee shall be required to file only one disciplinary contractor's bond of the type described in this section for each application or license subject to this bond requirement.

SEC. 3. Section 7099.10 of the Business and Professions Code is amended to read:

7099.10. (a) If, upon investigation, the registrar has probable cause to believe that a licensee, an applicant for a license, or an unlicensed individual acting in the capacity of a contractor who is not otherwise exempted from the provisions of this chapter, has violated Section 7027.1 by advertising for construction or work of improvement covered by this chapter in an alphabetical or classified directory, without being properly licensed, the registrar may issue a citation under Section 7099 containing an order of correction which requires the violator to cease the unlawful advertising and to notify the telephone company furnishing services to the violator to disconnect the telephone service furnished to any telephone number contained in the unlawful advertising, and that subsequent calls to that number shall not be referred by the telephone company to any new telephone number obtained by that person.

42460

(b) If the person to whom a citation is issued under subdivision (a) notifies the registrar that he or she intends to contest the citation, the registrar shall afford an opportunity for a hearing, as specified in Section 7099.5, within 90 days after receiving the notification.

(c) If the person to whom a citation and order of correction is issued under subdivision (a) fails to comply with the order of correction after the order is final, the registrar shall inform the Public Utilities Commission of the violation, and the Public Utilities Commission shall require the telephone corporation furnishing services to that person to disconnect the telephone service furnished to any telephone number contained in the unlawful advertising.

(d) The good faith compliance by a telephone corporation with an order of the Public Utilities Commission to terminate service issued pursuant to this section shall constitute a complete defense to any civil or criminal action brought against the telephone corporation arising from the termination of service.

SEC. 4. Section 7099.11 of the Business and Professions Code is amended to read:

7099.11. (a) No person shall advertise, as that term is defined in Section 7027.1, to promote his or her services for the removal of asbestos unless he or she is certified to engage in asbestos-related work pursuant to Section 7058.5, and registered for that purpose pursuant to Section 6501.5 of the Labor Code. Each advertisement shall include that person's certification and registration numbers and shall use the same name under which that person is certified and registered.

(b) The registrar shall issue a notice to comply with the order of correction provisions of subdivision (a) of Section 7099.10, to any person who is certified and registered, as described in subdivision (a), and who fails to include in any advertisement his or her certification and registration numbers.

(c) The registrar shall issue a citation pursuant to Section 7099 to any person who fails to comply with the notice required by subdivision (b), or who advertises to promote his or her services for the removal of asbestos but does not possess valid certification and registration numbers as required by subdivision (a), or who fails to use in that advertisement the same name under which he or she is certified and registered.

Citations shall be issued and conducted pursuant to Sections 7099 to 7099.10, inclusive.

42490

CHAPTER 799

An act to add Section 10853 to Article 8 of Chapter 2.5 of Part 2 of Division 2 of, and to add Article 1.7 (commencing with Section 20104.50) to Chapter 1 of Part 3 of Division 2 of, the Public Contract Code, relating to contracts.

[Approved by Governor September 21, 1992. Filed with Secretary of State September 22, 1992.]

The people of the State of California do enact as follows:

SECTION 1. Section 10853 is added to Article 8 of Chapter 2.5 of Part 2 of Division 2 of the Public Contract Code, to read:

10853. (a) If the trustees fail to make a progress payment on a contract within 39 days after receipt of an undisputed and properly submitted payment request from a contractor on a construction contract, the trustees shall pay interest to the contractor equivalent to the legal rate set forth in subdivision (a) of Section 685.010 of the Code of Civil Procedure. If the payment is not made within 39 days of receipt of the contractor's request, and the Controller has processed the payment within 14 days of the receipt of the request, the trustees shall pay interest to the contractor equivalent to the legal rate as provided in subdivision (a) of Section 685.010 of the Code of Civil Procedure. If the payment is not made within 39 days of receipt of the contractor's request, and the trustees have processed the payment within 25 days after the receipt of the request, the Controller shall pay interest equivalent to the legal rate

as provided in subdivision (a) of Section 685.010 of the Code of Civil Procedure.

(b) Upon receipt of a payment request, the trustees shall act in accordance with the following:

(1) Each payment request shall be reviewed by the trustees as soon as practicable after receipt for the purpose of determining that the payment request is a proper payment request.

(2) Any payment request determined not to be a proper request suitable for payment shall be returned to the contractor as soon as practicable, but not later than seven days after receipt. A request returned pursuant to this paragraph shall be accompanied by a document setting forth in writing the reasons why the payment request is not proper.

(3) Upon request from the trustees, the Controller may elect to expedite each payment request and may charge the trustees an appropriate amount, as determined by the Controller, for costs incurred in expediting the payment request.

(c) The number of days available to the trustees to make a payment without incurring interest shall be reduced by the number of days by which the trustees exceed the seven-day return requirement set forth in paragraph (2) of subdivision (b).

(d) A properly submitted payment request shall be defined as the date upon which the trustees receive a payment request, certified in accordance with the contract, at the address identified in the contract.

(e) For purposes of this section:

(1) A "progress payment" includes all payments due contractors, except that portion of the final payment withheld pursuant to Section 10851.

(2) A payment request shall be considered properly executed if funds are available for payment of the payment request and payment is not delayed due to an audit inquiry by the Controller.

SEC. 2. Article 1.7 (commencing with Section 20104.50) is added to Chapter 1 of Part 3 of Division 2 of the Public Contract Code, to read:

Article 1.7. Modifications; Performance; Payment

20104.50. (a) (1) It is the intent of the Legislature in enacting this section to require all local governments to pay their contractors on time so that these contractors can meet their own obligations. In requiring prompt payment by all local governments, the Legislature hereby finds and declares that the prompt payment of outstanding receipts is not merely a municipal affair, but is, instead, a matter of statewide concern.

(2) It is the intent of the Legislature in enacting this article to fully occupy the field of public policy relating to the prompt payment of local governments' outstanding receipts. The Legislature finds and declares that all government officials, including those in local

government, must set a standard of prompt payment that any business in the private sector which may contract for services should look towards for guidance.

(b) Any local agency which fails to make any progress payment within 30 days after receipt of an undisputed and properly submitted payment request from a contractor on a construction contract shall pay interest to the contractor equivalent to the legal rate set forth in subdivision (a) of Section 685.010 of the Code of Civil Procedure.

(c) Upon receipt of a payment request, each local agency shall act in accordance with both of the following:

(1) Each payment request shall be reviewed by the local agency as soon as practicable after receipt for the purpose of determining that the payment request is a proper payment request.

(2) Any payment request determined not to be a proper payment request suitable for payment shall be returned to the contractor as soon as practicable, but not later than seven days, after receipt. A request returned pursuant to this paragraph shall be accompanied by a document setting forth in writing the reasons why the payment request is not proper.

(d) The number of days available to a local agency to make a payment without incurring interest pursuant to this section shall be reduced by the number of days by which a local agency exceeds the seven-day return requirement set forth in paragraph (2) of subdivision (c).

(e) For purposes of this article:

(1) A "local agency" includes, but is not limited to, a city, including a charter city, a county, and a city and county, and is any public entity subject to this part.

(2) A "progress payment" includes all payments due contractors, except that portion of the final payment designated by the contract as retention earnings.

(3) A payment request shall be considered properly executed if funds are available for payment of the payment request, and payment is not delayed due to an audit inquiry by the financial officer of the local agency.

(f) Each local agency shall require that this article, or a summary thereof, be set forth in the terms of any contract subject to this article.

SEC. 3. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the

California Constitution.

CHAPTER 1042

An act to add Section 7107 to the Public Contract Code, relating to public works contracts.

[Approved by Governor September 27, 1992. Filed with Secretary of State September 29, 1992.]

The people of the State of California do enact as follows:

SECTION 1. Section 7107 is added to the Public Contract Code, to read:

7107. (a) This section is applicable with respect to all contracts entered into on or after January 1, 1993, relating to the construction of any public work of improvement.

(b) The retention proceeds withheld from any payment by the public entity from the original contractor, or by the original contractor from any subcontractor, shall be subject to this section.

(c) Within 60 days after the date of completion of the work of improvement, the retention withheld by the public entity shall be released. In the event of a dispute between the public entity and the original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount. For purposes of this subdivision, "completion" means any of the following:

(1) The occupation, beneficial use, and enjoyment of a work of improvement, excluding any operation only for testing, startup, or commissioning, by the public agency, or its agent, accompanied by cessation of labor on the work of improvement.

(2) The acceptance by the public agency, or its agent, of the work of improvement.

(3) After the commencement of a work of improvement, a cessation of labor on the work of improvement for a continuous period of 100 days or more, due to factors beyond the control of the contractor.

(4) After the commencement of a work of improvement, a cessation of labor on the work of improvement for a continuous period of 30 days or more, if the public agency files for record a notice of cessation or a notice of completion.

(d) Subject to subdivision (e), within 10 days from the time that all or any portion of the retention proceeds are received by the original contractor, the original contractor shall pay each of its subcontractors from whom retention has been withheld, each

subcontractor's share of the retention received. However, if a retention payment received by the original contractor is specifically designated for a particular subcontractor, payment of the retention shall be made to the designated subcontractor, if the payment is consistent with the terms of the subcontract.

(e) The original contractor may withhold from a subcontractor its portion of the retention proceeds if a bona fide dispute exists between the subcontractor and the original contractor. The amount withheld from the retention payment shall not exceed 150 percent of the estimated value of the disputed amount.

(f) In the event that retention payments are not made within the time periods required by this section, the public entity or original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorney's fees and costs.

(g) If a state agency retains an amount greater than 125 percent of the estimated value of the work yet to be completed pursuant to Section 10261 of the Public Contract Code, the state agency shall distribute undisputed retention proceeds in accordance with subdivision (c). However, notwithstanding subdivision (c), if a state agency retains an amount equal to or less than 125 percent of the estimated value of the work yet to be completed, the state agency shall have 90 days in which to release undisputed retentions.

(h) Any attempted waiver of the provisions of this section shall be void as against the public policy of this state.

SEC. 2. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

160420

BILL NUMBER: AB 340 CHAPTERED 10/11/93

CHAPTER 1032
FILED WITH SECRETARY OF STATE OCTOBER 11, 1993
APPROVED BY GOVERNOR OCTOBER 10, 1993
PASSED THE ASSEMBLY SEPTEMBER 3, 1993
PASSED THE SENATE AUGUST 31, 1993
AMENDED IN SENATE AUGUST 25, 1993
AMENDED IN SENATE JULY 15, 1993

INTRODUCED BY Assembly Member Katz
(Principal coauthors: Assembly Members Willie Brown and Lee)

(Principal coauthor: Senator Roberti)
(Coauthors: Assembly Members Alpert, Baca, Bowen, Bronshvag, Campbell, Costa, Eastin, Gotch, McDonald, Martinez, Moore, Murray, O'Connell, Peace, Solis, and Umberg)
(Coauthors: Senators Alquist, Dills, Hughes, Mello, Rosenthal, Torres, and Watson)

FEBRUARY 8, 1993

An act to amend Section 16857 of, and to add Section 16852.5 to, the Government Code, to add Section 999.10 to the Military and Veterans Code, and to amend Section 10115.10 of, and to add Sections 2001, 10108.7, and 10115.12 to, the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

AB 340, Katz. Public contracts: minority, women, and disabled veteran business enterprises.

(1) Existing law requires all contracts awarded by any state agency, department, officer, or other state governmental agency, and permits all contracts awarded by any local agency, for construction, certain professional services, materials, supplies, equipment, alteration, repair, or improvement to have participation goals of not less than 15% for minority business enterprises, 5% for women business enterprises, and 3% for disabled veteran business enterprises.

Existing law, the Subletting and Subcontracting Fair Practices Act, also imposes requirements on prime contractors with respect to providing certain information regarding subcontractors.

This bill would require that a contractor provide certain information in his or her bid or offer relating to the use of minority, women, or disabled veteran business enterprises as subcontractors in connection with the performance of the public contract, and would make provisions of the above act applicable to this information.

(2) Under existing law, it is unlawful for any person to commit certain acts in connection with state contracts, including those for professional bond services, awarded pursuant to statewide participation goals for minority, women, and disabled veteran business enterprises. Existing law further provides for the suspension of persons who violate these provisions and requires the Office of Small and Minority

Business to take certain actions in connection with violations of these provisions.

This bill would make it a misdemeanor for any person or firm to establish or cooperate in the establishment of, or exercise control over, a firm found to have violated these provisions, and would impose civil penalties in the amount not to exceed $50,000 for a 1st violation, and not to exceed $200,000 for each additional or subsequent violation. The bill would also broaden the suspension provisions and requirements on the office to include violations committed by firms. The creation of these new crimes would impose a state-mandated local program.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 16852.5 is added to the Government Code, to read:

16852.5. (a) Any awarding department taking bids in connection with the award of any contract shall provide, in the general conditions under which bids will be received, that any person making a bid or offer to perform a contract shall, in his or her bid or offer, set forth the following information:

(1) The name and the location of the place of business of each subcontractor certified as a minority, women, or disabled veteran business enterprise who will perform work or labor or render service to the prime contractor in connection with the performance of the contract and who will be used by the prime contractor to fulfill minority, women, and disabled veteran business enterprise participation goals.

(2) The portion of work that will be done by each subcontractor under paragraph (1). The prime contractor shall list only one subcontractor for each portion of work as is defined by the prime contractor in his or her bid or offer.

(b) The Subletting and Subcontracting Fair Practices Act (Chapter 4 (commencing with Section 4100) of Part 1 of Division 2 of the Public Contract Code) shall apply to the information required by subdivision (a) relating to subcontractors certified as minority, women, and disabled veteran business enterprises.

(c) For purposes of this section, "subcontractor" and "prime contractor" shall have the same meaning as those terms are defined in Section 4113 of the Public Contract Code.

SEC. 2. Section 16857 of the Government Code is amended to read:

16857. (a) It shall be unlawful for a person to:

(1) Knowingly and with intent to defraud, fraudulently obtain, retain, attempt to obtain or retain, or aid another in fraudulently obtaining or retaining or attempting to obtain or retain, acceptance or certification as a minority, women, or disabled veteran business enterprise, for the purposes of this chapter.

(2) Willfully and knowingly make a false statement with the intent to defraud, whether by affidavit, report, or other

representation, to a state official or employee for the purpose of influencing the acceptance or certification or denial of acceptance or certification of any entity as a minority, women, or disabled veteran business enterprise.

(3) Willfully and knowingly obstruct, impede, or attempt to obstruct or impede, any state official or employee who is investigating the qualifications of a business entity which has requested acceptance or certification as a minority, women, or disabled veteran business enterprise.

(4) Knowingly and with intent to defraud, fraudulently obtain, attempt to obtain, or aid another person in fraudulently obtaining or attempting to obtain, public moneys to which the person or firm is not entitled under this chapter.

(5) Establish, or cooperate in the establishment of, or exercise control over, a firm found to have violated any of paragraphs (1) to (4), inclusive. Any person or firm who violates this paragraph is guilty of a misdemeanor and shall be liable for a civil penalty not to exceed fifty thousand dollars ($50,000) for the first violation, and a civil penalty not to exceed two hundred thousand dollars ($200,000) for each additional or subsequent violation.

(6) This section shall not apply to minority and women business enterprise programs conducted by public utility companies pursuant to the California Public Utilities Commission's General Order 156.

(b) Any person who violates paragraphs (1) to (4), inclusive, of subdivision (a) is guilty of a misdemeanor and shall be liable for a civil penalty not to exceed five thousand dollars ($5,000) for the first violation, and a civil penalty not to exceed twenty thousand dollars ($20,000) for each additional or subsequent violation.

(c) Any person or firm that violates subdivision (a) shall, in addition to the penalties provided for in subdivision (b), be suspended from bidding on, or participating as either a contractor or subcontractor in, any contract awarded by the state for a period of not less than 30 days nor more than one year. However, for an additional or subsequent violation, the period of suspension shall be extended for a period of up to three years. Any person or firm that fails to satisfy the penalties imposed pursuant to subdivisions (b) and (c) shall be prohibited from further contracting with the state until the penalties are satisfied.

(d) The awarding department shall report all alleged violations of this section to the Office of Small and Minority Business. The office shall subsequently report all alleged violations to the Attorney General who shall determine whether to bring a civil action against any person or firm for violation of this section.

(e) The office shall monitor the status of all reported violations and shall maintain and make available to all state departments a central listing of all firms and persons who have been determined to have committed violations resulting in suspension.

(f) No awarding department shall enter into any contract with any person or firm suspended for violating this section during the period of the person's or firm's suspension. No awarding department shall award a contract to any contractor utilizing the services of any person or firm as a subcontractor suspended for violating this section during the period of the person's or firm's suspension.

(g) The awarding department shall check the central listing provided by the office to verify that the person, firm, or contractor to whom the contract is being awarded, or any person, or firm, being utilized as a subcontractor by that person, firm, or contractor, is not under suspension for violating this section.

SEC. 3. Section 999.10 is added to the Military and Veterans Code, to read:

999.10. (a) Any awarding department taking bids in connection with the award of any contract shall provide, in the general conditions under which bids will be received, that any person making a bid or offer to perform a contract shall, in his or her bid or offer, set forth the following information:

(1) The name and the location of the place of business of each subcontractor certified as a disabled veteran business enterprise who will perform work or labor or render service to the prime contractor in connection with the performance of the contract and who will be used by the prime contractor to fulfill disabled veteran business enterprise participation goals.

(2) The portion of work that will be done by each subcontractor under paragraph (1). Except in cases of emergency where a contract is necessary for the immediate preservation of the public health, welfare, or safety, or protection of state property, the prime contractor shall list only one subcontractor for each portion of work as is defined by the prime contractor in his or her bid or offer.

(b) The Subletting and Subcontracting Fair Practices Act (Chapter 4 (commencing with Section 4100) of Part 1 of Division 2 of the Public Contract Code) shall apply to the information required by subdivision (a) relating to subcontractors certified as disabled veteran business enterprises.

(c) For purposes of this section, "subcontractor" and "prime contractor" shall have the same meaning as those terms are defined in Section 4113 of the Public Contract Code.

(d) As used in this section, "contract" does not include a contract negotiated pursuant to Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.

SEC. 4. Section 2001 is added to the Public Contract Code, to read:

2001. (a) Any local agency, as defined in subdivision (d) of Section 2000, that requires that contracts be awarded to the lowest responsible bidder meeting, or making a good faith effort to meet, participation goals for minority, women, or disabled veteran business enterprises shall provide in the general conditions under which bids will be received, that any person making a bid or offer to perform a contract shall, in his or her bid or offer, set forth the following information:

(1) The name and the location of the place of business of each subcontractor certified as a minority, women, or disabled veteran business enterprise who will perform work or labor or render service to the prime contractor in connection with the performance of the contract and who will be used by the prime contractor to fulfill minority, women, and disabled veteran business enterprise participation goals.

(2) The portion of work that will be done by each subcontractor under paragraph (1). The prime contractor shall list only one subcontractor for each portion of work as is defined by the prime contractor in his or her bid or offer.

(b) The Subletting and Subcontracting Fair Practices Act (Chapter 4 (commencing with Section 4100) shall apply to the

information required by subdivision (a) relating to subcontractors certified as minority, women, or disabled veteran business enterprises.

(c) For purposes of this section, "subcontractor" and "prime contractor" shall have the same meaning as those terms are defined in Section 4113.

(d) As used in this section, "contract" does not include a contract negotiated pursuant to Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.

SEC. 5. Section 10108.7 is added to the Public Contract Code, to read:

10108.7. (a) The Department of Corrections shall provide in the general conditions under which bids will be received, that any person making a bid or offer to perform a contract shall, in his or her bid or offer, set forth the following information:

(1) The name and the location of the place of business of each subcontractor certified as a minority, women, or disabled veteran business enterprise who will perform work or labor or render service to the prime contractor in connection with the performance of the contract and who will be used by the prime contractor to fulfill minority, women, and disabled veteran business enterprise participation goals.

(2) The portion of work that will be done by each subcontractor under paragraph (1). The prime contractor shall list only one subcontractor for each portion of work as is defined by the prime contractor in his or her bid or offer.

(b) The Subletting and Subcontracting Fair Practices Act (Chapter 4 (commencing with Section 4100) of Part 1 shall apply to the information required by subdivision (a) relating to subcontractors certified as minority, women, or disabled veteran business enterprises.

(c) For purposes of this section, "subcontractor" and "prime contractor" shall have the same meaning as those terms are defined in Section 4113.

(d) As used in this section, "contract" does not include a contract negotiated pursuant to Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.

SEC. 6. Section 10115.10 of the Public Contract Code is amended to read:

10115.10. (a) It shall be unlawful for a person or firm to:

(1) Knowingly and with intent to defraud, fraudulently obtain, retain, attempt to obtain or retain, or aid another in fraudulently obtaining or retaining or attempting to obtain or retain, acceptance or certification as a minority, women, or disabled veteran business enterprise, for the purposes of this article.

(2) Willfully and knowingly make a false statement with the intent to defraud, whether by affidavit, report, or other representation, to a state official or employee for the purpose of influencing the acceptance or certification or denial of acceptance or certification of any entity as a minority, women, or disabled veteran business enterprise.

(3) Willfully and knowingly obstruct, impede, or attempt to obstruct or impede, any state official or employee who is investigating the qualifications of a business entity which has requested acceptance or certification as a minority, women, or disabled veteran business enterprise.

(4) Knowingly and with intent to defraud, fraudulently obtain, attempt to obtain, or aid another person or firm in

fraudulently obtaining or attempting to obtain, public moneys to which the person is not entitled under this article.

(5) Establish, or cooperate in the establishment of, or exercise control over, a firm found to have violated any of paragraphs (1) to (4), inclusive. Any person or firm who violates this paragraph is guilty of a misdemeanor and shall be liable for a civil penalty not to exceed fifty thousand dollars ($50,000) for the first violation, and a civil penalty not to exceed two hundred thousand dollars ($200,000) for each additional, or subsequent violation.

(6) This section shall not apply to minority and women business enterprise programs conducted by public utility companies pursuant to the California Public Utilities Commission's General Order 156.

(b) Any person who violates paragraphs (1) to (4), inclusive, of subdivision (a) is guilty of a misdemeanor and shall be liable for a civil penalty not to exceed five thousand dollars ($5,000) for the first violation, and a civil penalty not to exceed twenty thousand dollars ($20,000) for each additional or subsequent violation.

(c) Any person or firm that violates subdivision (a) shall, in addition to the penalties provided for in subdivision (b), be suspended from bidding on, or participating as either a contractor, subcontractor, or supplier in, any state contract or project for a period of not less than 30 days nor more than one year. However, for an additional or subsequent violation the period of suspension shall be extended for a period of up to three years. Any person or firm that fails to satisfy the penalties imposed pursuant to subdivisions (b) and (c) shall be prohibited from further contracting with the state until the penalties are satisfied.

(d) The awarding department shall report all alleged violations of this section to the Office of Small and Minority Business. The office shall subsequently report all alleged violations to the Attorney General who shall determine whether to bring a civil action against any person or firm for violation of this section.

(e) The office shall monitor the status of all reported violations and shall maintain and make available to all state departments a central listing of all firms and persons who have been determined to have committed violations resulting in suspension.

(f) No awarding department shall enter into any contract with any person or firm suspended for violating this section during the period of the person's or firm's suspension. No awarding department shall award a contract to any contractor utilizing the services of any person or firm as a subcontractor suspended for violating this section during the period of the person's or firm's suspension.

(g) The awarding department shall check the central listing provided by the office to verify that the person, firm, or contractor to whom the contract is being awarded, or any person or firm being utilized as a subcontractor by that person, firm, or contractor, is not under suspension for violating this section.

SEC. 7. Section 10115.12 is added to the Public Contract Code, to read:

10115.12. (a) Any awarding department taking bids in connection with the award of any contract shall provide in the general conditions under which bids will be received, that any

person making a bid or offer to perform a contract shall, in his or her bid or offer, set forth the following information:

(1) The name and the location of the place of business of each subcontractor certified as a minority, women, or disabled veteran business enterprise who will perform work or labor or render service to the prime contractor in connection with the performance of the contract and who will be used by the prime contractor to fulfill minority, women, and disabled veteran business enterprise participation goals.

(2) The portion of work that will be done by each subcontractor under paragraph (1). Except in cases of emergency where a contract is necessary for the immediate preservation of the public health, welfare, or safety, or protection of state property, the prime contractor shall list only one subcontractor for each portion of work as is defined by the prime contractor in his or her bid or offer.

(b) The Subletting and Subcontracting Fair Practices Act (Chapter 4 (commencing with Section 4100) of Part 1 shall apply to the information required by subdivision (a) relating to subcontractors certified as minority, women, or disabled veteran business enterprises.

(c) For purposes of this section, "subcontractor" and "prime contractor" shall have the same meaning as those terms are defined in Section 4113.

(d) As used in this section, "contract" does not include a contract negotiated pursuant to Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.

SEC. 8. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

CHAPTER 1195

An act to amend Sections 4201, 6159, 8162.9, 8180, 23101, 23119, 23130, 23133, 24000, 24250, 24256, 24304, 25332, 25845, 27008, 29088, 36934, 37110, 53080.1, 53534, 53901, 56844, 57025, and 68096.1 of, to add Sections 25521.5, 26990, 57330, and 65352.5 to, to repeal Section 40101 of, and to repeal Article 5.5 (commencing with Section 65958) of Chapter 4.5 of Division 1 of Title 7 of, the Government Code, to amend Sections 6937 and 6944 of, and to repeal Section 6832 of the Harbors and Navigation Code, to amend Sections 6487, 13800, and 13893 of, and to add Sections 4730.8 and 6480.7 to, the Health and Safety Code, to amend Sections 20206.9 and 22300 of, to add Section 20131 to, and to repeal Sections 9202, 20206.7, and 20206.8 of, the Public Contract Code, to add Sections 5541.2 and 5552.1 to the Public Resources Code, to add Section 97.05 to the Revenue and Taxation Code, to amend Section 1806 of the Streets and Highways Code, to amend Sections 21102, 21375, 21560, 22980, 74661, and 74466 of, and to add Section 75601 to, the Water Code, to amend Section 11 of Chapter 129 of the Statutes of 1868, to amend Sections 26.6 and 26.9 of Chapter 1405 of the Statutes of 1951, to amend Section 7.1 of Chapter 2137 of the Statutes of 1959, and to amend Section 700 of Chapter 1399 of the Statutes of 1987, relating to local agencies.

[Approved by Governor October 11, 1993. Filed with Secretary of State October 11, 1993.]

The people of the State of California do enact as follows:

SECTION 1. This act shall be known and may be cited as the Local Government Omnibus Act of 1993. The Legislature finds and declares that Californians desire their governments to be run efficiently and economically and that public officials should avoid waste and duplication whenever possible. The Legislature further finds and declares that it desires to reduce its own operating costs by reducing the number of separate bills affecting related topics. Therefore, in enacting this act, it is the intent of the Legislature to combine several minor, noncontroversial statutory changes relating to public agencies into a single measure.

SEC. 1.5. Section 4201 of the Government Code is amended to read:

4201. Any local agency that undertakes or contracts for an

county hospital without competitive bidding, so long as an appropriation for the costs of those purchases or contracts is included in the county budget.

As used in this subdivision, "medical or surgical equipment or supplies" means only equipment or supplies commonly, necessarily, and directly used by or under the direction of a physician and surgeon in caring for or treating a patient in a hospital.

SEC. 23. Section 20206.7 of the Public Contract Code is repealed.

SEC. 24. Section 20206.8 of the Public Contract Code is repealed.

SEC. 25. Section 20206.9 of the Public Contract Code is amended to read:

20206.9. The clerk shall furnish printed blanks for all proposals and contracts.

SEC. 25.5. Section 22300 of the Public Contract Code is amended to read:

22300. (a) Provisions shall be included in any invitation for bid and in any contract documents to permit the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract, provided that substitution of securities provisions shall not be required in contracts in which there will be financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. Sec. 1921 et seq.), and where federal regulations or policies, or both, do not allow the substitution of securities. At the request and expense of the contractor, securities equivalent to the amount withheld shall be deposited with the public agency, or with a state or federally chartered bank in California as the escrow agent, who shall then pay those moneys to the contractor. Upon satisfactory completion of the contract, the securities shall be returned to the contractor.

(b) Alternatively, the contractor may request and the owner shall make payment of retentions earned directly to the escrow agent at the expense of the contractor. At the expense of the contractor, the contractor may direct the investment of the payments into securities and the contractor shall receive the interest earned on the investments upon the same terms provided for in this section for securities deposited by the contractor. Upon satisfactory completion of the contract, the contractor shall receive from the escrow agent all securities, interest, and payments received by the escrow agent from the owner, pursuant to the terms of this section. The contractor shall pay to each subcontractor, not later than 20 days of receipt of the payment, the respective amount of interest earned, net of costs attributed to retention withheld from each subcontractor, on the amount of retention withheld to insure the performance of the contractor.

(c) Securities eligible for investment under this section shall include those listed in Section 16430 of the Government Code, bank or savings and loan certificates of deposit, interest bearing demand deposit accounts, standby letters of credit, or any other security

mutually agreed to by the contractor and the public agency.

The contractor shall be the beneficial owner of any securities substituted for moneys withheld and shall receive any interest thereon.

Failure to include these provisions in bid and contract documents shall void any provisions for performance retentions in a public agency contract.

For purposes of this section, the term "public agency" shall include, but shall not be limited to, chartered cities.

(d) The Legislature hereby declares that the provisions of this section are of statewide concern and are necessary to encourage full participation by contractors in public contract procedures.

(e) The escrow agreement used hereunder shall be null, void, and unenforceable unless it is substantially similar to the following form:

ESCROW AGREEMENT FOR
SECURITY DEPOSITS IN LIEU OF RETENTION

This Escrow Agreement is made and entered into by and between

_____ whose address is _____
_____ hereinafter called "Owner,"
_____ whose address is _____
_____ hereinafter called "Contractor"
and
_____ whose address is _____
_____ hereinafter called "Escrow Agent."

For the consideration hereinafter set forth, the Owner, Contractor, and Escrow Agent agree as follows:

(1) Pursuant to Section 22300 of the Public Contract Code of the State of California, Contractor has the option to deposit securities with Escrow Agent as a substitute for retention earnings required to be withheld by Owner pursuant to the Construction Contract entered into between the Owner and Contractor for _____ in the amount of _____ dated _____ (hereinafter referred to as the "Contract"). Alternatively, on written request of the Contractor, the Owner shall make payments of the retention earnings directly to the escrow agent. When the Contractor deposits the securities as a substitute for Contract earnings, the Escrow Agent shall notify the Owner within 10 days of the deposit. The market value of the securities at the time of the substitution shall be at least equal to the cash amount then required to be withheld as retention under the terms of the Contract between the Owner and Contractor. Securities shall be held in the name of _____, and shall designate the Contractor as the beneficial owner.

(2) The Owner shall make progress payments to the Contractor for those funds which otherwise would be withheld from progress payments pursuant to the Contract provisions, provided that the

224160

Escrow Agent holds securities in the form and amount specified above.

(3) When the Owner makes payment of retentions earned directly to the Escrow Agent, the Escrow Agent shall hold them for the benefit of the Contractor until the time that the escrow created under this contract is terminated. The Contractor may direct the investment of the payments into securities. All terms and conditions of this agreement and the rights and responsibilities of the parties shall be equally applicable and binding when the Owner pays the Escrow Agent directly.

(4) Contractor shall be responsible for paying all fees for the expenses incurred by Escrow Agent in administering the Escrow Account and all expenses of the Owner. These expenses and payment terms shall be determined by the Owner, Contractor, and Escrow Agent.

(5) The interest earned on the securities or the money market accounts held in escrow and all interest earned on that interest shall be for the sole account of Contractor and shall be subject to withdrawal by Contractor at any time and from time to time without notice to the Owner.

(6) Contractor shall have the right to withdraw all or any part of the principal in the Escrow Account only by written notice to Escrow Agent accompanied by written authorization from the Owner to the Escrow Agent that Owner consents to the withdrawal of the amount sought to be withdrawn by Contractor.

(7) The Owner shall have a right to draw upon the securities in the event of default by the Contractor. Upon seven days' written notice to the Escrow Agent from the owner of the default, the Escrow Agent shall immediately convert the securities to cash and shall distribute the cash as instructed by the Owner.

(8) Upon receipt of written notification from the Owner certifying that the Contract is final and complete, and that the Contractor has complied with all requirements and procedures applicable to the Contract, Escrow Agent shall release to Contractor all securities and interest on deposit less escrow fees and charges of the Escrow Account. The escrow shall be closed immediately upon disbursement of all moneys and securities on deposit and payments of fees and charges.

(9) Escrow Agent shall rely on the written notifications from the Owner and the Contractor pursuant to Sections (5) to (8), inclusive, of this agreement and the Owner and Contractor shall hold Escrow Agent harmless from Escrow Agent's release and disbursement of the securities and interest as set forth above.

(10) The names of the persons who are authorized to give written notice or to receive written notice on behalf of the Owner and on behalf of Contractor in connection with the foregoing, and exemplars of their respective signatures are as follows:

On behalf of Owner:

Title

Name

Signature

Address

On behalf of Contractor:

Title

Name

Signature

Address

On behalf of Escrow Agent:

Title

Name

Signature

Address

At the time the Escrow Account is opened, the Owner and Contractor shall deliver to the Escrow Agent a fully executed counterpart of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement by their proper officers on the date first set forth above.

Owner

Title

Name

Signature

Contractor

Title

Name

Signature

SEC. 25.7. Section 5541.2 is added to the Public Resources Code, to read:

5541.2. The Riverside County Regional Park and Open-Space District may plan, acquire, preserve, protect, and otherwise improve, extend, control, operate, and maintain open-space areas, greenbelt areas, wildlife habitat areas, and regional parks for the use and enjoyment of all the inhabitants of the district. The district may select, designate, and acquire land, or rights in land, within or without the district, to be used and appropriated for those purposes.

SEC. 25.8. Section 5552.1 is added to the Public Resources Code, to read:

use of land served by the water-producing facility, crops grown on land served by the water-producing facility, or any other criteria or criteria which may be used to determine with reasonable accuracy the amount of water produced from that water-producing facility. The district may levy an annual charge upon a water-producing facility for which no production has been recorded but which has not been permanently abandoned if that charge does not exceed the annual cost to the district of maintaining and administering the registration of that facility.

SEC. 31.7. Section 700 of the Colusa Basin Drainage District Act, Chapter 1399 of the Statutes of 1987, is amended to read:

Sec. 700. The district may levy benefit assessments on a districtwide basis or within any zone, upon land only, as follows:

(a) An initial assessment for district expenses may be levied on the basis of an equal amount per acre as shown on the assessment rolls, but not to exceed ten cents ($0.10) per acre. It is hereby declared for that purpose that the benefit of district activities is received equally by all land. This initial assessment may be levied annually in lieu of the assessment specified in subdivision (b) until a plan has been approved pursuant to Section 610.

(b) Annual assessments pursuant to Sections 703 to 708, inclusive.

SEC. 32. With respect to Sections 9 and 19 of this act, the Legislature finds and declares that a special law is necessary and that a general law cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitutions because of the unique circumstances of the Counties of Butte, Merced, Orange, Riverside, and Ventura and the Riverside County Regional Park and Open-Space District, Capistrano Beach Sanitary District and the Dana Point Sanitary District.

SEC. 33. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because this act is in accordance with the request of a local agency or school district which desired legislative authority to carry out the program specified in this act. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

CHAPTER 726

An act to amend Sections 905.3, 930, 935.6, 11030.1, 11031, 13909, 13910, 13920, 13943.2, 16304.1, 16400, 16401, and 21152 of, to add Sections 965.1 and 17051.5 to, and to repeal Sections 13921, 13922, 13925, and 13927 of, the Government Code, to amend Section 5101 of, and to add Article 1.5 (commencing with Section 20104) to Chapter 1 of Part 3 of Division 2 of, the Public Contract Code, and to amend Sections 6901, 6981, 7091, 8126, 8191, 9151, 9196, 11551, 11596, 12951, 12977, 19302, 19306, 19314, 19441, 21013, 30361, 30421, 32401, 32440, 38601, 38631, 40111, 40121, 41100, 41107, 43451, 43491, 45651, and 45801 of the Revenue and Taxation Code, relating to state boards, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 21, 1994. Filed with Secretary of State September 22, 1994.]

The people of the State of California do enact as follows:

SECTION 1. It is the intent of the Legislature that the State Board of Control use its reduced General Fund budgetary resources to perform the following duties:

(a) Administer Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code in a manner that allows the state to conduct timely claim investigations of unjust claims, correct the conditions and practices that give rise to those claims, and settle just claims in order to avoid the costs of litigation.

(b) Adjudicate those protests of proposed state procurement contract awards that are filed under Section 10306 and subdivision

SEC. 21. Section 5101 of the Public Contract Code is amended to read:

5101. (a) A bidder shall not be relieved of the bid unless by consent of the awarding authority nor shall any change be made in the bid because of mistake, but the bidder may bring an action against the public entity in a court of competent jurisdiction in the county in which the bids were opened for the recovery of the amount forfeited, without interest or costs. If the plaintiff fails to recover judgment, the plaintiff shall pay all costs incurred by the public entity in the suit, including a reasonable attorney's fee to be fixed by the court.

(b) If an awarding authority for the state consents to relieve a bidder of a bid because of mistake, the authority shall prepare a report in writing to document the facts establishing the existence of each element required by Section 5103. The report shall be available for inspection as a public record. In the case of the University of California or a California State University, the report shall be filed with the regents and the trustees, respectively, and shall be available as a public record.

SEC. 22. Article 1.5 (commencing with Section 20104) is added to Chapter 1 of Part 3 of Division 2 of the Public Contract Code, to read:

Article 1.5. Resolution of Construction Claims

20104. (a) (1) This article applies to all public works claims of three hundred seventy-five thousand dollars ($375,000) or less which arise between a contractor and a local agency.

(2) This article shall not apply to any claims resulting from a contract between a contractor and a public agency when the public agency has elected to resolve any disputes pursuant to Article 7.1 (commencing with Section 10240) of Chapter 1 of Part 2.

(b) (1) "Public work" has the same meaning as in Sections 3100 and 3106 of the Civil Code, except that "public work" does not include any work or improvement contracted for by the state or the Regents of the University of California.

(2) "Claim" means a separate demand by the contractor for (A) a time extension, (B) payment of money or damages arising from work done by, or on behalf of, the contractor pursuant to the contract for a public work and payment of which is not otherwise expressly provided for or the claimant is not otherwise entitled to, or (C) an amount the payment of which is disputed by the local agency.

(c) The provisions of this article or a summary thereof shall be set forth in the plans or specifications for any work which may give rise to a claim under this article.

(d) This article applies only to contracts entered into on or after January 1, 1991.

20104.2. For any claim subject to this article, the following requirements apply:

(a) The claim shall be in writing and include the documents necessary to substantiate the claim. Claims must be filed on or before the date of final payment. Nothing in this subdivision is intended to extend the time limit or supersede notice requirements otherwise provided by contract for the filing of claims.

(b) (1) For claims of less than fifty thousand dollars ($50,000), the local agency shall respond in writing to any written claim within 45 days of receipt of the claim, or may request, in writing, within 30 days of receipt of the claim, any additional documentation supporting the claim or relating to defenses to the claim the local agency may have against the claimant.

(2) If additional information is thereafter required, it shall be requested and provided pursuant to this subdivision, upon mutual agreement of the local agency and the claimant.

(3) The local agency's written response to the claim, as further documented, shall be submitted to the claimant within 15 days after receipt of the further documentation or within a period of time no greater than that taken by the claimant in producing the additional information, whichever is greater.

(c) (1) For claims of over fifty thousand dollars ($50,000) and less than or equal to three hundred seventy-five thousand dollars ($375,000), the local agency shall respond in writing to all written claims within 60 days of receipt of the claim, or may request, in writing, within 30 days of receipt of the claim, any additional documentation supporting the claim or relating to defenses to the claim the local agency may have against the claimant.

(2) If additional information is thereafter required, it shall be requested and provided pursuant to this subdivision, upon mutual agreement of the local agency and the claimant.

(3) The local agency's written response to the claim, as further documented, shall be submitted to the claimant within 30 days after receipt of the further documentation, or within a period of time no greater than that taken by the claimant in producing the additional information or requested documentation, whichever is greater.

(d) If the claimant disputes the local agency's written response, or the local agency fails to respond within the time prescribed, the claimant may so notify the local agency, in writing, either within 15 days of receipt of the local agency's response or within 15 days of the local agency's failure to respond within the time prescribed, respectively, and demand an informal conference to meet and confer for settlement of the issues in dispute. Upon a demand, the local agency shall schedule a meet and confer conference within 30 days for settlement of the dispute.

(e) Following the meet and confer conference, if the claim or any portion remains in dispute, the claimant may file a claim as provided in Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of Division 3.6 of Title 1 of the Government Code. For purposes of those provisions, the running of the period of time within which a claim must be filed shall be

tolled from the time the claimant submits his or her written claim pursuant to subdivision (a) until the time that claim is denied as a result of the meet and confer process, including any period of time utilized by the meet and confer process.

(f) This article does not apply to tort claims and nothing in this article is intended nor shall be construed to change the time periods for filing tort claims or actions specified by Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of Division 3.6 of Title 1 of the Government Code.

20104.4. The following procedures are established for all civil actions filed to resolve claims subject to this article:

(a) Within 60 days, but no earlier than 30 days, following the filing or responsive pleadings, the court shall submit the matter to nonbinding mediation unless waived by mutual stipulation of both parties. The mediation process shall provide for the selection within 15 days by both parties of a disinterested third person as mediator, shall be commenced within 30 days of the submittal, and shall be concluded within 15 days from the commencement of the mediation unless a time requirement is extended upon a good cause showing to the court or by stipulation of both parties. If the parties fail to select a mediator within the 15-day period, any party may petition the court to appoint the mediator.

(b) (1) If the matter remains in dispute, the case shall be submitted to judicial arbitration pursuant to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, notwithstanding Section 1141.11 of that code. The Civil Discovery Act of 1986 (Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure) shall apply to any proceeding brought under this subdivision consistent with the rules pertaining to judicial arbitration.

(2) Notwithstanding any other provision of law, upon stipulation of the parties, arbitrators appointed for purposes of this article shall be experienced in construction law, and, upon stipulation of the parties, mediators and arbitrators shall be paid necessary and reasonable hourly rates of pay not to exceed their customary rate, and such fees and expenses shall be paid equally by the parties, except in the case of arbitration where the arbitrator, for good cause, determines a different division. In no event shall these fees or expenses be paid by state or county funds.

(3) In addition to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, any party who after receiving an arbitration award requests a trial de novo but does not obtain a more favorable judgment shall, in addition to payment of costs and fees under that chapter, pay the attorney's fees of the other party arising out of the trial de novo.

(c) The court may, upon request by any party, order any witnesses to participate in the mediation or arbitration process.

20104.6. (a) No local agency shall fail to pay money as to any portion of a claim which is undisputed except as otherwise provided

in the contract.

(b) In any suit filed under Section 20104.4, the local agency shall pay interest at the legal rate on any arbitration award or judgment. The interest shall begin to accrue on the date the suit is filed in a court of law.

SEC. 23. Section 6901 of the Revenue and Taxation Code is amended to read:

6901. If the board determines that any amount, penalty, or interest has been paid more than once or has been erroneously or illegally collected or computed, the board shall set forth that fact in the records of the board and shall certify the amount collected in excess of the amount legally due and the person from whom it was collected or by whom paid. The excess amount collected or paid shall be credited by the board on any amounts then due and payable from the person from whom the excess amount was collected or by whom it was paid under this part, and the balance shall be refunded to the person, or his or her successors, administrators, or executors, if a determination by the board is made in any of the following cases:

(a) Any amount of tax, interest, or penalty was not required to be paid.

(b) Any amount of prepayment of sales tax, interest, or penalty paid pursuant to Article 1.5 (commencing with Section 6480) of Chapter 5 was not required to be paid.

(c) Any amount that is approved as a settlement pursuant to Section 7093.5.

Any overpayment of the use tax by a purchaser to a retailer who is required to collect the tax and who gives the purchaser a receipt therefor pursuant to Article 1 (commencing with Section 6201) of Chapter 3 shall be credited or refunded by the state to the purchaser. Any proposed determination by the board pursuant to this section with respect to an amount in excess of fifty thousand dollars ($50,000) shall be available as a public record for at least 10 days prior to the effective date of that determination.

SEC. 24. Section 6981 of the Revenue and Taxation Code is amended to read:

6981. If any amount has been illegally determined either by the person filing the return or by the board, the board shall set forth that fact in its records, certify the amount determined to be in excess of the amount legally due and the person against whom the determination was made, and authorize the cancellation of the amount upon the records of the board. Any proposed determination by the board pursuant to this section with respect to an amount in excess of fifty thousand dollars ($50,000) shall be available as a public record for at least 10 days prior to the effective date of that determination.

SEC. 25. Section 7091 of the Revenue and Taxation Code is amended to read:

7091. (a) Every taxpayer is entitled to be reimbursed for any reasonable fees and expenses related to a hearing before the board

person filing the return or by the board, the board shall certify the amount determined to be in excess of the amount legally due and the person against whom the determination was made, and authorize the cancellation of the amount upon the records of the board. Any proposed determination by the board pursuant to this section with respect to an amount in excess of fifty thousand dollars ($50,000) shall be available as a public record for at least 10 days prior to the effective date of that determination.

SEC. 51. Section 45651 of the Revenue and Taxation Code is amended to read:

45651. If the board determines that any amount of fee, penalty, or interest has been paid more than once or has been erroneously or illegally collected or computed, the board shall set forth that fact in the records of the board, certify the amount collected in excess of what was legally due and the person from whom it was collected or by whom paid, and credit the excess amount collected or paid on any amounts then due from the person from whom the excess amount was collected or by whom it was paid under this part, and the balance shall be refunded to the person, or his or her successors, administrators, or executors. Any proposed determination by the board pursuant to this section with respect to an amount in excess of fifteen thousand dollars ($15,000) shall be available as a public record for at least 10 days prior to the effective date of that determination.

SEC. 52. Section 45801 of the Revenue and Taxation Code is amended to read:

45801. If any amount has been illegally determined, either by the person filing the return or by the board, the board shall certify the amount determined to be in excess of the amount legally due and the person against whom the determination was made, and authorize the cancellation of the amount upon the records of the board. Any proposed determination by the board pursuant to this section with respect to an amount in excess of fifteen thousand dollars ($15,000) shall be available as a public record for at least 10 days prior to the effective date of that determination.

SEC. 53. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to ensure that the State Board of Control is able to properly accommodate reductions in board funding by eliminating some of its nonessential functions and streamlining those functions remaining, it is necessary that this act take effect immediately.

CHAPTER 504

An act to add Section 1373.95 to the Health and Safety Code, and to add Section 10133.55 to the Insurance Code, relating to health coverage.

[Approved by Governor October 3, 1995. Filed with Secretary of State October 4, 1995.]

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) The health care delivery system in California is increasingly relying upon various forms of managed care to control the costs of providing health care.

(b) Strong provider-patient relationships, particularly for patients with acute medical conditions, may enhance the curative process.

(c) Maintaining continuity of care as patients change providers and health plans is important to the health and well-being of the enrollees of managed care plans.

SEC. 2. Section 1373.95 is added to the Health and Safety Code, immediately following Section 1373.9, to read:

1373.95. (a) On or before July 1, 1996, every health care service plan that provides coverage on a group basis shall file with the Department of Corporations, a written policy describing how the health plan shall facilitate the continuity of care for new enrollees receiving services during a current episode of care for an acute condition from a nonparticipating provider. This written policy shall describe the process used to facilitate the continuity of care, including the assumption of care by a participating provider. Notice of the policy and information regarding how enrollees may request a review under the policy shall be provided to all new enrollees , except those enrollees who are not eligible as described in subdivision (e). A copy of the written policy shall be provided to eligible enrollees upon request.

(b) The written policy shall describe how requests to continue services with an existing provider are reviewed by the plan. The policy shall ensure that reasonable consideration is given to the potential clinical effect that a change of provider would have on the enrollee's treatment for the acute condition.

(c) A health care service plan may require any nonparticipating provider whose services are continued pursuant to the written policy to agree in writing to meet the same contractual terms and conditions that are imposed upon the plan's participating providers, including location within the plan's service area, reimbursement methodologies, and rates of payment. If the health care service plan determines that a patient's health care treatment should temporarily continue with the patient's existing provider, the health care service plan shall not be liable for actions resulting solely from the negligence, malpractice, or other tortious or wrongful acts arising out of the provision of services by the existing provider.

(d) Nothing in this section shall require a health care service plan to cover services or provide benefits that are not otherwise covered under the terms and conditions of the plan contract.

(e) The written policy shall not apply to any enrollee who is offered an out-of-network option, or who had the option to continue

with his or her previous health plan or provider and instead voluntarily chose to change health plans.

(f) This section shall not apply to health plan contracts that include out-of-network coverage under which the enrollee is able to obtain services from the enrollee's existing provider.

(g) For purposes of this section, "provider" refers to a person who is described in subdivision (f) of Section 900 of the Business and Professions Code.

SEC. 3. Section 10133.55 is added to the Insurance Code, to read:

10133.55. (a) On or before July 1, 1996, every disability insurer covering hospital, medical, and surgical expenses on a group basis, or nonprofit hospital service plan providing coverage on a group basis, that contracts with providers for alternative rates pursuant to Section 10133 or Section 11512 and limit payments under those policies and plans to services secured by insureds and subscribers from providers charging alternative rates pursuant to these contracts, shall file with the Department of Insurance, a written policy describing how the health plan shall facilitate the continuity of care for new insureds or enrollees receiving services during a current episode of care for an acute condition from a noncontracting provider. This written policy shall describe the process used to facilitate continuity of care, including the assumption of care by a contracting provider. Notice of the policy and information regarding how insureds and subscribers may request a review under the policy shall be provided to all new insureds and subscribers , except those insureds or subscribers who are not eligible as described in subdivision (e). A copy of the written policy shall be provided to eligible insureds and subscribers upon request.

(b) The written policy shall describe how requests to continue services with an existing noncontracting provider are reviewed by the insurer or plan. The policy shall ensure that reasonable consideration is given to the potential clinical effect that a change of provider would have on the insured's or subscriber's treatment for the acute condition.

(c) An insurer or plan may require any nonparticipating provider whose services are continued pursuant to the written policy to agree in writing to meet the same contractual terms and conditions that are imposed upon the insurer's or plan's participating providers, including location within the plan's service area, reimbursement methodologies, and rates of payment. If the insurer or plan determines that a patient's health care treatment should temporarily continue with the patient's existing provider, the insurer or plan shall not be liable for actions resulting solely from the negligence, malpractice, or other tortious or wrongful acts arising out of the provision of services by the existing provider.

(d) Nothing in this section shall require an insurer or plan to cover services or provide benefits that are not otherwise covered under the terms and conditions of the policy or plan contract.

(e) The written policy shall not apply to any insured or subscriber who is offered an out-of-network option, or who had the option to continue with his or her previous health benefits carrier or provider and instead voluntarily chose to change health plans.

(f) This section shall not apply to health plan contracts that include out-of-network coverage under which the insured or subscriber is able to obtain services from the insured's or subscriber's existing provider.

(g) For purposes of this section, "provider" refers to a person who is described in subdivision (f) of Section 900 of the Business and Professions Code.

(h) This section shall only apply to a group disability insurance policy if it provides coverage for hospital, medical, or surgical benefits.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Notwithstanding Section 17580 of the Government Code, unless otherwise specified, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

CHAPTER 897

An act to amend Sections 20111, 20113, 20114, 20116, 20651, 20654, 20655, and 20657 of, and to repeal Section 20651.5 of, the Public Contract Code, relating to local agency contracts.

[Approved by Governor October 13, 1995. Filed with Secretary of State October 16, 1995.]

The people of the State of California do enact as follows:

SECTION 1. Section 20111 of the Public Contract Code is amended to read:

20111. (a) The governing board of any school district, in accordance with any requirement established by that governing board pursuant to subdivision (a) of Section 2000, shall let any contracts involving an expenditure of more than fifty thousand dollars ($50,000) for any of the following:

(1) The purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district.

(2) Services, except construction services.

(3) Repairs, including maintenance as defined in Section 20115, that are not a public project as defined in subdivision (c) of Section 22002.

The contract shall be let to the lowest responsible bidder who shall give security as the board requires, or else reject all bids.

(b) The governing board shall let any contract for a public project, as defined in subdivision (c) of Section 22002, involving an expenditure of fifteen thousand dollars ($15,000) or more, to the lowest responsible bidder who shall give security as the board requires, or else reject all bids. All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(1) Cash.

(2) A cashier's check made payable to the school district.

(3) A certified check made payable to the school district.

(4) A bidder's bond executed by an admitted surety insurer, made payable to the school district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the school district beyond 60 days from the time the award is made.

(c) This section applies to all equipment, materials, or supplies, whether patented or otherwise, and to contracts awarded pursuant to subdivision (a) of Section 2000. This section shall not apply to professional services or advice, insurance services, or any other purchase or service otherwise exempt from this section, or to any work done by day labor or by force account pursuant to Section 20114.

(d) Commencing January 1, 1997, the Superintendent of Public Instruction shall annually adjust the dollar amounts specified in subdivision (a) to reflect the percentage change in the annual average value of the Implicit Price Deflator for State and Local Government Purchases of Goods and Services for the United States, as published by the United States Department of Commerce for the 12-month period ending in the prior fiscal year. The annual adjustments shall be rounded to the nearest one hundred dollars ($100).

SEC. 2. Section 20113 of the Public Contract Code is amended to read:

20113. (a) In an emergency when any repairs, alterations, work, or improvement is necessary to any facility of public schools to permit the continuance of existing school classes, or to avoid danger to life or property, the board may, by unanimous vote, with the approval of the county superintendent of schools, do either of the following:

(1) Make a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing of materials or supplies for the purpose without advertising for or inviting bids.

(2) Notwithstanding Section 20114, authorize the use of day labor or force account for the purpose.

(b) Nothing in this section shall eliminate the need for any bonds or security otherwise required by law.

SEC. 3. Section 20114 of the Public Contract Code is amended to read:

20114. (a) In each school district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 20115 by day labor, or by force account, whenever the total number of hours on the job does not exceed 350 hours. Moreover, in any school district having an average daily attendance of 35,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance, as defined in Section 20115, by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours, or when the cost of material does not exceed twenty-one thousand dollars ($21,000).

(b) For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

SEC. 4. Section 20116 of the Public Contract Code is amended to read:

20116. It shall be unlawful to split or separate into smaller work orders or projects any work, project, service, or purchase for the purpose of evading the provisions of this article requiring contracting after competitive bidding.

The district shall maintain job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California School Accounting Manual for a period of not less than three years after completion of the project.

Informal bidding may be used on work, projects, services, or purchases that cost up to the limits set forth in this article. For the purpose of securing informal bids, the board shall publish annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. All contractors included on the informal bidding list shall be given notice of all informal bid projects in any manner as the district deems appropriate.

SEC. 5. Section 20651 of the Public Contract Code is amended to read:

20651. (a) The governing board of any community college district shall let any contracts involving an expenditure of more than fifty thousand dollars ($50,000) for any of the following:

(1) The purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district.

(2) Services, except construction services.

(3) Repairs, including maintenance as defined in Section 20656, that are not a public project as defined in subdivision (c) of Section 22002.

The contract shall be let to the lowest responsible bidder who shall give security as the board requires, or else reject all bids.

(b) The governing board shall let any contract for a public project, as defined in subdivision (c) of Section 22002, involving an expenditure of fifteen thousand dollars ($15,000) or more to the lowest responsible bidder who shall give security as the board requires, or else reject all bids. All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(1) Cash.

(2) A cashier's check made payable to the community college district.

(3) A certified check made payable to the community college district.

(4) A bidder's bond executed by an admitted surety insurer, made payable to the community college district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

(c) This section applies to all equipment, materials, or supplies, whether patented or otherwise. This section shall not apply to

professional services or advice, insurance services, or any other purchase or service otherwise exempt from this section, or to any works done by day labor or by force account pursuant to Section 20655.

(d) Commencing January 1, 1997, the Board of Governors of the California Community Colleges shall annually adjust the dollar amounts specified in subdivision (a) to reflect the percentage change in the annual average value of the Implicit Price Deflator for State and Local Government Purchases of Goods and Services for the United States, as published by the United States Department of Commerce for the 12-month period ending in the prior fiscal year. The annual adjustments shall be rounded to the nearest one hundred dollars ($100).

SEC. 6. Section 20651.5 of the Public Contract Code is repealed.

SEC. 7. Section 20654 of the Public Contract Code is amended to read:

20654. (a) In an emergency when any repairs, alterations, work, or improvement is necessary to any facility of the college, or to permit the continuance of existing college classes, or to avoid danger to life or property, the board may by unanimous vote, with the approval of the county superintendent of schools, do either of the following:

(1) Make a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing of materials or supplies for the purpose without advertising for or inviting bids.

(2) Notwithstanding Section 20655, authorize the use of day labor or force account for the purpose.

(b) Nothing in this section shall eliminate the need for any bonds or security otherwise required by law.

SEC. 8. Section 20655 of the Public Contract Code is amended to read:

20655. (a) In each community college district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 20656 by day labor, or by force account, whenever the total number of hours on the job does not exceed 350 hours. Moreover, in any district whose number of full-time equivalent students is 15,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance, as defined in Section 20656, by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours, or when the cost of materials does not exceed twenty-one thousand dollars ($21,000).

(b) For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

SEC. 9. Section 20657 of the Public Contract Code is amended to read:

20657. It shall be unlawful to split or separate into smaller work orders or projects any work, project, service, or purchase for the purpose of evading the provisions of this article requiring contracting after competitive bidding.

The district shall maintain job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California Community College Budget and Accounting Manual for a period of not less than three years after completion of the project.

Informal bidding may be used on work, projects, services, or purchases that cost up to the limits set forth in this article. For the purpose of securing informal bids, the board shall publish annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. All contractors included on the informal bidding list shall be given notice of all informal bid projects, in any manner as the district deems appropriate.

Assembly Bill No. 611

CHAPTER 390

An act to amend Sections 17280, 17295, 81130, and 81133 of the Education Code, and to amend Section 20111.5 of the Public Contract Code, relating to education facilities, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor August 26, 1997. Filed with Secretary of State August 27, 1997.]

LEGISLATIVE COUNSEL'S DIGEST

AB 611, Villaraigosa. Educational facilities.

(1) Existing law requires the Department of General Services to supervise the construction of any public school building, and to supervise an alteration or reconstruction of, or addition to, any public school building when the estimated cost exceeds $20,000. Existing law requires the Department of General Services to pass on the construction of any public school building, and to pass on any alteration of a public school building when the estimated cost exceeds $20,000. Existing law requires a structural engineer to examine and report, as specified, on any alteration of a public school building, when the estimated cost exceeds $10,000 but does not exceed $20,000.

This bill would require the Department of General Services to pass on an alteration of any public school building when the estimated cost exceeds $25,000. This bill would require a licensed structural engineer to examine and report, as specified, on any alteration of a public school building, when the estimated cost exceeds $25,000 but does not exceed $100,000. This bill would require a design professional, as specified, to certify that the plans and specifications for any alteration of a public school building meet specified requirements when the alteration does not involve structural elements.

(2) Existing law permits a school district to prequalify prospective bidders for contracts with the district, as specified.

This bill would permit a school district to establish a process for prequalifying bidders on a quarterly basis and would authorize that prequalification to be considered valid for up to one calendar year following the date of initial prequalification.

(3) This bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 17280 of the Education Code is amended to read:

17280. (a) The Department of General Services under the police power of the state shall supervise the design and construction of any school building or the reconstruction or alteration of or addition to any school building, if not exempted under Section 17295, to ensure that plans and specifications comply with the rules and regulations adopted pursuant to this article and building standards published in Title 24 of the California Code of Regulations, and to ensure that the work of construction has been performed in accordance with the approved plans and specifications, for the protection of life and property. Nothing in this section shall be construed to allow a school district to perform work with its own forces in excess of the limitations set forth in Sections 17595 and 17599. In calculating the cost of any project of reconstruction or alteration of, or addition to, any school building for the purpose of determining the applicability of the rules and regulations adopted pursuant to this article and building standards published in Title 24 of the California Code of Regulations, the Department of General Services shall not include, as an element of that cost, any expenses of air-conditioning equipment or insulation materials for that building, or of installing the equipment or materials.

(b) Whenever repairs due to fire damage, not including any damage caused by wind or earthquake, must be made to any school building previously approved by the Department of General Services, the approved plans and specifications used in the original work under then existing rules, regulations, and building standards may be used without modification, providing all other provisions of this article are carried out.

(c) Notwithstanding any other provision of law, no school district shall be authorized to construct or reconstruct any school building, regardless of the source of funding, unless and until the governing board of the district, by resolution, has indicated the agreement of the district that any school building construction or reconstruction that exceeds those construction costs and allowable area standards or any allowable building area computed for an attendance area pursuant to Section 17041 shall, in the event of the district's subsequent application for state funding for school facility construction, be deducted from the allowable building area for which the district would otherwise have been eligible, which restriction shall not be subject to waiver or exception as otherwise may be provided by law.

(d) If it is determined that, for any reason, a school district failed to comply with the requirement of this section, the district shall not be eligible for any additional building area pursuant to Section 17049

and may be denied any time priority established for the particular project pursuant to Section 17016.

SEC. 2. Section 17295 of the Education Code is amended to read:

17295. (a) The Department of General Services shall pass upon and approve or reject all plans for the construction or, if the estimated cost exceeds twenty-five thousand dollars ($25,000), the alteration of any school building. To enable it to do so, the governing board of each school district and any other school authority before adopting any plans for the school building shall submit the plans to the Department of General Services for approval, and shall pay the fees prescribed in this article.

(b) Notwithstanding subdivision (a) of Section 17295, where the estimated cost of the reconstruction or alteration of, or an addition to, any school building exceeds twenty-five thousand dollars ($25,000) but does not exceed one hundred thousand dollars ($100,000), a licensed structural engineer shall examine the proposed project to determine if it is a nonstructural alteration or a structural alteration. If he or she determines that the project is a nonstructural alteration, he or she shall prepare a statement so indicating. If he or she determines that the project is structural, he or she shall prepare plans and specifications for the project which shall be submitted to the Department of General Services for review and approval. A copy of the engineer's report stating that the work does not affect structural elements shall be filed with the Department of General Services.

(c) If a licensed structural engineer submits a report to the Department of General Services stating that the plans or activities authorized pursuant to subdivision (b) do not involve structural elements, then all of the following shall apply to that project:

(1) The design professional in responsible charge of the project undertaken pursuant to this subdivision shall certify that the plans and specifications for the project meet any applicable fire and life safety standards, and do not affect the disabled access requirements of Section 4450 of the Government Code, and shall submit this certification to the department. The letter of certification shall bear the identifying licensing stamp or seal of the design professional. This provision does not preclude a design professional from submitting plans and specifications to the department along with the appropriate fee for review.

(2) Within 10 days of the completion of any project authorized pursuant to subdivision (b), the school construction inspector of record on the project, who is certified by the department to inspect school buildings, shall certify in writing to the department that the reconstruction, alteration, or addition has been completed in compliance with the plans and specifications.

(3) The dollar amounts cited in this section shall be increased on an annual basis, commencing January 1, 1999, by the department

according to an inflationary index governing construction costs that is selected and recognized by the department.

(4) No school district shall subdivide a project for the purpose of evading the limitation on amounts cited in this

(d) For purposes of this section, "design professional in responsible charge" or "design professional" means the licensed architect, licensed structural engineer, or licensed civil engineer who is responsible for the completion of the design work involved with the project.

SEC. 3. Section 81130 of the Education Code is amended to read:

81130. (a) The Department of General Services under the police power of the state shall supervise the design and construction of any school building or the reconstruction or alteration of, or addition to, any school building, if not exempted under Section 81133, to ensure that plans and specifications comply with the rules and regulations adopted pursuant to this article and building standards published in Title 24 of the California Code of Regulations, and to ensure that the work of construction has been performed in accordance with the approved plans and specifications, for the protection of life and property. Nothing in this section shall be construed to allow a community college district to perform work with its own forces in excess of the limitations set forth in Article 41 (commencing with Section 20650) of Part 3 of Division 2 of the Public Contract Code.

(b) Whenever repairs due to fire damage must be made to any school building previously approved by the Department of General Services, the approved plans and specifications used in the original work under then existing rules, regulations, and building standards may be used without modification, providing all other provisions of this article are carried out.

SEC. 4. Section 81133 of the Education Code is amended to read:

81133. (a) The Department of General Services shall pass upon and approve or reject all plans for the construction or, if the estimated cost exceeds twenty-five thousand dollars ($25,000), the alteration of any school building. To enable it to do so, the governing board of each community college district and any other school authority before adopting any plans for the school building shall submit the plans to the Department of General Services for approval, and shall pay the fees prescribed in this article.

(b) Notwithstanding subdivision (a) , where the estimated cost of reconstruction or alteration of, or addition to, a school building exceeds twenty-five thousand dollars ($25,000), but does not exceed one hundred thousand dollars ($100,000), a licensed structural engineer shall examine the proposed project to determine if it is a nonstructural alteration or a structural alteration. If he or she determines that the project is a nonstructural alteration, he or she shall prepare a statement so indicating. If he or she determines that the project is structural, he or she shall prepare plans and

specifications for the project which shall be submitted to the Department of General Services for review and approval. A copy of the engineer's report stating that the work does not affect structural elements shall be filed with the Department of General Services.

(c) If a licensed structural engineer submits a report to the Department of General Services stating that the plans or activities authorized pursuant to subdivision (b) do not involve structural elements, then all of the following shall apply to that project:

(1) The design professional in responsible charge of the project undertaken pursuant to this subdivision shall certify that the plans and specifications for the project meet any applicable fire and life safety standards, and do not affect the disabled access requirements of Section 4450 of the Government Code, and shall submit this certification to the department. The letter of certification shall bear the identifying licensing stamp or seal of the design professional. This provision does not preclude a design professional from submitting plans and specifications to the department along with the appropriate fee for review.

(2) Within 10 days of the completion of any project authorized pursuant to subdivision (b), the school construction inspector of record on the project, who is certified by the department to inspect school buildings, shall certify in writing to the department that the reconstruction, alteration, or addition has been completed in compliance with the plans and specifications.

(3) The dollar amounts cited in this section shall be increased on an annual basis, commencing January 1, 1999, by the department according to an inflationary index governing construction costs that is selected and recognized by the department.

(4) No school district shall subdivide a project for the purpose of evading the limitation on amounts cited in this section.

(5) Before letting any contract for any construction or alteration of any school building, the written approval of the plans, as to safety of design and construction, by the Department of General Services, shall first be had and obtained.

(6) In each case the application for approval of the plans shall be accompanied by the plans and full, complete, and accurate specifications, and structural design computations, and estimates of cost, which shall comply in every respect with any and all requirements prescribed by the Department of General Services.

(7) The application shall be accompanied by a filing fee in amounts as determined by the Department of General Services based on the estimated cost according to the following schedule:

(A) For the first one million dollars ($1,000,000), a fee of not more than 0.7 percent of the estimated cost.

(B) For all costs in excess of one million dollars ($1,000,000), a fee of not more than 0.6 percent of the estimated cost.

The minimum fee in any case shall be two hundred fifty dollars ($250). If the actual cost exceeds the estimated cost by more than 5 percent, a further fee shall be paid to the Department of General Services, based on the above schedule and computed on the amount by which the actual cost exceeds the amount of the estimated cost.

(8) All fees shall be paid into the State Treasury and credited to the Division of Architecture Public Building Fund, which fund is continued in existence and is retitled the Architecture Public Building Fund, and are continuously appropriated, without regard to fiscal years, for the use of the Department of General Services, subject to approval of the Department of Finance, in carrying out the provisions of this article.

Adjustments in the amounts of the fees, as determined by the Department of General Services and approved by the Department of Finance, shall be made within the limits set in subdivision (j) in order to maintain a reasonable working balance in the fund.

(9) No contract for the construction or alteration of any school building, made or executed by the governing board of any community college district or other public board, body, or officer otherwise vested with authority to make or execute this contract, is valid, and no public money shall be paid for any work done under this contract or for any labor or materials furnished in constructing or altering the building, unless the plans, specifications, and estimates comply in every particular with the provisions of this article and the requirements prescribed by the Department of General Services and unless the approval thereof in writing has first been had and obtained from the Department of General Services.

(d) For purposes of this section, "design professional in responsible charge" or "design professional" means the licensed architect, licensed structural engineer, or licensed civil engineer who is responsible for the completion of the design work involved with the project.

SEC. 5. Section 20111.5 of the Public Contract Code is amended to read:

20111.5. (a) The governing board of the district may require that each prospective bidder for a contract, as described under Section 20111, complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's financial ability and experience in performing public works. The questionnaire and financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaires and financial statements shall not be public records and shall not be open to public inspection.

(b) Any school district requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating

bidders on the basis of the completed questionnaires and financial statements, in order to determine the size of the contracts upon which each bidder shall be deemed qualified to bid.

(c) Each prospective bidder on any contract described under Section 20111 shall be furnished by the school district letting the contract with a standardized proposal form that, when completed and executed, shall be submitted as his or her bid. Bids not presented on the forms so furnished shall be disregarded.

(d) A proposal form required pursuant to subdivision (c) shall not be accepted from any person or other entity who is required to submit a completed questionnaire and financial statement for prequalification pursuant to subdivision (a), but has not done so at least five days prior to the date fixed for the public opening of sealed bids or has not been prequalified, pursuant to subdivision (b), for at least one day prior to that date.

(e) Notwithstanding subdivision (d), any school district may establish a process for prequalifying prospective bidders pursuant to this section on a quarterly basis and may authorize that prequalification to be considered valid for up to one calendar year following the date of initial prequalification.

SEC. 6. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to help expedite, as soon as possible, the approval process for structural alteration school construction projects, it is necessary that this act take effect immediately.

O

Assembly Bill No. 994

CHAPTER 722

An act to add Section 20103.6 to the Public Contract Code, relating to local agency contracts.

[Approved by Governor October 6, 1997. Filed with Secretary of State October 7, 1997.]

LEGISLATIVE COUNSEL'S DIGEST

AB 994, Sweeney. Local Agency Public Construction Act: architectural design services: bids.

The Local Agency Public Construction Act sets forth the procedures pursuant to which local agencies may solicit and evaluate bids or proposals for, and award, contracts for the construction of public works.

This bill would, as of July 1, 1998, require any local agency subject to the act, in the procurement of architectural design services requiring an expenditure in excess of $10,000, to include in any request for proposals for those services or invitation to bid from a prequalified list for a specific project, a disclosure of any contract provision that would require the contracting architect to indemnify and hold harmless the local agency against any and all liability, whether or not caused by the activity of the contracting architect. It would provide that, in the event a local agency fails to disclose such a contract provision in the request for proposals or invitation to bid, that local agency would (1) be precluded from requiring the selected architect to agree to any contract provision requiring the selected architect to indemnify or hold harmless the local agency against any and all liability not caused by the activity of the selected architect, (2) be required to cease discussions with the selected architect and reopen the request for proposals or invitations to bid, or (3) be required to mutually agree to an indemnity clause acceptable to both parties.

The people of the State of California do enact as follows:

SECTION 1. Section 20103.6 is added to the Public Contract Code, to read:

20103.6. (a) (1) Any local agency subject to this chapter shall, in the procurement of architectural design services requiring an expenditure in excess of ten thousand dollars ($10,000), include in any request for proposals for those services or invitations to bid from a prequalified list for a specific project a disclosure of any contract provision that would require the contracting architect to indemnify

and hold harmless the local agency against any and all liability, whether or not caused by the activity of the contracting architect.

(2) The disclosure statement shall be prominently set forth in bold type.

(b) In the event a local agency fails to comply with paragraph (1) of subdivision (a), that local agency shall (1) be precluded from requiring the selected architect to agree to any contract provision requiring the selected architect to indemnify or hold harmless the local agency against any and all liability not caused by the activity of the selected architect, (2) cease discussions with the selected architect and reopen the request for proposals or invitations to bid from a qualification list, or (3) mutually agree to an indemnity clause acceptable to both parties.

(c) This section shall become operative on July 1, 1998.

O

REAL PROPERTY—COMMUNITY COLLEGE DISTRICT—AUTHORIZATION AND REGULATIONS

CHAPTER 657

A.B. No. 1921

AN ACT to amend and renumber the heading of Article 1 (commencing with Section 81300) of Chapter 2 of, to add the heading of Chapter 2 (commencing with Section 81250) to, to add Article 1 (commencing with Section 81250) to Chapter 2 of, and to repeal the heading of Chapter 2 (commencing with Section 81300) of, Part 49 of the Education Code, and to add Section 20651.5 to the Public Contract Code, relating to community colleges.

[Approved by Governor September 20, 1998.]

[Filed with Secretary of State September 21, 1998.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1921, Scott. Community colleges: real property of community college districts.

(1) Existing law authorizes the establishment of community college districts and their operation of community college campuses. Existing law prescribes procedures with regard to the sale, lease, use, gift, and exchange of real property by community college districts.

This bill would authorize the governing board of a community college district to request the Board of Governors of the California Community Colleges to waive, insofar as necessary to accomplish the purpose of the waiver request, all or a portion of the procedures regulating the sale, lease, use, gift, or exchange of community college district real property, other than any provision of the bill. The bill would require that this waiver could be requested only after a noticed public hearing, and only if the waiver request demonstrates that the district has provided the required written notice, that the district was unable to reach agreement with any public agency that sought to acquire the property, that the waiver will not substantially increase state costs or decrease state revenues, and that the waiver will further the ability of the district to meet the educational needs of the community. The bill would provide that the Board of Governors of the California Community Colleges may approve a request for a waiver upon finding that the waiver would promote efficiency and further the public benefit. The bill would require the Chancellor of the California Community Colleges to annually report to the

Governor and the Legislature on the number, types, and disposition of waiver requests submitted under the bill.

(2) Existing law requires the governing board of any community college district to let any contracts involving an expenditure of more than $50,000 for the purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district; for services, except construction services; or repairs, including maintenance as defined, that are not a public project, as defined. Existing law also requires the governing board of a community college district to let any contract for a public project, as defined, involving an expenditure of $15,000 or more to the lowest responsible bidder who gives security as the board requires, or else to reject all bids.

This bill would authorize a governing board of any community college district to require that each prospective bidder for a contract complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district. This bill would impose a state-mandated local program by requiring that a governing board of a community college district furnish prospective bidders for contracts subject to the bill with a standardized proposal form.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. The heading of Chapter 2 (commencing with Section 81250) is added to Part 49 of the Education Code, to read:

CHAPTER 2. PROPERTY: SALE, LEASE, USE, GIFT, AND EXCHANGE

SEC. 2. Article 1 (commencing with Section 81250) is added to Chapter 2 of Part 49 of the Education Code, to read:

Article 1. General Provisions

81250. (a) The governing board of a community college district may, after a public hearing on the matter, request the Board of Governors of the California Community Colleges to waive, insofar as necessary to accomplish the purpose of the waiver request, all or part of any section of this chapter, other than any provision of this article, or any regulation adopted by the Board of Governors that implements a provision of this chapter.

(b) If a waiver request involves the sale or lease of district real property, the governing board of a district requesting a waiver shall provide written notice of the public hearing conducted pursuant to subdivision (a), at least 30 days prior to the hearing, to any city, county, park or recreation district, regional park authority, or public housing authority within which the land may be situated.

81252. (a) The Board of Governors of the California Community Colleges may approve any request for waiver upon finding that the waiver would promote efficiency and further the public benefit. Waivers may be approved for purposes including, but not necessarily limited to, joint or shared use of property and facilities and for collaborative partnerships between colleges and other public and private entities.

(b) The Board of Governors of the California Community Colleges shall not approve any request for waiver of any provision of this chapter pursuant to Section 81250 unless the district seeking the waiver demonstrates all of the following:

(1) The district has provided the written notice required by subdivision (b) of Section 81250.

(2) The district, after making a good faith effort, was unable to reach agreement with any public agency that sought to acquire the site pursuant to Section 81363.5.

(3) The waiver will not substantially increase state costs or decrease state revenues.

(4) The waiver will further the ability of the district to meet the educational needs of the community.

81254. The Chancellor of the California Community Colleges shall annually report to the Governor and Legislature on the number, types, and disposition of waiver requests submitted pursuant to Section 81250.

SEC. 3. The heading of Chapter 2 (commencing with Section 81300) of Part 49 of the Education Code is repealed.

SEC. 4. The heading of Article 1 (commencing with Section 81300) of Chapter 2 of Part 49 of the Education Code is amended and renumbered to read:

Article 1.5. Conveyances

SEC. 5. Section 20651.5 is added to the Public Contract Code, to read:

20651.5. (a) The governing board of any community college district may require each prospective bidder for a contract, as described under Section 20651, to complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's financial ability and experience in performing public works. The questionnaire and financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaire responses of prospective bidders and their financial statements shall not be deemed public records and shall not be open to public inspection.

(b) Any community college district requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine the size of the contracts upon which each bidder shall be deemed financially qualified to bid. The prequalification of a prospective bidder shall neither limit nor preclude a district's subsequent consideration of a prequalified bidder's responsibility on factors other than the prospective bidder's financial qualifications.

(c) Each prospective bidder on any contract described under Section 20651 that is subject to this section shall be furnished, by the community college district letting the contract, with a standardized proposal form that, when completed and executed, shall be submitted as his or her bid. Bids not presented on the forms so furnished shall be deemed nonresponsive and shall be rejected. A proposal form shall not be accepted from any person who, or other entity which, is required to submit a completed questionnaire and financial statement for prequalification pursuant to subdivision (a), but who or which has not done so at least five days prior to the date fixed for the public opening of sealed bids and has not been prequalified, pursuant to subdivision (b), at least one day prior to that date.

SEC. 6. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

Notwithstanding Section 17580 of the Government Code, unless otherwise specified, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

PUBLIC CONTRACTS—RETENTION PROCEEDS—SUBCONTRACTORS

CHAPTER 857

A.B. No. 2084

AN ACT to amend Section 3248 of the Civil Code, and to amend Sections 3400, 7107, 10121, 10127, 10140, 10240.1, 10261, 10262, 10262.5, 10263, and 22300 of, and to add Section 7200 to, the Public Contract Code, relating to public works contracts.

[Approved by Governor September 24, 1998.]

[Filed with Secretary of State September 25, 1998.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2084, Miller. Public works contracts.

(1) Existing law requires a contractor in a public works contract to file a payment bond with the public entity in specified amounts depending on the value of the contract.

This bill would revise the amounts of the bond.

(2) Existing law governs the distribution of retention proceeds in a public works contract and requires an original contractor to pay subcontractors from whom a retention has been withheld within 10 days of receipt from the public agency of retention proceeds.

This bill would reduce that period to 7 days.

(3) Existing law sets forth the requirements respecting disbursement of retention proceeds withheld from any payment by a public entity to the original contractor for a work of improvement, or withheld from any payment by the original contractor to a subcontractor.

This bill would additionally specify that, with respect to a contract for the construction of any public work of improvement entered into on or after January 1, 1999, in a contract between the original contractor and a subcontractor, and in a contract between a subcontractor and any subcontractor thereunder, the percentage of the retention proceeds withheld may not exceed the percentage specified in the contract between the public entity and the original contractor, except as specified. It would also prohibit any party from requiring any other party to waive any of these provisions.

(4) The State Contract Act requires that the director of the respective state agency approve project plans, specifications, and estimates of cost.

This bill would delete that requirement.

(5) The act provides for arbitration of claims arising under project contracts.

This bill would shorten the time in which a claimant may initiate arbitration.

(6) The bill would make other changes with regard to the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract, and would also require a contractor who elects to receive interest on moneys withheld in retention by a public agency to offer that option to subcontractors.

The bill would provide that its provisions shall apply only with respect to contracts entered into on or after January 1, 1999.

The people of the State of California do enact as follows:

SECTION 1. Section 3248 of the Civil Code is amended to read:

3248. In order to be approved, the payment bond shall satisfy all of the following requirements:

(a) The bond shall be in a sum not less than that prescribed in the following paragraph which is applicable to the total amount payable:

(1) * * * One hundred percent of the total amount payable by the terms of the contract when the total amount payable does not equal or exceed five million dollars ($5,000,000).

(2) * * * Fifty percent of the total amount payable by the terms of the contract when the total amount payable is not less than five million dollars ($5,000,000) and does not exceed ten million dollars ($10,000,000).

(3) * * * Twenty-five percent of the total amount payable by the terms of the contract if the contract exceeds ten million dollars ($10,000,000) * * *.

(b) The bond shall provide that if the original contractor or a subcontractor fails to pay (1) any of the persons named in Section 3181, (2) amounts due under the Unemployment Insurance Code with respect to work or labor performed under the contract, or (3) for any amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of the contractor and subcontractors pursuant to Section 13020 of the Unemployment Insurance Code * * * with respect to the work and labor, that the sureties will pay for the same, and also, in case suit is brought upon the bond, a reasonable attorney's fee, to be fixed by the court. The original contractor may require of the subcontractors a bond to indemnify the original contractor for any loss sustained by the original contractor because of any default by the subcontractors under this section.

(c) The bond shall, by its terms, inure to the benefit of any of the persons named in Section 3181 so as to give a right of action to those persons or their assigns in any suit brought upon the bond.

(d) The bond shall be in the form of a bond and not a deposit in lieu of a bond.

SEC. 2. Section 3400 of the Public Contract Code is amended to read:

3400. (a) No agency of the state nor any political subdivision, municipal corporation, or district, nor any public officer or person charged with the letting of contracts for the construction, alteration, or repair of public works shall draft or cause to be drafted specifications for bids, in connection with the construction, alteration, or repair of public works, (1) in such a manner as to limit the bidding, directly or indirectly, to any one specific concern, or (2) except in those instances where the product is designated to match others in use on a particular public improvement either completed or in the course of completion, calling for a designated material, product, thing, or service by specific brand or trade name unless the specification lists at least two brands or trade names of comparable quality or utility and is followed by the words "or equal" so that bidders may furnish any equal material, product, thing, or service. In applying this section, the specifying agency shall, if aware of an equal product manufactured in * * * this state, name that product in the specification. In those cases involving a unique or novel product application required to be used in the public interest, or where only one brand or trade name is known to the specifying agency, it may list only one. Specifications shall provide a period of time * * * prior to the award of the contract for submission of data substantiating a request for a substitution of "an equal" item.

(b) Subdivision (a) shall not be applicable if the governing body of one of the entities named therein by resolution makes a finding that is included in the specifications that a particular material, product, thing, or service is designated by specific brand or trade name in order that a field test or experiment may be made to determine the product's suitability for future use.

SEC. 3. Section 7107 of the Public Contract Code is amended to read:

7107. (a) This section is applicable with respect to all contracts entered into on or after January 1, 1993, relating to the construction of any public work of improvement.

(b) The retention proceeds withheld from any payment by the public entity from the original contractor, or by the original contractor from any subcontractor, shall be subject to this section.

(c) Within 60 days after the date of completion of the work of improvement, the retention withheld by the public entity shall be released. In the event of a dispute between the public entity and the original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount. For purposes of this subdivision "completion" means any of the following:

(1) The occupation, beneficial use, and enjoyment of a work of improvement, excluding any operation only for testing, startup, or commissioning, by the public agency, or its agent, accompanied by cessation of labor on the work of improvement.

(2) The acceptance by the public agency, or its agent, of the work of improvement.

(3) After the commencement of a work of improvement, a cessation of labor on the work of improvement for a continuous period of 100 days or more, due to factors beyond the control of the contractor.

(4) After the commencement of a work of improvement, a cessation of labor on the work of improvement for a continuous period of 30 days or more, if the public agency files for record a notice of cessation or a notice of completion.

(d) Subject to subdivision (e), within seven days from the time that all or any portion of the retention proceeds are received by the original contractor, the original contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received. However, if a retention payment received by the original contractor is specifically designated for a particular subcontractor, payment of the retention shall be made to the designated subcontractor, if the payment is consistent with the terms of the subcontract.

(e) The original contractor may withhold from a subcontractor its portion of the retention proceeds if a bona fide dispute exists between the subcontractor and the original contractor. The amount withheld from the retention payment shall not exceed 150 percent of the estimated value of the disputed amount.

(f) In the event that retention payments are not made within the time periods required by this section, the public entity or original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorney's fees and costs.

(g) If a state agency retains an amount greater than 125 percent of the estimated value of the work yet to be completed pursuant to Section 10261 * * *, the state agency shall distribute undisputed retention proceeds in accordance with subdivision (c). However, notwithstanding subdivision (c), if a state agency retains an amount equal to or less than 125 percent of the estimated value of the work yet to be completed, the state agency shall have 90 days in which to release undisputed retentions.

(h) Any attempted waiver of the provisions of this section shall be void as against the public policy of this state.

SEC. 4. Section 7200 is added to the Public Contract Code, to read:

7200. (a)(1) This section shall apply with respect to all contracts entered into on or after January 1, 1999, between a public entity and an original contractor, between an original contractor and a subcontractor, and between all subcontractors thereunder, relating to the construction of any public work of improvement.

(2) For purposes of this section, "public entity" means the state, including every state agency, office, department, division, bureau, board, or commission, a city, county, city and county, including chartered cities and chartered counties, district, special district, public authority, political subdivision, public corporation, or nonprofit transit corporation wholly owned by a public agency and formed to carry out the purposes of the public agency.

(b) In a contract between the original contractor and a subcontractor, and in a contract between a subcontractor and any subcontractor thereunder, the percentage of the retention proceeds withheld may not exceed the percentage specified in the contract between the public entity and the original contractor.

(c) When a performance and payment bond is required in the solicitation for bids, subdivision (b) shall not apply to either of the following:

(1) The original contractor, if the subcontractor fails or refuses to provide a performance and payment bond, issued by an admitted surety insurer, to the original contractor.

(2) The subcontractor, if a subcontractor thereunder fails or refuses to provide a performance and payment bond, issued by an admitted surety insurer, to the subcontractor.

On behalf of the escrow agent:

Title

Name

Signature

Address

At the time the escrow account is opened, the owner and contractor shall deliver to the escrow agent a fully executed counterpart of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement by their proper officers on the date first set forth above.

Owner	Contractor
Title	Title
Name	Name
Signature	Signature

SEC. 13. Section 22300 of the Public Contract Code is amended to read:

22300. (a) Provisions shall be included in any invitation for bid and in any contract documents to permit the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract * * *; however, substitution of securities provisions shall not be required in contracts in which there will be financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. Sec. 1921 et seq.), and where federal regulations or policies, or both, do not allow the substitution of securities. At the request and expense of the contractor, securities equivalent to the amount withheld shall be deposited with the public agency, or with a state or federally chartered bank in * * * this state as the escrow agent, who shall then pay those moneys to the contractor. Upon satisfactory completion of the contract, the securities shall be returned to the contractor.

(b) Alternatively, the contractor may request and the owner shall make payment of retentions earned directly to the escrow agent at the expense of the contractor. At the expense of the contractor, the contractor may direct the investment of the payments into securities and the contractor shall receive the interest earned on the investments upon the same terms provided for in this section for securities deposited by the contractor. Upon satisfactory completion of the contract, the contractor shall receive from the escrow agent all securities, interest, and payments received by the escrow agent from the owner, pursuant to the terms of this section. * * *

(c) Securities eligible for investment under this section shall include those listed in Section 16430 of the Government Code, bank or savings and loan certificates of deposit, interest-bearing demand deposit accounts, standby letters of credit, or any other security mutually agreed to by the contractor and the public agency.

The contractor shall be the beneficial owner of any securities substituted for moneys withheld and shall receive any interest thereon.

Failure to include these provisions in bid and contract documents shall void any provisions for performance retentions in a public agency contract.

For purposes of this section, the term "public agency" shall include, but shall not be limited to, chartered cities.

(d)(1) Any contractor who elects to receive interest on moneys withheld in retention by a public agency shall, at the request of any subcontractor, make that option available to the subcontractor regarding any moneys withheld in retention by the contractor from the

subcontractor. If the contractor elects to receive interest on any moneys withheld in retention by a public agency, then the subcontractor shall receive the identical rate of interest received by the contractor on any retention moneys withheld from the subcontractor by the contractor, less any actual pro rata costs associated with administering and calculating that interest. In the event that the interest rate is a fluctuating rate, the rate for the subcontractor shall be determined by calculating the interest rate paid during the time that retentions were withheld from the subcontractor. If the contractor elects to substitute securities in lieu of retention, then, by mutual consent of the contractor and subcontractor, the subcontractor may substitute securities in exchange for the release of moneys held in retention by the contractor.

(2) This subdivision shall apply only to those subcontractors performing more than five percent of the contractor's total bid.

(3) No contractor shall require any subcontractor to waive any provision of this section.

(e) The Legislature hereby declares that the provisions of this section are of statewide concern and are necessary to encourage full participation by contractors and subcontractors in public contract procedures.

(f) The escrow agreement used hereunder shall be null, void, and unenforceable unless it is substantially similar to the following form:

ESCROW AGREEMENT FOR
SECURITY DEPOSITS IN LIEU OF RETENTION

This Escrow Agreement is made and entered into by and between _____
_____ whose address is _____
_____ hereinafter called "Owner,"
_____ whose address is _____
_____ hereinafter called "Contractor" and
_____ whose address is _____
_____ hereinafter called "Escrow Agent."

For the consideration hereinafter set forth, the Owner, Contractor, and Escrow Agent agree as follows:

(1) Pursuant to Section 22300 of the Public Contract Code of the State of California, Contractor has the option to deposit securities with Escrow Agent as a substitute for retention earnings required to be withheld by Owner pursuant to the Construction Contract entered into between the Owner and Contractor for _____ in the amount of _____ dated _____ (hereinafter referred to as the "Contract"). Alternatively, on written request of the Contractor, the Owner shall make payments of the retention earnings directly to the Escrow Agent. When the Contractor deposits the securities as a substitute for Contract earnings, the Escrow Agent shall notify the Owner within 10 days of the deposit. The market value of the securities at the time of the substitution shall be at least equal to the cash amount then required to be withheld as retention under the terms of the Contract between the Owner and Contractor. Securities shall be held in the name of _____, and shall designate the Contractor as the beneficial owner.

(2) The Owner shall make progress payments to the Contractor for those funds which otherwise would be withheld from progress payments pursuant to the Contract provisions, provided that the Escrow Agent holds securities in the form and amount specified above.

(3) When the Owner makes payment of retentions earned directly to the Escrow Agent, the Escrow Agent shall hold them for the benefit of the Contractor until the time that the escrow created under this contract is terminated. The Contractor may direct the investment of the payments into securities. All terms and conditions of this agreement and the rights and responsibilities of the parties shall be equally applicable and binding when the Owner pays the Escrow Agent directly.

(4) Contractor shall be responsible for paying all fees for the expenses incurred by Escrow Agent in administering the Escrow Account and all expenses of the Owner. These expenses and payment terms shall be determined by the Owner, Contractor, and Escrow Agent.

(5) The interest earned on the securities or the money market accounts held in escrow and all interest earned on that interest shall be for the sole account of Contractor and shall be subject to withdrawal by Contractor at any time and from time to time without notice to the Owner.

(6) Contractor shall have the right to withdraw all or any part of the principal in the Escrow Account only by written notice to Escrow Agent accompanied by written authorization from the Owner to the Escrow Agent that Owner consents to the withdrawal of the amount sought to be withdrawn by Contractor.

(7) The Owner shall have a right to draw upon the securities in the event of default by the Contractor. Upon seven days' written notice to the Escrow Agent from the owner of the default, the Escrow Agent shall immediately convert the securities to cash and shall distribute the cash as instructed by the Owner.

(8) Upon receipt of written notification from the Owner certifying that the Contract is final and complete, and that the Contractor has complied with all requirements and procedures applicable to the Contract, Escrow Agent shall release to Contractor all securities and interest on deposit less escrow fees and charges of the Escrow Account. The escrow shall be closed immediately upon disbursement of all moneys and securities on deposit and payments of fees and charges.

(9) Escrow Agent shall rely on the written notifications from the Owner and the Contractor pursuant to Sections (5) to (8), inclusive, of this Agreement and the Owner and Contractor shall hold Escrow Agent harmless from Escrow Agent's release and disbursement of the securities and interest as set forth above.

(10) The names of the persons who are authorized to give written notice or to receive written notice on behalf of the Owner and on behalf of Contractor in connection with the foregoing, and exemplars of their respective signatures are as follows:

On behalf of Owner:

_____
Title

_____
Name

_____
Signature

_____
Address

On behalf of Contractor:

_____
Title

_____
Name

_____
Signature

_____
Address

On behalf of Escrow Agent:

_____
Title

_____
Name

_____
Signature

_____
Address

At the time the Escrow Account is opened, the Owner and Contractor shall deliver to the Escrow Agent a fully executed counterpart of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement by their proper officers on the date first set forth above.

Owner

_____
Title

_____
Name

Contractor

_____
Title

_____
Name

Signature Signature

SEC. 14. The provisions of this act shall apply only with respect to contracts entered into on or after January 1, 1999.

Assembly Bill No. 574

CHAPTER 972

An act to amend Section 4107 of, and to add Sections 1103 and 20101 to, the Public Contract Code, relating to public contracts.

[Approved by Governor October 10, 1999. Filed with Secretary of State October 10, 1999.]

LEGISLATIVE COUNSEL'S DIGEST

AB 574, Hertzberg. Public contracts: responsible bidder.

Existing law defines the terms "public entity" and "public works contract" for the purposes of specified provisions of the Public Contract Code.

This bill would define the term "responsible bidder" for these purposes, and would authorize a public entity to require each prospective bidder for a contract to complete and submit to the entity a standardized questionnaire and financial statement. This bill would require, with a specified exception, any public entity requiring standard questionnaires and financial statements to adopt and apply a uniform system of rating bidders on the basis of standard questionnaires and financial statements. This bill would require the Department of Industrial Relations, in collaboration with affected agencies and interested parties, to develop and draft a standardized questionnaire that public entities may use and to develop guidelines for rating bidders. The bill would also require the public entity requiring the prequalification to establish a process to permit prospective bidders to dispute their proposed prequalification rating.

Under existing law, a prime contractor whose bid is accepted may not substitute a person as subcontractor in place of the subcontractor listed in the original bid, except that the awarding authority may, except as otherwise provided, consent to the substitution of another person as a subcontractor in specified situations.

This bill would provide for the consent to the substitution in the situation when the awarding authority determines that a listed subcontractor is not a responsible contractor.

The people of the State of California do enact as follows:

SECTION 1. The Legislature hereby finds and declares that the establishment by public agencies of a uniform system to evaluate the ability, competency, and integrity of bidders on public works projects is in the public interest, will result in the construction of public works projects of the highest quality for the lowest costs, and is in

furtherance of the objectives stated in Section 100 of the Public Contract Code.

SEC. 2. Section 1103 is added to the Public Contract Code, to read:

1103. "Responsible bidder," as used in this part, means a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract.

The Legislature finds and declares that this section is declaratory of existing law.

SEC. 3. Section 4107 of the Public Contract Code is amended to read:

4107. A prime contractor whose bid is accepted may not:

(a) Substitute a person as subcontractor in place of the subcontractor listed in the original bid, except that the awarding authority, or its duly authorized officer, may, except as otherwise provided in Section 4107.5, consent to the substitution of another person as a subcontractor in any of the following situations:

(1) When the subcontractor listed in the bid after having had a reasonable opportunity to do so fails or refuses to execute a written contract, when that written contract, based upon the general terms, conditions, plans and specifications for the project involved or the terms of that subcontractor's written bid, is presented to the subcontractor by the prime contractor.

(2) When the listed subcontractor becomes bankrupt or insolvent.

(3) When the listed subcontractor fails or refuses to perform his or her subcontract.

(4) When the listed subcontractor fails or refuses to meet the bond requirements of the prime contractor as set forth in Section 4108.

(5) When the prime contractor demonstrates to the awarding authority, or its duly authorized officer, subject to the further provisions set forth in Section 4107.5, that the name of the subcontractor was listed as the result of an inadvertent clerical error.

(6) When the listed subcontractor is not licensed pursuant to the Contractors License Law.

(7) When the awarding authority, or its duly authorized officer, determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications, or that the subcontractor is substantially delaying or disrupting the progress of the work.

(8) When the listed subcontractor is ineligible to work on a public works project pursuant to Section 1777.1 or 1777.7 of the Labor Code.

(9) When the awarding authority determines that a listed subcontractor is not a responsible contractor.

Prior to approval of the prime contractor's request for the substitution the awarding authority, or its duly authorized officer, shall give notice in writing to the listed subcontractor of the prime contractor's request to substitute and of the reasons for the request. The notice shall be served by certified or registered mail to the last known address of the subcontractor. The listed subcontractor who has been so notified shall have five working days within which to submit written objections to the substitution to the awarding authority. Failure to file these written objections shall constitute the listed subcontractor's consent to the substitution.

If written objections are filed, the awarding authority shall give notice in writing of at least five working days to the listed subcontractor of a hearing by the awarding authority on the prime contractor's request for substitution.

(b) Permit a subcontract to be voluntarily assigned or transferred or allow it to be performed by anyone other than the original subcontractor listed in the original bid, without the consent of the awarding authority, or its duly authorized officer.

(c) Other than in the performance of "change orders" causing changes or deviations from the original contract, sublet or subcontract any portion of the work in excess of one-half of 1 percent of the prime contractor's total bid as to which his or her original bid did not designate a subcontractor.

SEC. 4. Section 20101 is added to the Public Contract Code, to read:

20101. (a) Except as provided in Section 20111.5, a public entity subject to this part may require that each prospective bidder for a contract complete and submit to the entity a standardized questionnaire and financial statement in a form specified by the entity, including a complete statement of the prospective bidder's experience in performing public works. The standardized questionnaire may not require prospective bidders to disclose any violations of Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code committed prior to January 1, 1998, if a violation was based on a subcontractor's failure to comply with these provisions and the bidder had no knowledge of the subcontractor's violations. The Department of Industrial Relations, in collaboration with affected agencies and interested parties, shall develop model guidelines for rating bidders, and draft the standardized questionnaire, that may be used by public entities for the purposes of this part. The Department of Industrial Relations, in developing the standardized questionnaire, shall consult with affected public agencies, cities and counties, the construction industry, the surety industry, and other interested parties. The questionnaire and financial statement shall be verified under oath by

the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaires and financial statements shall not be public records and shall not be open to public inspection; however, records of the names of contractors applying for prequalification status shall be public records subject to disclosure under Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

(b) Any public entity requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine both the minimum requirements permitted for qualification to bid, and the type and size of the contracts upon which each bidder shall be deemed qualified to bid. The uniform system of rating prospective bidders shall be based on objective criteria.

(c) A public entity may establish a process for prequalifying prospective bidders pursuant to this section on a quarterly basis and a prequalification pursuant to this process shall be valid for one calendar year following the date of initial prequalification.

(d) Any public entity requiring prospective bidders on a public works project to prequalify pursuant to this section shall establish a process that will allow prospective bidders to dispute their proposed prequalification rating prior to the closing time for receipt of bids. The appeal process shall include the following:

(1) Upon request of the prospective bidder, the public entity shall provide notification to the prospective bidder in writing of the basis for the prospective bidder's disqualification and any supporting evidence that has been received from others or adduced as a result of an investigation by the public entity.

(2) The prospective bidder shall be given the opportunity to rebut any evidence used as a basis for disqualification and to present evidence to the public entity as to why the prospective bidder should be found qualified.

(3) If the prospective bidder chooses not to avail itself of this process, the proposed prequalification rating may be adopted without further proceedings.

(e) For the purposes of subdivision (a), a financial statement shall not be required from a contractor who has qualified as a Small Business Administration entity pursuant to paragraph (1) of subdivision (d) of Section 14837 of the Government Code, when the bid is no more than 25 percent of the qualifying amount provided in paragraph (1) of subdivision (d) of Section 14837 of the Government Code.

(f) Nothing in this section shall preclude an awarding agency from prequalifying or disqualifying a subcontractor. The disqualification of

a subcontractor by an awarding agency does not disqualify an otherwise prequalified contractor.

SEC. 5. Nothing contained in this act shall apply to services procured pursuant to Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.

O

Assembly Bill No. 2336

CHAPTER 126

An act to amend Section 9203 of the Public Contract Code, relating to public contracts.

[Approved by Governor July 8, 2000. Filed with Secretary of State July 10, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2336, Zettel. Local agency contracts.

Existing law prescribes limits on progress payment that may be made on any contract with a local agency for the creation, construction, alteration, repair, or improvement of any public structure, building, road, or other improvement, that exceeds $5,000.

This bill would provide that a county water authority shall be subject to a $25,000 limit for purposes of these provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 9203 of the Public Contract Code is amended to read:

9203. (a) Payment on any contract with a local agency for the creation, construction, alteration, repair, or improvement of any public structure, building, road, or other improvement, of any kind which will exceed in cost a total of five thousand dollars ($5,000), shall be made as the legislative body prescribes upon estimates approved by the legislative body, but progress payments shall not be made in excess of 95 percent of the percentage of actual work completed plus a like percentage of the value of material delivered on the ground or stored subject to, or under the control of, the local agency, and unused. The local agency shall withhold not less than 5 percent of the contract price until final completion and acceptance of the project. However, at any time after 50 percent of the work has been completed, if the legislative body finds that satisfactory progress is being made, it may make any of the remaining progress payments in full for actual work completed.

(b) Notwithstanding the dollar limit specified in subdivision (a), a county water authority shall be subject to a twenty-five thousand dollar ($25,000) limit for purposes of subdivision (a).

O

Assembly Bill No. 2866

CHAPTER 127

An act to amend Sections 215, 631, 1730, 1734, 1735, and 1742 of the Code of Civil Procedure, to amend Section 14038 of the Corporations Code, to amend Section 17070.70 of the Education Code, to amend Sections 12012.85, 12439, 16429.30, and 53661 of, to amend and add Section 15202 to, to add Section 19134 to, to add Chapter 1.4 (commencing with Section 15363.70) to Part 6.7 of Division 3 of Title 2 of, to add and repeal Section 13968.7 of, and to repeal Sections 16429.34, 16429.36, 16429.38, 16429.40, and 16429.49 of, the Government Code, to amend Sections 51451 and 51452 of the Health and Safety Code, to amend Section 2675.5 of, and to add Sections 3099.5 and 7929.5 to, the Labor Code, to add Section 531 to the Military and Veterans Code, to add Sections 3006 and 5024 to the Penal Code, to add Section 10299 to the Public Contract Code, to add Section 355.1 to the Public Utilities Code, and to add Section 140.3 to the Streets and Highways Code, relating to state government, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor July 8, 2000. Filed with Secretary of State July 10, 2000.]

I am signing Assembly Bill No. 2866; however, I am concerned about several provisions contained in this measure.

First, I am deleting Section 10 of this measure, because it contains an appropriation. This section would authorize the Board of Control to enter into an interagency agreement with the University of California, San Francisco, to establish a victims of crime recovery center, as a pilot project until June 30, 2004, at San Francisco General Hospital; and to establish supplemental mental health rates for eligible victims. By providing for new and expanded uses of a continuously appropriated fund, Section 10 of this bill would make an appropriation.

Consistent with my strong support for victims' rights, I sustained a total of $525,000 in the 2000 Budget Act for one-time start-up costs for the victims of crime recovery center. However, I am concerned Section 10 would fund services that are normally not reimbursed and at rates that are twice the current level. The enhanced mental health reimbursement rates, funded by the Restitution Fund, which is continuously appropriated to the Board of Control, could set a potentially costly precedent that could ultimately have a negative impact on the Restitution Fund and the ability to fund services to victims on a statewide basis.

I am also deleting Section 36 to conform with this action.

Second, I am concerned about provisions included in this measure that would require an assessment of rail transportation in California and recommendations for projects. While I do not object to assessing the potential for greater connectivity of the passenger rail system with other passenger travel modes, improved public safety, and mitigating congestion on rail corridors providing passenger service, I am concerned with the bill's implication that the State should propose projects to support private freight rail capital needs.

(1) Improvements in the existing statewide master agreement procedures for purchasing contract and noncontract drugs at a discount from drug manufacturers.

(2) Participation by offenders in state custody infected with human immunodeficiency virus (HIV), the etiologic agent of acquired immune deficiency syndrome (AIDS), in the AIDS Drug Assistance Program.

(3) Membership in the Minnesota Multistate Contracting Alliance for Pharmacy (MMCAP) or other cooperative purchasing arrangements with other governmental entities.

(4) Greater centralization or standardization of procurement of drugs and medical supplies among individual prisons in the Department of Corrections prison system.

(d) The Bureau of State Audits shall report to the Legislature and the Governor by January 10, 2002, its findings in regard to:

(1) An evaluation of the trends in state costs for the procurement of drugs and medical supplies for offenders in state custody, and an assessment of the major factors affecting those trends.

(2) A summary of the steps taken by the Department of Corrections, the Department of General Services, and other appropriate state agencies to implement this section.

(3) An evaluation of the compliance by these state agencies with the findings and recommendations of the January 2000 Bureau of State Audits report for reform of procurement of drugs and medical supplies for offenders in state custody.

(4) Any further recommendations of the Bureau of State Audits for reform of state drug procurement practices, policies, or statutes.

SEC. 30. Section 10299 is added to the Public Contract Code, to read:

10299. (a) Notwithstanding any other provision of law, the director may consolidate the needs of multiple state agencies for information technology goods and services, and, pursuant to the procedures established in Chapter 3 (commencing with Section 12100), establish contracts, master agreements, multiple award schedules, cooperative agreements, including agreements with entities outside the state, and other types of agreements that leverage the state's buying power, for acquisitions authorized under Chapter 2 (commencing with Section 10290), Chapter 3 (commencing with Section 12100), and Chapter 3.6 (commencing with Section 12125). State agencies and local agencies may contract with suppliers awarded the contracts without further competitive bidding.

(b) The director may make the services of the department available, upon the terms and conditions agreed upon, to any school district empowered to expend public funds. These school districts may, without further competitive bidding, utilize contracts, master agreements, multiple award schedules, cooperative agreements, or other types of agreements established by the department for use by

school districts for the acquisition of information technology, goods, and services. The state shall incur no financial responsibility in connection with the contracting of local agencies under this section.

SEC. 31. Section 355.1 is added to the Public Utilities Code, to read:

355.1. The commission may investigate issues associated with multiple qualified exchanges. If the commission determines that allowing electrical corporations to purchase from multiple qualified exchanges is in the public interest, the commission shall prepare and submit findings and recommendations to the Legislature on or before June 1, 2001. Prior to June 1, 2001, the commission may not implement the part of any decision authorizing electrical corporations to purchase from exchanges other than the Power Exchange. That portion of any decision of the commission adopted prior to January 1, 2001, but after June 1, 2000, authorizing electrical corporations to purchase from multiple qualified exchanges, may not be implemented.

SEC. 32. Section 140.3 is added to the Streets and Highways Code, to read:

140.3. (a) For the purposes of this section, the following terms have the following meanings:

(1) (A) "Mobile equipment" means devices owned by the department by which any person or property may be propelled, moved, or drawn on or off highway and that are used for employee transportation or material movement, or for construction or maintenance work relating to transportation, including, but not limited to, passenger vehicles, heavy duty trucks, boats, trailers, motorized construction equipment, and "slip-in" accessories or attachments that are used by more than one functional unit.

(B) "Mobile equipment" does not include any of the following:

(i) Office equipment, computers, and any other stationary, nonmovable, and integral part of a transportation facility.

(ii) Passenger vehicles used to transport the public.

(iii) Aircraft or related aeronautics equipment.

(iv) Rolling stock used for intercity rail operations.

(2) "Mobile equipment services" includes, but is not limited to, all of the following:

(A) Use of mobile equipment and services, including, but not limited to, the purchase of new vehicles.

(B) Receiving, servicing, and equipping new mobile equipment units.

(C) Assembling components into completed mobile equipment units.

(D) Managing mobile equipment and services, including, but not limited to, payment for fuel and insurance.

(E) Repairing, rehabilitating, and maintaining mobile equipment.

SEC. 39. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

SEC. 40. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to make the statutory changes to implement the Budget Act of 2000 at the earliest possible time, it is necessary that this act take effect immediately.

O

95

Senate Bill No. 266

CHAPTER 159

An act to add Section 6610 to the Public Contract Code, relating to public contracts.

[Approved by Governor July 21, 2000. Filed with Secretary of State July 21, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

SB 266, Chesbro. Public contracts: bids.

Existing law generally requires public agencies and contractors to take various actions with regard to bidding for public contracts.

This bill would impose a state-mandated local program by requiring that when a public agency invites formal bids for public projects, and requires that there be a mandatory prebid site visit, conference, or other mandatory meeting prior to the submission of the bid by a contractor, that the public agency provide a notice of that requirement that includes specified information.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 6610 is added to the Public Contract Code, to read:

6610. Notice inviting formal bids for projects by a public agency that include a requirement for any type of mandatory prebid conference, site visit, or meeting shall include the time, date, and location of the mandatory prebid site visit, conference or meeting, and when and where project documents, including final plans and specifications are available. Any mandatory prebid site visit, conference or meeting shall not occur within a minimum of five calendar days of the publication of the initial notice. This provision shall not apply to the Regents of the University of California.

SEC. 2. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

O

Assembly Bill No. 2182

CHAPTER 292

An act to amend Section 10126 of, to add Section 10780.5 to, and to add Article 1.3 (commencing with Section 20103.8) to Chapter 1 of Part 3 of Division 2 of, the Public Contract Code, relating to public contracts.

[Approved by Governor September 1, 2000. Filed with Secretary of State September 5, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2182, Mazzoni. Bidding procedures: alternative bids.

Existing law establishes procedures for competitive bidding of certain contracts by public entities, and permits designated state officials to approve cost estimates that contain additions to or deletions from the base bid.

This bill would revise procedures affecting state contracts to prescribe procedures for determining the lowest bidder if additions or deletions from the base bid are considered. The bill would also authorize local agencies and the Trustees of the California State University to include alternatives that may be added to or deleted from the final bid award for a project, and would specify how those alternatives shall be considered in determining who is the lowest responsible bidder.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) Because the dollar amount of the lowest bid is not known until the bids are received and opened on bid day, and because the amount of money available for public works projects is limited, public entities need the budgetary flexibility afforded by allowing them to list items on which bidders must provide bid prices, but which may or may not be added to, or deleted from, the contract, depending upon the availability of funds.

(b) Selective use of additive and deductive bid items to determine the lowest responsible bidder can violate the public policies described in subdivisions (c) and (d) of Section 100 of the Public Contract Code.

(c) The public policies described in subdivisions (c) and (d) of Section 100 of the Public Contract Code can be satisfied by a process in which additive and deductive bid items are selectively used to determine the lowest monetary bidder after the bids are received, if

no information that would identify any of the bidders is revealed to the public entity before the lowest monetary bidder is determined.

SEC. 2. Section 10126 of the Public Contract Code is amended to read:

10126. Notwithstanding the provisions of Section 10125, the estimate of cost may be approved by the director, which includes alternates contemplating additions to, or deletions from, the base bid, provided that all of the following requirements are met:

(a) Estimates are made for each contingency and, in the aggregate, such alternates do not exceed 10 percent of the estimated cost for the project.

(b) The available funds are at least sufficient to cover the filed estimate for the base project.

(c) Whenever additive or deductive items are included in a bid, the bid solicitation shall specify which one of the following methods will be used to determine the lowest bid. In the absence of such a specification, only the method provided by paragraph (1) will be used:

(1) The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

(2) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

(3) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items taken in order from a specifically identified list of those items, depending upon available funds as identified in the solicitation.

(4) The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

(d) The contract is awarded to the lowest bidder, as determined by the method prescribed in subdivision (c).

(e) A responsible bidder who submitted the lowest bid as determined by this section shall be awarded the contract, if it is awarded. This section does not preclude the public entity from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined.

SEC. 3. Section 10780.5 is added to the Public Contract Code, to read:

10780.5. The trustees may require a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted. Whenever additive or deductive items are included in a

bid, the bid solicitation shall specify which one of the following methods will be used to determine the lowest bid. In the absence of such a specification, only the method provided by subdivision (a) will be used:

(a) The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

(b) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

(c) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items taken in order from a specifically identified list of those items, depending upon available funds as identified in the solicitation.

(d) The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

A responsible bidder who submitted the lowest bid as determined by this section shall be awarded the contract, if it is awarded. This section does not preclude the trustees from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined.

SEC. 4. Article 1.3 (commencing with Section 20103.8) is added to Chapter 1 of Part 3 of Division 2 of the Public Contract Code, to read:

Article 1.3. Award of Contracts

20103.8. A local agency may require a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted. Whenever additive or deductive items are included in a bid, the bid solicitation shall specify which one of the following methods will be used to determine the lowest bid. In the absence of such a specification, only the method provided by subdivision (a) will be used:

(a) The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

(b) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

(c) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items taken in order

from a specifically identified list of those items, depending upon available funds as identified in the solicitation.

(d) The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

A responsible bidder who submitted the lowest bid as determined by this section shall be awarded the contract, if it is awarded. This section does not preclude the local agency from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined.

O

Assembly Bill No. 2890

CHAPTER 776

An act to amend Section 3320 of the Civil Code, to amend Section 14838.5 of the Government Code, to amend Section 38079 of the Health and Safety Code, to amend Sections 10295.5, 10300, 10302.5, 10302.6, 10304, 10307, 10308, 10308.5, 10309, 10310, 10311, 10312, 10313, 10314, 10315, 10318, 10319, 10320, 10320.5, 10321, 10325, 10326, 10327, 10328, 10330, 10331, 10332, 10333, 10334, 12100.5, 12100.7, 12101, 12102, 12103, 12104, 12108, 12109, 12112, 12113, and 12120 of, to amend the heading of Article 3 (commencing with Section 10300) of Chapter 2 of, to amend the heading of Chapter 2 (commencing with Section 10290) of, and to amend the heading of Chapter 3 (commencing with Section 12100) of, Part 2 of Division 2 of, and to repeal Sections 10295.1, 10295.3, 12111, and 12113.5 of, the Public Contract Code, relating to public contracts, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 26, 2000. Filed with Secretary of State September 27, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2890, Committee on Consumer Protection, Governmental Efficiency and Economic Development. Public contracts.

Under existing law, a state agency may award a contract for goods, services, or information technology that has an estimated value between $2,500 and $50,000 by obtaining quotations from at least 2 small businesses. For these contracts, a state agency does not have to comply with bidding and contract award requirements that govern contracts of greater value.

This bill would make corrective changes to these provisions, to clarify that contracts with a value greater than $2,500 and less than $50,000 do not have to comply with various provisions that generally govern public contracts.

Existing law generally governs the state procurement of materials, supplies, equipment, and services, and the acquisition of electronic data-processing and telecommunications goods and services.

This bill would make various technical and clarifying changes to these provisions and would delete outdated provisions.

This bill would incorporate additional changes in Section 14838.5 of the Government Code, proposed by SB 1049, to be operative only if SB 1049 and this bill are both chaptered and become effective on or before January 1, 2001, and this bill is chaptered last.

The bill would declare that it is to take effect immediately as an urgency statute.

acquisitions from the previous fiscal year that were subject to this chapter and involved the replacement of a computer central processing unit when only one bid was received and the bid was from the supplier whose equipment was being replaced. The report shall be submitted to the chairperson of the committee in each house that considers appropriations and the Chairperson of the Joint Legislative Budget Committee.

SEC. 45. Section 12108 of the Public Contract Code is amended to read:

12108. Until the time that the Department of General Services has published in the State Administrative Manual the procedures required in accordance with Section 12102, acquisitions of information technology goods and services shall be accomplished in accordance with either existing State Administrative Manual procedures for the acquisition of information technology goods and services, or Article 2 (commencing with Section 14790) of Chapter 6 of Part 5.5 of Division 3 of Title 2 of the Government Code, as determined by the Department of General Services.

SEC. 46. Section 12109 of the Public Contract Code is amended to read:

12109. The Director of General Services may make the services of the department under this chapter available, upon the terms and conditions that may be deemed satisfactory, to any tax-supported public agency in the state, including a school district, for assisting the agency in the acquisition of information technology goods or services.

SEC. 47. Section 12111 of the Public Contract Code is repealed.

SEC. 48. Section 12112 of the Public Contract Code is amended to read:

12112. Any contract for information technology goods or services, to be manufactured or performed by the contractor especially for the state and not suitable for sale to others in the ordinary course of the contractor's business may provide, on the terms and conditions that the department deems necessary to protect the state's interests, for progress payments for work performed and costs incurred at the contractor's shop or plant, provided that not less than 10 percent of the contract price is required to be withheld until final delivery and acceptance of the goods or services, and provided further, that the contractor is required to submit a faithful performance bond, acceptable to the department, in a sum not less than one-half of the total amount payable under the contract securing the faithful performance of the contract by the contractor.

SEC. 49. Section 12113 of the Public Contract Code is amended to read:

12113. (a) Notwithstanding any other provision of law, state and local agencies may enter into agreements to pay for telecommunications services to be utilized beyond the current fiscal year. "Telecommunications services" for purposes of this section

budgetary objectives. The Trustees of the California State University and the Board of Governors of the California Community Colleges shall assume the functions of the Department of Finance and the Department of General Services with regard to acquisition of telecommunication goods and services by the California State University and the California Community Colleges, respectively. The trustees and the board shall each grant to the Department of General Services, Division of Telecommunications, an opportunity to bid whenever the university or the college system solicits bids for telecommunications goods and services.

SEC. 52. Section 2.5 of this bill incorporates amendments to Section 14838.5 of the Government Code proposed by both this bill and SB 1049. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2001, but this bill becomes operative first, (2) each bill amends Section 14838.5 of the Government Code, and (3) this bill is enacted after SB 1094, in which case Section 14838.5 of the Government Code, as amended by Section 2 of this bill, shall remain operative only until the operative date of SB 1049, at which time Section 2.5 of this bill shall become operative.

SEC. 53. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to make the statutory changes necessary to increase small business participation in state contracts, it is necessary for this act to take effect immediately as an urgency measure.

O

96

Assembly Bill No. 138

CHAPTER 455

An act to amend Sections 10126, 10780.5, and 20103.8 of the Public Contract Code, relating to public contracts.

[Approved by Governor September 11, 2002. Filed with Secretary of State September 11, 2002.]

LEGISLATIVE COUNSEL'S DIGEST

AB 138, Nation. Bidding procedures: alternative bids.

Existing law affecting state contracts prescribes procedures for determining the lowest bidder if additions or deletions from the base bid are considered, authorizes local agencies and the Trustees of the California State University to include alternatives that may be added to, or deleted from, the final bid award for a project, and specifies how those alternatives shall be considered in determining who is the lowest responsible bidder. Existing law requires the lowest bid to be determined in a manner that prevents any information that would identify any of the bidders from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

This bill would also require the determination of the lowest bid to be made in a manner that prevents any information that would identify any of the proposed subcontractors or suppliers from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

The people of the State of California do enact as follows:

SECTION 1. Section 10126 of the Public Contract Code is amended to read:

10126. Notwithstanding the provisions of Section 10125, the estimate of cost may be approved by the director, which includes alternates contemplating additions to, or deletions from, the base bid, provided that all of the following requirements are met:

(a) Estimates are made for each contingency and, in the aggregate, the alternates do not exceed 10 percent of the estimated cost for the project.

(b) The available funds are at least sufficient to cover the filed estimate for the base project.

(c) Whenever additive or deductive items are included in a bid, the bid solicitation shall specify which one of the following methods will be

used to determine the lowest bid. In the absence of such a specification, only the method provided by paragraph (1) will be used:

(1) The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

(2) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

(3) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that, when taken in order from a specifically identified list of those items in the solicitation, and added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the department before the first bid is opened.

(4) The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders or proposed subcontractors or suppliers from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

(d) The contract is awarded to the lowest bidder, as determined by the method prescribed in subdivision (c).

(e) A responsible bidder who submitted the lowest bid as determined by this section shall be awarded the contract, if it is awarded. This section does not preclude the department from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined.

(f) Nothing in this section shall preclude the prequalification of subcontractors.

SEC. 2. Section 10780.5 of the Public Contract Code is amended to read:

10780.5. The trustees may require a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted. Whenever additive or deductive items are included in a bid, the bid solicitation shall specify which one of the following methods will be used to determine the lowest bid. In the absence of such a specification, only the method provided by subdivision (a) will be used:

(a) The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

(b) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

(c) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that, when taken in order from a specifically identified list of those items in the solicitation, and added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the trustees before the first bid is opened.

(d) The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders or proposed subcontractors or suppliers from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

A responsible bidder who submitted the lowest bid as determined by this section shall be awarded the contract, if it is awarded. This section does not preclude the trustees from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined.

(e) Nothing in this section shall preclude the prequalification of subcontractors.

SEC. 3. Section 20103.8 of the Public Contract Code is amended to read:

20103.8. A local agency may require a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted. Whenever additive or deductive items are included in a bid, the bid solicitation shall specify which one of the following methods will be used to determine the lowest bid. In the absence of such a specification, only the method provided by subdivision (a) will be used:

(a) The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

(b) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

(c) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items taken in order from a specifically identified list of those items that, when in the solicitation, and added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the local agency before the first bid is opened.

(d) The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders or proposed subcontractors or suppliers from being revealed to the public entity

before the ranking of all bidders from lowest to highest has been determined.

A responsible bidder who submitted the lowest bid as determined by this section shall be awarded the contract, if it is awarded. This section does not preclude the local agency from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined.

(e) Nothing in this section shall preclude the prequalification of subcontractors.

O

EXHIBIT 3
COPIES OF CODE SECTIONS CITED

§ 2000. Lowest bidders who meet specified requirements relating to minority and women business enterprises; definitions; application of section

(a) Notwithstanding any other provision of law requiring a local agency to award contracts to the lowest responsible bidder, any local agency may require that a contract be awarded to the lowest responsible bidder who also does either of the following:

(1) Meets goals and requirements established by the local agency relating to participation in the contract by minority business enterprises and women business enterprises. If the bidder does not meet the goals and requirements established by the local agency for that participation, the local agency shall evaluate the good faith effort of the bidder to comply with those goals and requirements as provided in paragraph (2).

(2) Makes a good faith effort, in accordance with the criteria established pursuant to subdivision (b), prior to the time bids are opened, to comply with the goals and requirements established by the local agency relating to participation in the contract by minority or women business enterprises.

(b) (1) The bidder attended any presolicitation or prebid meetings that were scheduled by the local agency to inform all bidders of the minority and women business enterprise program requirements for the project for which the contract will be awarded. A local agency may waive this requirement if it determines that the bidder is informed as to those program requirements.

(2) The bidder identified and selected specific items of the project for which the contract will be awarded to be performed by minority or women business enterprises to provide an opportunity for participation by those enterprises.

(3) The bidder advertised, not less than 10 calendar days before the date the bids are opened, in one or more daily or weekly newspapers, trade association publications, minority or trade oriented publications, trade journals, or other media, specified by the local agency for minority or women business enterprises that are interested in participating in the project. This paragraph applies only if the local agency gave public notice of the project not less than 15 calendar days prior to the date the bids are opened.

(4) The bidder provided written notice of his or her interest in bidding on the contract to the number of minority or women business enterprises required to be notified by the project specifications not less than 10 calendar days prior to the opening of bids. To the extent possible, the local agency shall make available to the bidder not less than 15 calendar days prior to the date the bids are opened a list or a source of lists of enterprises which are certified by the local agency as minority or women business enterprises. If the local agency does not provide that list or source of lists to the bidder, the bidder may utilize the list of certified minority or women business enterprises prepared by the Department of Transportation pursuant to Section 14030.5 of the Government Code for this purpose.

(5) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested in performing specific items of the project.

(6) The bidder provided interested minority and women business enterprises with information about the plans, specifications, and requirements for the selected subcontracting or material supply work.

(7) The bidder requested assistance from minority and women community organizations; minority and women contractor groups; local, state, or federal minority and women business assistance offices; or other organizations that provide assistance in the recruitment and placement of minority or women business enterprises, if any are available.

(8) The bidder negotiated in good faith with the minority or women business enterprises, and did not unjustifiably reject as unsatisfactory bids prepared by any minority or women business enterprises, as determined by the local agency.

(9) Where applicable, the bidder advised and made efforts to assist interested minority and women business enterprises in obtaining bonds, lines of credit, or insurance required by the local agency or contractor.

(10) The bidder's efforts to obtain minority and women business enterprise participation could reasonably be expected by the local agency to produce a level of participation sufficient to meet the goals and requirements of the local agency.

(c) The performance by a bidder of all of the criteria specified in subdivision (b) shall create a rebuttable presumption, affecting the burden of producing evidence, that a bidder has made a good faith effort to comply with the goals and requirements relating to participation by minority and women business enterprises established pursuant to subdivision (a).

(d) "Local agency," as used in this section, means a county or city, whether general law or chartered, city and county, school district, or other district. "District," as used in this section, means an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.

(e) "Minority or women business enterprise," as used in this section, means a business enterprise that meets both of the following criteria:

(1) A business that is at least 51 percent owned by one or more minority persons or women or, in the case of any business whose stock is publicly held, at least 51 percent of the stock is owned by one or more minority persons or women.

(2) A business whose management and daily business operations are controlled by one or more minority persons or women.

(f) "Minority person," for purposes of this section, means Black Americans, Hispanic Americans, Native Americans (including American Indians, Eskimos, Aleuts, and Native Hawaiians), Asian-Pacific Americans (including persons whose origins are from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the United States Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, and Taiwan), or any other group of natural persons identified as minorities in the project specifications by the local agency.

(g) This section does not apply to any of the following:

(1) Any contract, funded in whole or in part by the federal government, to the extent of any conflict between the requirements imposed by this section and any requirements imposed by the federal government relating to participation in a contract by a minority or women business enterprise as a condition of receipt of the federal funds.

(2) The San Francisco Bay Area Rapid Transit District, the Los Angeles County Transportation Commission, or any other local agency that has authority to facilitate the participation of minority or women business enterprises substantially similar to the authority granted to the San Francisco Bay Area Rapid Transit District pursuant to Section 20229 of this code or the Los Angeles County Transportation Commission pursuant to Section 130239 of the Public Utilities Code.

(Added by Stats.1986, c. 1060, § 2. Amended by Stats.1988, c. 538, § 1.)

§ 2001. Contracts; bid contracts; minority, women, or disabled veteran business enterprises

(a) Any local agency, as defined in subdivision (d) of Section 2000, that requires that contracts b awarded to the lowest responsible bidder meeting, or making a good faith effort to meet, participatio goals for minority, women, or disabled veteran business enterprises shall provide in the genera conditions under which bids will be received, that any person making a bid or offer to perform a contrac shall, in his or her bid or offer, set forth the following information:

(1) The name and the location of the place of business of each subcontractor certified as a minority women, or disabled veteran business enterprise who will perform work or labor or render service to th prime contractor in connection with the performance of the contract and who will be used by the prim contractor to fulfill minority, women, and disabled veteran business enterprise participation goals

(2) The portion of work that will be done by each subcontractor under paragraph (1). The prim contractor shall list only one subcontractor for each portion of work as is defined by the prime contractor in his or her bid or offer.

(b) The Subletting and Subcontracting Fair Practices Act (Chapter 4 (commencing with Section 4100) shall apply to the information required by subdivision (a) relating to subcontractors certified as minority, women, or disabled veteran business enterprises.

(c) For purposes of this section, "subcontractor" and "prime contractor" shall have the same meaning as those terms are defined in Section 4113.

(d) As used in this section, "contract" does not include a contract negotiated pursuant to Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.

(Added by Stats.1993, c. 1032 (A.B.340), § 4.)

§ 3300. Specification of classification of contractor's license at time contract is awarded; failure of entity to comply

(a) Any public entity, as defined in Section 1100, the University of California, and the California State University shall specify the classification of the contractor's license which a contractor shall possess at the time a contract is awarded. The specification shall be included in any plans prepared for a public project and in any notice inviting bids required pursuant to this code.

This requirement shall apply only with respect to contractors who contract directly with the public entity.

(b) A contractor who is not awarded a public contract because of the failure of an entity, as defined in subdivision (a), to comply with that subdivision shall not receive damages for the loss of the contract.

(Added by Stats.1985, c. 1073, § 2.)

§ 6610. Formal bid notice including mandatory prebid conference; site visit or meeting; criteria

Notice inviting formal bids for projects by a public agency that include a requirement for any type of mandatory prebid conference, site visit, or meeting shall include the time, date, and location of the mandatory prebid site visit, conference or meeting, and when and where project documents, including final plans and specifications are available. Any mandatory prebid site visit, conference or meeting shall not occur within a minimum of five calendar days of the publication of the initial notice. This provision shall not apply to the Regents of the University of California.

(Added by Stats.2000, c. 159 (S.B.266), § 1.)

§ 7104. Contracts for digging trenches or excavations; notice on discovery of hazardous waste or other unusual conditions; investigations; change orders; effect on contract

Any public works contract of a local public entity which involves digging trenches or other excavations that extend deeper than four feet below the surface shall contain a clause which provides the following:

(a) That the contractor shall promptly, and before the following conditions are disturbed, notify the public entity, in writing, of any:

(1) Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.

(2) Subsurface or latent physical conditions at the site differing from those indicated.

(3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

(b) That the public entity shall promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work shall issue a change order under the procedures described in the contract.

(c) That, in the event that a dispute arises between the public entity and the contractor whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor's cost of, or time required for, performance of any part of the work, the contractor shall not be excused from any scheduled completion date provided for by the contract, but shall proceed with all work to be performed under the contract. The contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties.

(Added by Stats.1989, c. 330, § 1.)

§ 7107. **Retention proceeds; withholding; disbursement**

(a) This section is applicable with respect to all contracts entered into on or after January 1, 1993, relating to the construction of any public work of improvement.

(b) The retention proceeds withheld from any payment by the public entity from the original contractor, or by the original contractor from any subcontractor, shall be subject to this section.

(c) Within 60 days after the date of completion of the work of improvement, the retention withheld by the public entity shall be released. In the event of a dispute between the public entity and the original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount. For purposes of this subdivision, "completion" means any of the following:

(1) The occupation, beneficial use, and enjoyment of a work of improvement, excluding any operation only for testing, startup, or commissioning, by the public agency, or its agent, accompanied by cessation of labor on the work of improvement.

(2) The acceptance by the public agency, or its agent, of the work of improvement.

(3) After the commencement of a work of improvement, a cessation of labor on the work of improvement for a continuous period of 100 days or more, due to factors beyond the control of the contractor.

(4) After the commencement of a work of improvement, a cessation of labor on the work of improvement for a continuous period of 30 days or more, if the public agency files for record a notice of cessation or a notice of completion.

(d) Subject to subdivision (e), within seven days from the time that all or any portion of the retention proceeds are received by the original contractor, the original contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received. However, if a retention payment received by the original contractor is specifically designated for a particular subcontractor, payment of the retention shall be made to the designated subcontractor, if the payment is consistent with the terms of the subcontract.

(e) The original contractor may withhold from a subcontractor its portion of the retention proceeds if a bona fide dispute exists between the subcontractor and the original contractor. The amount withheld from the retention payment shall not exceed 150 percent of the estimated value of the disputed amount.

(f) In the event that retention payments are not made within the time periods required by this section, the public entity or original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorney's fees and costs.

(g) If a state agency retains an amount greater than 125 percent of the estimated value of the work yet to be completed pursuant to Section 10261 * * *, the state agency shall distribute undisputed retention proceeds in accordance with subdivision (c). However, notwithstanding subdivision (c), if a state agency retains an amount equal to or less than 125 percent of the estimated value of the work yet to be completed, the state agency shall have 90 days in which to release undisputed retentions.

(h) Any attempted waiver of the provisions of this section shall be void as against the public policy of this state.

(Added by Stats.1992, c. 1042 (A.B.1702), § 1. Amended by Stats.1998, c. 857 (A.B.2084), § 3.)

§ 7109. Graffiti; vulnerable projects; antigraffiti technology; abatement and deterrence programs

(a) For purposes of this section:

(1) "Antigraffiti technology" means landscaping, paint, or other covering resistant to graffiti, or other procedures to deter graffiti.

(2) "Graffiti" means any unauthorized inscription, work, figure, or design that is marked, etched, scratched, drawn, or painted on any structural component of any building, structure, or other facility regardless of its content or nature and regardless of the nature of the material of the structural component.

(3) "Project" means the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind.

(b) If a public entity determines that a project may be vulnerable to graffiti and the public entity will be awarding a public works contract after January 1, 1996, for that project, it is the intent of the Legislature that the public entity may do one or more of the following:

(1) Include a provision in the public works contract that specifies requirements for antigraffiti technology in the plans and specifications for the project.

(2) Establish a method to finance a graffiti abatement program.

(3) Establish a program to deter graffiti.

(Added by Stats.1994, c. 504 (A.B.2519), § 1.)

§ 9203. Payments for projects costing over $5,000; progress payments; limitation on amount

(a) Payment on any contract with a local agency for the creation, construction, alteration, repair, or improvement of any public structure, building, road, or other improvement, of any kind which will exceed in cost a total of five thousand dollars ($5,000), shall be made as the legislative body prescribes upon estimates approved by the legislative body, but progress payments shall not be made in excess of 95 percent of the percentage of actual work completed plus a like percentage of the value of material delivered on the ground or stored subject to, or under the control of, the local agency, and unused. The local agency shall withhold not less than 5 percent of the contract price until final completion and acceptance of the project. However, at any time after 50 percent of the work has been completed, if the legislative body finds that satisfactory progress is being made, it may make any of the remaining progress payments in full for actual work completed.

(b) Notwithstanding the dollar limit specified in subdivision (a), a county water authority shall be subject to a twenty-five thousand dollar ($25,000) limit for purposes of subdivision (a).

(Added by Stats.1990, c. 694 (A.B.3416), § 8. Amended by Stats.2000, c. 126 (A.B.2336), § 1.)

§ 10299. Consolidation of needs of multiple state agencies in order to increase buying power; provision of services to school districts

(a) Notwithstanding any other provision of law, the director may consolidate the needs of multiple state agencies for information technology goods and services, and, pursuant to the procedures established in Chapter 3 (commencing with Section 12100), establish contracts, master agreements, multiple award schedules, cooperative agreements, including agreements with entities outside the state, and other types of agreements that leverage the state's buying power, for acquisitions authorized under Chapter 2 (commencing with Section 10290), Chapter 3 (commencing with Section 12100), and Chapter 3.6 (commencing with Section 12125). State agencies and local agencies may contract with suppliers awarded the contracts without further competitive bidding.

(b) The director may make the services of the department available, upon the terms and conditions agreed upon, to any school district empowered to expend public funds. These school districts may, without further competitive bidding, utilize contracts, master agreements, multiple award schedules, cooperative agreements, or other types of agreements established by the department for use by school districts for the acquisition of information technology, goods, and services. The state shall incur no financial responsibility in connection with the contracting of local agencies under this section.

(Added by Stats.2000, c. 71 (S.B.1667), § 33, eff. July 5, 2000; Stats.2000, c. 127 (A.B.2866), § 30, eff. July 10, 2000.)

§ 12109. Availability of services to tax-supported public agencies

The Director of General Services may make the services of the department under this chapter available, upon the terms and conditions that may be deemed satisfactory, to any tax-supported public agency in the state, including a school district, for assisting the agency in the * * * acquisition of * * * information technology goods or services.

(Amended by Stats.2000, c. 776 (A.B.2890), § 46, eff. Sept. 27, 2000.)

§ 20100. Short title

This chapter may be cited as the Local Agency Public Construction Act.

(Added by Stats.1982, c. 465, p. 1914, § 11.)

§ 20101. Prospective bidders; questionnaires and financial statements; prequalification

(a) Except as provided in Section 20111.5, a public entity subject to this part may require that each prospective bidder for a contract complete and submit to the entity a standardized questionnaire and financial statement in a form specified by the entity, including a complete statement of the prospective bidder's experience in performing public works. The standardized questionnaire may not require prospective bidders to disclose any violations of Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code committed prior to January 1, 1998, if a violation was based on a subcontractor's failure to comply with these provisions and the bidder had no knowledge of the subcontractor's violations. The Department of Industrial Relations, in collaboration with affected agencies and interested parties, shall develop model guidelines for rating bidders, and draft the standardized questionnaire, that may be used by public entities for the purposes of this part. The Department of Industrial Relations, in developing the standardized questionnaire, shall consult with affected public agencies, cities and counties, the construction industry, the surety industry, and other interested parties. The questionnaire and financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaires and financial statements shall not be public records and shall not be open to public inspection; however, records of the names of contractors applying for prequalification status shall be public records subject to disclosure under Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

(b) Any public entity requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine both the minimum requirements permitted for qualification to bid, and the type and size of the contracts upon which each bidder shall be deemed qualified to bid. The uniform system of rating prospective bidders shall be based on objective criteria.

(c) A public entity may establish a process for prequalifying prospective bidders pursuant to this section on a quarterly basis and a prequalification pursuant to this process shall be valid for one calendar year following the date of initial prequalification.

(d) Any public entity requiring prospective bidders on a public works project to prequalify pursuant to this section shall establish a process that will allow prospective bidders to dispute their proposed prequalification rating prior to the closing time for receipt of bids. The appeal process shall include the following:

(1) Upon request of the prospective bidder, the public entity shall provide notification to the prospective bidder in writing of the basis for the prospective bidder's disqualification and any supporting evidence that has been received from others or adduced as a result of an investigation by the public entity.

(2) The prospective bidder shall be given the opportunity to rebut any evidence used as a basis for disqualification and to present evidence to the public entity as to why the prospective bidder should be found qualified.

(3) If the prospective bidder chooses not to avail itself of this process, the proposed prequalification rating may be adopted without further proceedings.

(e) For the purposes of subdivision (a), a financial statement shall not be required from a contractor who has qualified as a Small Business Administration entity pursuant to paragraph (1) of subdivision (d) of Section 14837 of the Government Code, when the bid is no more than 25 percent of the qualifying amount provided in paragraph (1) of subdivision (d) of Section 14837 of the Government Code.

(f) Nothing in this section shall preclude an awarding agency from prequalifying or disqualifying a subcontractor. The disqualification of a subcontractor by an awarding agency does not disqualify an otherwise prequalified contractor.

(Added by Stats.1999, c. 972 (A.B.574), § 4.)

§ 20102. Performance of work by day's labor; plans and specifications; revision

Notwithstanding any other provision of this part to the contrary, where plans and specifications have been prepared by a public agency, whose activities are subject to this part, in order for a public project to be put out for formal or informal bid, and, subsequently, the public agency elects to perform the work by day's labor, the public agency shall perform the work in strict accordance with these same plans and specifications.

Revisions of the plans and specifications may be made once a justification detailing the specific reasons for the change or changes has been approved by the public agency or its project director and a copy of the change and its justification is placed in the project file.

* * *

(Amended by Stats.1990, c. 688 (A.B.3226), § 1; Stats.1990, c. 694 (A.B.3416), § 9.)

§ 20102. Performance of work by day's labor; plans and specifications; revision

Notwithstanding any other provision of this part to the contrary, where plans and specifications have been prepared by a public agency, whose activities are subject to this part, in order for a public project to be put out for formal or informal bid, and, subsequently, the public agency elects to perform the work by day's labor, the public agency shall perform the work in strict accordance with these same plans and specifications.

Revisions of the plans and specifications may be made once a justification detailing the specific reasons for the change or changes has been approved by the public agency or its project director and a copy of the change and its justification is placed in the project file.

* * *

(Amended by Stats.1990, c. 688 (A.B.3226), § 1; Stats.1990, c. 694 (A.B.3416), § 9.)

§ 20103.5. Contracts involving federal funds; failure to obtain license; penalties

In all contracts subject to this part where federal funds are involved, no bid submitted shall be invalidated by the failure of the bidder to be licensed in accordance with the laws of this state. However, at the time the contract is awarded, the contractor shall be properly licensed in accordance with the laws of this state. The first payment for work or material under any contract shall not be made unless and until the Registrar of Contractors verifies to the agency that the records of the Contractors' State License Board indicate that the contractor was properly licensed at the time the contract was awarded. Any bidder or contractor not so licensed shall be subject to all legal penalties imposed by law, including, but not limited to, any appropriate disciplinary action by the Contractors' State License Board. The agency shall include a statement to that effect in the standard form of prequalification questionnaire and financial statement. Failure of the bidder to obtain proper and adequate licensing for an award of a contract shall constitute a failure to execute the contract and shall result in the forfeiture of the security of the bidder.

(Added by Stats.1990, c. 321 (S.B.929), § 2, eff. July 17, 1990. Renumbered § 20103.5 and amended by Stats.1990, c. 1414 (A.B.4165), § 1.)

§ 20103.6. Local agencies; procurement of architectural design services; bids from prequalified list; disclosure statement

(a)(1) Any local agency subject to this chapter shall, in the procurement of architectural design services requiring an expenditure in excess of ten thousand dollars ($10,000), include in any request for proposals for those services or invitations to bid from a prequalified list for a specific project a disclosure of any contract provision that would require the contracting architect to indemnify and hold harmless the local agency against any and all liability, whether or not caused by the activity of the contracting architect.

(2) The disclosure statement shall be prominently set forth in bold type.

(b) In the event a local agency fails to comply with paragraph (1) of subdivision (a), that local agency shall (1) be precluded from requiring the selected architect to agree to any contract provision requiring the selected architect to indemnify or hold harmless the local agency against any and all liability not caused by the activity of the selected architect, (2) cease discussions with the selected architect and reopen the request for proposals or invitations to bid from a qualification list, or (3) mutually agree to an indemnity clause acceptable to both parties.

(c) This section shall become operative on July 1, 1998.

(Added by Stats.1997, c. 722 (A.B.994), § 1, operative July 1, 1998.)

§ 20103.8. Additive and deductive items

A local agency may require a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted. Whenever additive or deductive items are included in a bid, the bid solicitation shall specify which one of the following methods will be used to determine the lowest bid. In the absence of such a specification, only the method provided by subdivision (a) will be used:

(a) The lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items.

(b) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purpose of determining the lowest bid price.

(c) The lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items taken in order from a specifically identified list of those items * * * that, when in the solicitation, and added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the local agency before the first bid is opened.

(d) The lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders or proposed subcontractors or suppliers from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

A responsible bidder who submitted the lowest bid as determined by this section shall be awarded the contract, if it is awarded. This section does not preclude the local agency from adding to or deducting from the contract any of the additive or deductive items after the lowest responsible bidder has been determined.

(e) Nothing in this section shall preclude the prequalification of subcontractors.

(Added by Stats.2000, c. 292 (A.B.2182), § 4. Amended by Stats.2002, c. 455 (A.B.138), § 3.)

§ 20104. Application of article; provisions included in plans and specifications

(a)(1) This article applies to all public works claims of three hundred seventy-five thousand dollars ($375,000) or less which arise between a contractor and a local agency.

(2) This article shall not apply to any claims resulting from a contract between a contractor and a public agency when the public agency has elected to resolve any disputes pursuant to Article 7.1 (commencing with Section 10240) of Chapter 1 of Part 2.

(b)(1) "Public work" has the same meaning as in Sections 3100 and 3106 of the Civil Code, except that "public work" does not include any work or improvement contracted for by the state or the Regents of the University of California.

(2) "Claim" means a separate demand by the contractor for (A) a time extension, (B) payment of money or damages arising from work done by, or on behalf of, the contractor pursuant to the contract for a public work and payment of which is not otherwise expressly provided for or the claimant is not otherwise entitled to, or (C) an amount the payment of which is disputed by the local agency.

(c) The provisions of this article or a summary thereof shall be set forth in the plans or specifications for any work which may give rise to a claim under this article.

(d) This article applies only to contracts entered into on or after January 1, 1991.

(Added by Stats.1994, c. 726 (A.B.3069), § 22, eff. Sept. 22, 1994.)

§ 20104.2. **Claims; requirements; tort claims excluded**

For any claim subject to this article, the following requirements apply:

(a) The claim shall be in writing and include the documents necessary to substantiate the claim. Claims must be filed on or before the date of final payment. Nothing in this subdivision is intended to extend the time limit or supersede notice requirements otherwise provided by contract for the filing of claims.

(b)(1) For claims of less than fifty thousand dollars ($50,000), the local agency shall respond in writing to any written claim within 45 days of receipt of the claim, or may request, in writing, within 30 days of receipt of the claim, any additional documentation supporting the claim or relating to defenses to the claim the local agency may have against the claimant.

(2) If additional information is thereafter required, it shall be requested and provided pursuant to this subdivision, upon mutual agreement of the local agency and the claimant.

(3) The local agency's written response to the claim, as further documented, shall be submitted to the claimant within 15 days after receipt of the further documentation or within a period of time no greater than that taken by the claimant in producing the additional information, whichever is greater.

(c)(1) For claims of over fifty thousand dollars ($50,000) and less than or equal to three hundred seventy-five thousand dollars ($375,000), the local agency shall respond in writing to all written claims within 60 days of receipt of the claim, or may request, in writing, within 30 days of receipt of the claim, any additional documentation supporting the claim or relating to defenses to the claim the local agency may have against the claimant.

(2) If additional information is thereafter required, it shall be requested and provided pursuant to this subdivision, upon mutual agreement of the local agency and the claimant.

(3) The local agency's written response to the claim, as further documented, shall be submitted to the claimant within 30 days after receipt of the further documentation, or within a period of time no greater than that taken by the claimant in producing the additional information or requested documentation, whichever is greater.

(d) If the claimant disputes the local agency's written response, or the local agency fails to respond within the time prescribed, the claimant may so notify the local agency, in writing, either within 15 days of receipt of the local agency's response or within 15 days of the local agency's failure to respond within the time prescribed, respectively, and demand an informal conference to meet and confer for settlement of the issues in dispute. Upon a demand, the local agency shall schedule a meet and confer conference within 30 days for settlement of the dispute.

(e) Following the meet and confer conference, if the claim or any portion remains in dispute, the claimant may file a claim as provided in Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of Division 3.6 of Title 1 of the Government Code. For purposes of those provisions, the running of the period of time within which a claim must be filed shall be tolled from the time the claimant submits his or her written claim pursuant to subdivision (a) until the time that claim is denied as a result of the meet and confer process, including any period of time utilized by the meet and confer process.

(f) This article does not apply to tort claims and nothing in this article is intended nor shall be construed to change the time periods for filing tort claims or actions specified by Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of Division 3.6 of Title 1 of the Government Code.

(Added by Stats.1994, c. 726 (A.B.3069), § 22, eff. Sept. 22, 1994.)

§ 20104.4. Civil action procedures; mediation and arbitration; trial de novo; witnesses

The following procedures are established for all civil actions filed to resolve claims subject to this article:

(a) Within 60 days, but no earlier than 30 days, following the filing or responsive pleadings, the court shall submit the matter to nonbinding mediation unless waived by mutual stipulation of both parties. The mediation process shall provide for the selection within 15 days by both parties of a disinterested third person as mediator, shall be commenced within 30 days of the submittal, and shall be concluded within 15 days from the commencement of the mediation unless a time requirement is extended upon a good cause showing to the court or by stipulation of both parties. If the parties fail to select a mediator within the 15-day period, any party may petition the court to appoint the mediator.

(b)(1) If the matter remains in dispute, the case shall be submitted to judicial arbitration pursuant to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, notwithstanding Section 1141.11 of that code. The Civil Discovery Act of 1986 (Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure) shall apply to any proceeding brought under this subdivision consistent with the rules pertaining to judicial arbitration.

(2) Notwithstanding any other provision of law, upon stipulation of the parties, arbitrators appointed for purposes of this article shall be experienced in construction law, and, upon stipulation of the parties, mediators and arbitrators shall be paid necessary and reasonable hourly rates of pay not to exceed their customary rate, and such fees and expenses shall be paid equally by the parties, except in the case of arbitration where the arbitrator, for good cause, determines a different division. In no event shall these fees or expenses be paid by state or county funds.

(3) In addition to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, any party who after receiving an arbitration award requests a trial de novo but does not obtain a more favorable judgment shall, in addition to payment of costs and fees under that chapter, pay the attorney's fees of the other party arising out of the trial de novo.

(c) The court may, upon request by any party, order any witnesses to participate in the mediation or arbitration process.

(Added by Stats.1994, c. 726 (A.B.3069), § 22, eff. Sept. 22, 1994.)

§ 20104.6. **Payment on undisputed portion of claim; interest on arbitration awards or judgments**

(a) No local agency shall fail to pay money as to any portion of a claim which is undisputed except as otherwise provided in the contract.

(b) In any suit filed under Section 20104.4, the local agency shall pay interest at the legal rate on any arbitration award or judgment. The interest shall begin to accrue on the date the suit is filed in a court of law.

(Added by Stats.1994, c. 726 (A.B.3069), § 22, eff. Sept. 22, 1994.)

§ 20104.50. Timely progress payments; legislative intent; interest; payment requests

(a) (1) It is the intent of the Legislature in enacting this section to require all local governments to pay their contractors on time so that these contractors can meet their own obligations. In requiring prompt payment by all local governments, the Legislature hereby finds and declares that the prompt payment of outstanding receipts is not merely a municipal affair, but is, instead, a matter of statewide concern.

(2) It is the intent of the Legislature in enacting this article to fully occupy the field of public policy relating to the prompt payment of local governments' outstanding receipts. The Legislature finds and declares that all government officials, including those in local government, must set a standard of prompt payment that any business in the private sector which may contract for services should look towards for guidance.

(b) Any local agency which fails to make any progress payment within 30 days after receipt of an undisputed and properly submitted payment request from a contractor on a construction contract shall pay interest to the contractor equivalent to the legal rate set forth in subdivision (a) of Section 685.010 of the Code of Civil Procedure.

(c) Upon receipt of a payment request, each local agency shall act in accordance with both of the following:

(1) Each payment request shall be reviewed by the local agency as soon as practicable after receipt for the purpose of determining that the payment request is a proper payment request.

(2) Any payment request determined not to be a proper payment request suitable for payment shall be returned to the contractor as soon as practicable, but not later than seven days, after receipt. A request returned pursuant to this paragraph shall be accompanied by a document setting forth in writing the reasons why the payment request is not proper.

(d) The number of days available to a local agency to make a payment without incurring interest pursuant to this section shall be reduced by the number of days by which a local agency exceeds the seven-day return requirement set forth in paragraph (2) of subdivision (c).

(e) For purposes of this article:

(1) A "local agency" includes, but is not limited to, a city, including a charter city, a county, and a city and county, and is any public entity subject to this part.

(2) A "progress payment" includes all payments due contractors, except that portion of the final payment designated by the contract as retention earnings.

(3) A payment request shall be considered properly executed if funds are available for payment of the payment request, and payment is not delayed due to an audit inquiry by the financial officer of the local agency.

(f) Each local agency shall require that this article, or a summary thereof, be set forth in the terms of any contract subject to this article.

(Added by Stats.1992, c. 799 (S.B.56), § 2.)

§ 20107. **Bidder's security**

All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(a) Cash.

(b) A cashier's check made payable to the school district.

(c) A certified check made payable to the school district.

(d) A bidder's bond executed by an admitted surety insurer, made payable to the school district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the school district beyond 60 days from the time the award is made.

(Added by Stats.1989, c. 1163, § 1. Amended by Stats.1990, c. 808 (S.B.886), § 1.)

§ 20110. School districts; contracts; application of Part 3

The provisions of this part shall apply to contracts awarded by school districts subject to Part 21 (commencing with Section 35000) of Division 3 of Title 2 of the Education Code.

(Added by Stats.1982, c. 465, p. 1914, § 11.)

§ 20111. **Expenditures in excess of specified amount; purpose of expenditure; periodic adjustment of specified amount**

(a) The governing board of any school district, in accordance with any requirement established by that governing board pursuant to subdivision (a) of Section 2000, shall let any contracts involving an expenditure of more than fifty thousand dollars ($50,000) for * * * any of the following:

(1) The purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district * * *.

(2) Services, except construction services.

(3) Repairs, including maintenance as defined in Section 20115, that are not a public project as defined in subdivision (c) of Section 22002.

The contract shall be let to the lowest responsible bidder who shall give security as the board requires, or else reject all bids.

(b) The governing board shall let any contract for a public project, as defined in subdivision (c) of Section 22002, involving an expenditure of fifteen thousand dollars ($15,000) or more, to the lowest responsible bidder who shall give security as the board requires, or else reject all bids. All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(1) Cash.

(2) A cashier's check made payable to the school district.

(3) A certified check made payable to the school district.

(4) A bidder's bond executed by an admitted surety insurer, made payable to the school district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the school district beyond 60 days from the time the award is made.

(c) This section applies to all equipment, materials * * *, or supplies, whether patented or otherwise, and to contracts awarded pursuant to subdivision (a) of Section 2000. This section shall not apply to professional services or advice, insurance services, or any other purchase or service otherwise exempt from this section, or to any work done by day labor or by force account pursuant to Section 20114.

(d) Commencing January 1, 1997, the Superintendent of Public Instruction shall annually adjust the dollar amounts specified in subdivision (a) to reflect the percentage change in the annual average value of the Implicit Price Deflator for State and Local Government Purchases of Goods and Services for the United States, as published by the United States Department of Commerce for the 12-month period ending in the prior fiscal year. The annual adjustments shall be rounded to the nearest one hundred dollars ($100).

(Added by Stats.1982, c. 465, p. 1914, § 11. Amended by Stats.1984, c. 173, § 3; Stats.1988, c. 538, § 2; Stats.1989, c. 1163, § 2; Stats.1990, c. 808 (S.B.886), § 4; Stats.1995, c. 897 (S.B.429), § 1.)

§ 20111.5. Bidder questionnaire and financial statement; bid proposal form

(a) The governing board of the district may require that each prospective bidder for a contract, as described under Section 20111, complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's financial ability and experience in performing public works. The questionnaire and financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaires and financial statements shall not be public records and shall not be open to public inspection.

(b) Any school district requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine the size of the contracts upon which each bidder shall be deemed qualified to bid.

(c) Each prospective bidder on any contract described under Section 20111 shall be furnished by the school district letting the contract with a standardized proposal form that, when completed and executed, shall be submitted as his or her bid. Bids not presented on the forms so furnished shall be disregarded.

(d) A proposal form required pursuant to subdivision (c) shall not be accepted from any person or other entity who is required to submit a completed questionnaire and financial statement for prequalification pursuant to subdivision (a), but has not done so at least five days prior to the date fixed for the public opening of sealed bids or has not been prequalified, pursuant to subdivision (b), for at least one day prior to that date.

(e) Notwithstanding subdivision (d), any school district may establish a process for prequalifying prospective bidders pursuant to this section on a quarterly basis and may authorize that prequalification to be considered valid for up to one calendar year following the date of initial prequalification.

(Added by Stats.1986, c. 886, § 33. Amended by Stats.1987, c. 102, § 1; Stats.1997, c. 390 (A.B.611), § 5, eff. Aug. 27, 1997.)

§ 20116. Split or separation into smaller work orders or projects; total cost of projects; records; informal bids

It shall be unlawful to split or separate into smaller work orders or projects any work, project, service, or purchase for the purpose of evading the provisions of this article requiring * * * contracting after competitive bidding.

The district shall maintain job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California School Accounting Manual for a period of not less than three years after completion of the project.

* * * Informal bidding may be used on work, projects * * *, services, or purchases that cost up to * * * the limits set forth in * * * this article. For the purpose of securing informal bids, the board shall publish annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. All contractors included on the informal bidding list shall be given notice of all informal bid projects in any manner as the district deems appropriate.

(Amended by Stats.1995, c. 897 (S.B.429), § 4.)

§ 20650. Application of article; community college districts

The provisions of this article shall apply to contracts by community college districts as provided for in Part 49 (commencing with Section 81000) of the Education Code.

(Added by Stats. 1983, c. 256, § 84.)

§ 20651. Letting contracts; necessity of bids; security

(a) The governing board of any community college district shall let any contracts involving an expenditure of more than fifty thousand dollars * * * ($50,000) for any of the following:

(1) The purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district* * *.

(2) Services, except construction services.

(3) Repairs, including maintenance as defined in Section 20656, that are not a public project as defined in subdivision (c) of Section 22002.

The contract shall be let to the lowest responsible bidder who shall give * * * security as the board requires, or else reject all bids.

(b) The governing board shall let any contract for a public project, as defined in subdivision (c) of Section 22002, involving an expenditure of fifteen thousand dollars ($15,000) or more to the lowest responsible bidder who shall give security as the board requires, or else reject all bids. All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

(1) Cash.

(2) A cashier's check made payable to the community college district.

(3) A certified check made payable to the community college district.

(4) A bidder's bond executed by an admitted surety insurer, made payable to the community college district.

Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

(c) This section applies to all equipment, materials * * *, or supplies, whether patented or otherwise. This section shall not apply to professional services or advice, insurance services, or any other purchase or service otherwise exempt from this section, or to any works done by day labor or by force account pursuant to Section 20655.

(d) Commencing January 1, 1997, the Board of Governors of the California Community Colleges shall annually adjust the dollar amounts specified in subdivision (a) to reflect the percentage change in the annual average value of the Implicit Price Deflator for State and Local Government Purchases of Goods and Services for the United States, as published by the United States Department of Commerce for the 12-month period ending in the prior fiscal year. The annual adjustments shall be rounded to the nearest one hundred dollars ($100).

(Amended by Stats.1995, c. 897 (S.B.429), § 5.)

§ 20651.5. Bidder questionnaire and financial statement; prequalified bidder; proposal form

(a) The governing board of any community college district may require each prospective bidder for a contract, as described under Section 20651, to complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district, including a complete statement of the prospective bidder's financial ability and experience in performing public works. The questionnaire and financial statement shall be verified under oath by the bidder in the manner in which civil pleadings in civil actions are verified. The questionnaire responses of prospective bidders and their financial statements shall not be deemed public records and shall not be open to public inspection.

(b) Any community college district requiring prospective bidders to complete and submit questionnaires and financial statements, as described in subdivision (a), shall adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements, in order to determine the size of the contracts upon which each bidder shall be deemed financially qualified to bid. The prequalification of a prospective bidder shall neither limit nor preclude a district's subsequent consideration of a prequalified bidder's responsibility on factors other than the prospective bidder's financial qualifications.

(c) Each prospective bidder on any contract described under Section 20651 that is subject to this section shall be furnished, by the community college district letting the contract, with a standardized proposal form that, when completed and executed, shall be submitted as his or her bid. Bids not presented on the forms so furnished shall be deemed nonresponsive and shall be rejected. A proposal form shall not be accepted from any person who, or other entity which, is required to submit a completed questionnaire and financial statement for prequalification pursuant to subdivision (a), but who or which has not done so at least five days prior to the date fixed for the public opening of sealed bids and has not been prequalified, pursuant to subdivision (b), at least one day prior to that date.

(Added by Stats.1998, c. 657 (A.B.1921), § 5.)

§ 20657. Splitting projects to evade article prohibited; records; informal bidding; annual publication of notice of opportunity to register

It shall be unlawful to split or separate into smaller work orders or projects any work, project, service, or purchase for the purpose of evading the provisions of this article requiring * * * contracting after competitive bidding.

The district shall maintain job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California Community College Budget and Accounting Manual for a period of not less than three years after completion of the project.

* * * Informal bidding may be used on work, projects * * *, services, or purchases that cost up to * * * the limits set forth in * * * this article. For the purpose of securing informal bids, the board shall publish annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. All contractors included on the informal bidding list shall be given notice of all informal bid projects, in any manner as the district deems appropriate.

(Amended by Stats.1995, c. 897 (S.B.429), § 9.)

§ 20659. Changes or alterations of contracts; necessity of writing; proceeding without bids

If any change or alteration of a contract governed by the provisions of this article is ordered by the governing board of the community college district, such change or alteration shall be specified in writing and the cost agreed upon between the governing board and the contractor. The board may authorize the contractor to proceed with performance of the change or alteration without the formality of securing bids, if the cost so agreed upon does not exceed the greater of:

(a) The amount specified in Section 20651 or 20655, whichever is applicable to the original contract; or

(b) Ten percent of the original contract price.

(Added by Stats.1983, c. 256, § 84.)

§ 22300. **Performance retentions; provision for substitute security; escrow agreement**

(a) Provisions shall be included in any invitation for bid and in any contract documents to permit the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract * * *; however, substitution of securities provisions shall not be required in contracts in which there will be financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. Sec. 1921 et seq.), and where federal regulations or policies, or both, do not allow the substitution of securities. At the request and expense of the contractor, securities equivalent to the amount withheld shall be deposited with the public agency, or with a state or federally chartered bank in * * * this state as the escrow agent, who shall then pay those moneys to the contractor. Upon satisfactory completion of the contract, the securities shall be returned to the contractor.

Additions or changes indicated by underline; deletions by asterisks * * *

(b) Alternatively, the contractor may request and the owner shall make payment of retentions earned directly to the escrow agent at the expense of the contractor. At the expense of the contractor, the contractor may direct the investment of the payments into securities and the contractor shall receive the interest earned on the investments upon the same terms provided for in this section for securities deposited by the contractor. Upon satisfactory completion of the contract, the contractor shall receive from the escrow agent all securities, interest, and payments received by the escrow agent from the owner, pursuant to the terms of this section. * * *

(c) Securities eligible for investment under this section shall include those listed in Section 16430 of the Government Code, bank or savings and loan certificates of deposit, interest-bearing demand deposit accounts, standby letters of credit, or any other security mutually agreed to by the contractor and the public agency.

The contractor shall be the beneficial owner of any securities substituted for moneys withheld and shall receive any interest thereon.

Failure to include these provisions in bid and contract documents shall void any provisions for performance retentions in a public agency contract.

For purposes of this section, the term "public agency" shall include, but shall not be limited to, chartered cities.

(d)(1) Any contractor who elects to receive interest on moneys withheld in retention by a public agency shall, at the request of any subcontractor, make that option available to the subcontractor regarding any moneys withheld in retention by the contractor from the subcontractor. If the contractor elects to receive interest on any moneys withheld in retention by a public agency, then the subcontractor shall receive the identical rate of interest received by the contractor on any retention moneys withheld from the subcontractor by the contractor, less any actual pro rata costs associated with administering and calculating that interest. In the event that the interest rate is a fluctuating rate, the rate for the subcontractor shall be determined by calculating the interest rate paid during the time that retentions were withheld from the subcontractor. If the contractor elects to substitute securities in lieu of retention, then, by mutual consent of the contractor and subcontractor, the subcontractor may substitute securities in exchange for the release of moneys held in retention by the contractor.

(2) This subdivision shall apply only to those subcontractors performing more than five percent of the contractor's total bid.

(3) No contractor shall require any subcontractor to waive any provision of this section.

(e) The Legislature hereby declares that the provisions of this section are of statewide concern and are necessary to encourage full participation by contractors and subcontractors in public contract procedures.

(f) The escrow agreement used hereunder shall be null, void, and unenforceable unless it is substantially similar to the following form:

ESCROW AGREEMENT FOR
SECURITY DEPOSITS IN LIEU OF RETENTION

This Escrow Agreement is made and entered into by and between _____ whose address is _____ hereinafter called "Owner," whose address is _____ hereinafter called "Contractor" and whose address is _____ hereinafter called "Escrow Agent."

For the consideration hereinafter set forth, the Owner, Contractor, and Escrow Agent agree as follows:

(1) Pursuant to Section 22300 of the Public Contract Code of the State of California, Contractor has the option to deposit securities with Escrow Agent as a substitute for retention earnings required to be withheld by Owner pursuant to the Construction Contract entered into between the Owner and Contractor for _____ in the amount of _____ dated _____ (hereinafter referred to as the "Contract"). Alternatively, on written request of the Contractor, the Owner shall make payments of the retention earnings directly to the Escrow Agent. When the Contractor deposits the securities as a substitute for Contract earnings, the Escrow Agent shall notify the Owner within 10 days of the deposit. The market value of the securities at the time of the substitution shall be at least equal to the cash amount then required to be withheld as retention under the terms of the Contract between the Owner and Contractor. Securities shall be held in the name of _____, and shall designate the Contractor as the beneficial owner.

(2) The Owner shall make progress payments to the Contractor for those funds which otherwise would be withheld from progress payments pursuant to the Contract provisions, provided that the Escrow Agent holds securities in the form and amount specified above.

(3) When the Owner makes payment of retentions earned directly to the Escrow Agent, the Escrow Agent shall hold them for the benefit of the Contractor until the time that the escrow created under this contract is terminated. The Contractor may direct the investment of the payments into securities. All terms and conditions of this agreement and the rights and responsibilities of the parties shall be equally applicable and binding when the Owner pays the Escrow Agent directly.

(4) Contractor shall be responsible for paying all fees for the expenses incurred by Escrow Agent in administering the Escrow Account and all expenses of the Owner. These expenses and payment terms shall be determined by the Owner, Contractor, and Escrow Agent.

(5) The interest earned on the securities or the money market accounts held in escrow and all interest earned on that interest shall be for the sole account of Contractor and shall be subject to withdrawal by Contractor at any time and from time to time without notice to the Owner.

(6) Contractor shall have the right to withdraw all or any part of the principal in the Escrow Account only by written notice to Escrow Agent accompanied by written authorization from the Owner to the Escrow Agent that Owner consents to the withdrawal of the amount sought to be withdrawn by Contractor.

(7) The Owner shall have a right to draw upon the securities in the event of default by the Contractor. Upon seven days' written notice to the Escrow Agent from the owner of the default, the Escrow Agent shall immediately convert the securities to cash and shall distribute the cash as instructed by the Owner.

(8) Upon receipt of written notification from the Owner certifying that the Contract is final and complete, and that the Contractor has complied with all requirements and procedures applicable to the Contract, Escrow Agent shall release to Contractor all securities and interest on deposit less escrow fees and charges of the Escrow Account. The escrow shall be closed immediately upon disbursement of all moneys and securities on deposit and payments of fees and charges.

(9) Escrow Agent shall rely on the written notifications from the Owner and the Contractor pursuant to Sections (5) to (8), inclusive, of this Agreement and the Owner and Contractor shall hold Escrow Agent harmless from Escrow Agent's release and disbursement of the securities and interest as set forth above.

(10) The names of the persons who are authorized to give written notice or to receive written notice on behalf of the Owner and on behalf of Contractor in connection with the foregoing, and exemplars of their respective signatures are as follows:

On behalf of Owner:	On behalf of Contractor:
Title	Title
Name	Name
Signature	Signature
Address	Address

On behalf of Escrow Agent:

Title

Name

Signature

Address

At the time the Escrow Account is opened, the Owner and Contractor shall deliver to the Escrow Agent a fully executed counterpart of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement by their proper officers on the date first set forth above.

Owner	Contractor
Title	Title
Name	Name
Signature	Signature

(Added by Stats.1988, c. 1408, § 11. Amended by Stats.1991, c. 933 (A.B.1648), § 1; Stats.1993, c. 1195 (S.B.405), § 25.5; Stats.1998, c. 857 (A.B.2084), § 13.)

§ 7028.15. Submission of a bid to a public agency without a license; misdemeanor; exceptions; previous conviction; fine; application; citation to public officer or employee; verification of license status

(a) It is a misdemeanor for any person to submit a bid to a public agency in order to engage in the business or act in the capacity of a contractor within this state without having a license therefor, except in any of the following cases:

(1) The person is particularly exempted from this chapter.

(2) The bid is submitted on a state project governed by Section 10164 of the Public Contract Code or on any local agency project governed by Section 20103.5 of the Public Contract Code.

(b) If a person has been previously convicted of the offense described in this section, the court shall impose a fine of 20 percent of the price of the contract under which the unlicensed person performed contracting work, or four thousand five hundred dollars ($4,500), whichever is greater, or imprisonment in the county jail for not less than 10 days nor more than six months, or both.

In the event the person performing the contracting work has agreed to furnish materials and labor on an hourly basis, "the price of the contract" for the purposes of this subdivision means the aggregate sum of the cost of materials and labor furnished and the cost of completing the work to be performed.

(c) This section shall not apply to a joint venture license, as required by Section 7029.1. However, at the time of making a bid as a joint venture, each person submitting the bid shall be subject to this section with respect to his or her individual licensure.

(d) This section shall not affect the right or ability of a licensed architect, land surveyor, or registered professional engineer to form joint ventures with licensed contractors to render services within the scope of their respective practices.

(e) Unless one of the foregoing exceptions applies, a bid submitted to a public agency by a contractor who is not licensed in accordance with this chapter shall be considered nonresponsive and shall be rejected by the public agency. Unless one of the foregoing exceptions applies, a local public agency shall, before awarding a contract or issuing a purchase order, verify that the contractor was properly licensed when the contractor submitted the bid. Notwithstanding any other provision of law, unless one of the foregoing exceptions applies, the registrar may issue a citation to any public officer or employee of a public entity who knowingly awards a contract or issues a purchase order to a contractor who is not licensed pursuant to this chapter. The amount of civil penalties, appeal, and finality of such citations shall be subject to Sections 7028.7 to 7028.13, inclusive. Any contract awarded to, or any purchase order issued to, a contractor who is not licensed pursuant to this chapter is void.

(f) Any compliance or noncompliance with subdivision (e) of this section, as added by Chapter 863 of the Statutes of 1989, shall not invalidate any contract or bid awarded by a public agency during which time that subdivision was in effect.

(g) A public employee or officer shall not be subject to a citation pursuant to this section if the public employee, officer, or employing agency made an inquiry to the board for the purposes of verifying the license status of any person or contractor and the board failed to respond to the inquiry within three business days. For purposes of this section, a telephone response by the board shall be deemed sufficient.

(Added by Stats.1989, c. 863, § 1. Amended by Stats.1990, c. 321 (S.B.929), § 1, eff. July 17, 1990; Stats.1991, c. 785 (A.B.800), § 2; Stats.1992, c. 294 (A.B.2347), § 1.)

EXHIBIT 4
COPIES OF REGULATIONS CITED

(c) Records of students shall be transferred to the district which, after the date on which the reorganization becomes effective for all purposes, maintains the college in which a student was last enrolled.

NOTE: Authority cited: Sections 66700 and 70901, Education Code. Reference: Section 70901, Education Code.

HISTORY

1. Renumbering and amendment of former section 53540 to section 59424 filed 5–15–93; operative 6–4–93 (Register 93, No. 25).

Subchapter 9. Minority, Women, and Disabled Veteran Business Enterprise Participation Goals for the California Community Colleges

§ 59500. Scope of Subchapter.

(a) The California Community Colleges shall provide opportunities for minority, women, and disabled veteran business enterprise participation in the award of district contracts consistent with this Subchapter. The statewide goal for such participation is not less than 15 percent minority business enterprise participation, not less than 5 percent women business enterprise participation, and not less than 3 percent disabled veteran business enterprise participation of the dollar amount expended by all districts each year for construction, professional services, materials, supplies, equipment, alternation, repair, or improvement. However, each district shall have flexibility to determine whether or not to seek participation by minority, women, and disabled veteran business enterprises for any given contract.

(b) Nothing in this Subchapter authorizes any district to discriminate in awarding contracts on the basis of ethnic group identification, ancestry, religion, age, sex, race, color, or physical or mental disability.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New subchapter 9 and section filed 12–29–93; operative 1–28–94. Submitted to OAL for printing only (Register 94, No. 6). For prior history of former chapter 11 (sections 59500–59503), see Register 88, No. 16.
2. Editorial correction removing duplicative sections and amending HISTORY 1 (Register 98, No. 18).

§ 59502. Definitions.

The definitions set forth in Subsections (d), (e), and (f) of Section 10115.1 of the Public Contract Code, as they may be amended from time to time, apply to this Subchapter and are incorporated herein as though fully set forth in addition, for purposes of this Subchapter:

(a) "Certification" means a process to identify minority, women, and disabled veteran business enterprises.

(b) "Contract" includes any agreement or joint development agreement to provide labor, services, material, supplies, or equipment in the performance of a contract, franchise, concession, or lease granted, let, or awarded for and on behalf of the district. The term "contract" does not include payments to utility companies or purchases, leases or services secured through other public agencies and corporations, the Department of General Services, or the federal government pursuant to Public Contract Code sections 20652 and 20653 and Education Code Section 81653;

(c) "Contractor" means any person or persons, regardless of ethnic group identification, ancestry, religion, sex, race, or color, or any firm, partnership, corporation, or combination thereof, whether or not a minority, women, and disabled veteran business enterprise, who enters into a contract with a district.

(d) "District" means any community college district, board of trustees or officer, employee, or agent of such a district or board empowered to enter into contracts on behalf of the district.

(e) "MBE/WBE/DVBE" means a minority business enterprise, a women business enterprise, and/or a disabled veteran business enterprise. Although a business enterprise may qualify under multiple categories, the entry shall be designated in one specific category for the purposes of these regulations.

(f) "Goal" means a numerically expressed objective for systemwide MBE/WBE/DVBE participation that districts are expected to contribute to achieving. Goals are not quotas, set–asides, or rigid proportions.

(g) "Disabled veteran business enterprise" means a business enterprise certified as a disabled veteran business enterprise by the Office of Small and Minority Business, pursuant to Military and Veterans Code Section 999, or a business enterprise that certifies that it has met such standards.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New section filed 12–29–93; operative 1–28–94. Submitted to OAL for printing only (Register 94, No. 6).

§ 59504. Efforts by Districts.

Each district shall undertake appropriate efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises in district contracts. Appropriate efforts may include vendor and service contractor orientation programs related to participating in district contracts or in understanding and complying with the provisions of this Subchapter, developing a listing of minority, women, and disabled veteran business enterprises potentially available as contractors or suppliers, or such other activities they may assist interested parties in being considered for participation in district contracts. Districts shall also undertake efforts to contribute to achievement of the systemwide goals established in Section 59500 by seeking minority, women, and disabled veteran business enterprises as contractors for such contracts as the district may deem appropriate pursuant to Section 59505.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New section filed 12–29–93; operative 1–28–94. Submitted to OAL for printing only (Register 94, No. 6).

§ 59505. Application of Participation Goals.

(a) If a district elects to apply MBE/WBE/DVBE goals to any contract which is to be awarded to the lowest responsible bidder, bidding notices shall include a statement that at the time of bid opening, bidders shall be considered responsive only if they document to the satisfaction of the district that they meet or have made a good faith effort to meet minority, women, and disabled veteran business enterprise participation goals.

(b) A responsive bidder documents a good faith effort to meet the participation goals if, in connection with the submission of a bid, the bidder provides evidence satisfactory to the district that efforts were made to seek out and consider minority, women, and disabled veteran business enterprises as potential subcontractors, materials and/or equipment suppliers, or both subcontractors and/or suppliers.

(c) The district may also elect to seek minority, women, and disabled veteran business enterprises to serve as contractors for any other contracts not covered by subsection (a).

(d) The district shall assess the status of each of its contractors and, if the contractor is a certified or self–certified minority, women, and disabled veteran business enterprise subcontractors and/or suppliers to the satisfaction of the district, the district may include the actual dollar amount attributable to minority, women, and disabled veteran business enterprise participation in reporting its participation activity pursuant to Section 59509.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, part 1, Public Contract Code.

HISTORY

1. New section filed 12–29–93; operative 1–28–94. Submitted to OAL for printing only (Register 94, No. 6).

§ 59506. Certification.

(a) Each district shall establish a process to collect and retain certification information provided by a business enterprise claiming minority, women, and disabled veteran business enterprise status.

(b) The process described in subsection (a) shall include notification to responsive bidders subject to Section 59505(a) of the requirements for qualification as a responsive bidder.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New section filed 12–29–93; operative 1–28–94. Submitted to OAL for printing only (Register 94, No. 6).

§ 59508. Enforcement of Contracts and Severability Provision.

(a) Notwithstanding any other provision of this Subchapter, the participation goals established herein shall not affect the validity or enforceability of any contract or any bonds, notes or other obligations issued by the district to provide for the payment of any contract subject to this Subchapter.

(b) If any provision of this Subchapter or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the Subchapter which can be given effect without the invalid provision or application, and to this end, the provisions of this Subchapter are severable.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New section filed 12–29–93; operative 1–28–94. Submitted to OAL for printing only (Register 94, No. 6).

§ 59509. Monitoring of Participation Goals.

Each district shall monitor its participation as specified in this Subchapter. Beginning October 15, 1994, and by each October 15 thereafter, each district shall report to the Chancellor the level of participation by minority, women, and disabled veteran business enterprises pursuant to this Subchapter for the previously completed fiscal year. Even if a district elects not to apply minority, women, and disabled veteran business enterprise goals to one or more particular contract(s), all such contracts shall be reported to the Chancellor and shall be taken into account in determining whether the community college system as a whole has achieved the goals set forth in Section 59500.

The Chancellor shall prescribe forms to be used by the districts in making their yearly reports.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New section filed 12–29–93; operative 1–28–94. Submitted to OAL for printing only (Register 94, No. 6).

* * *

STATE OF CALIFORNIA

CALIFORNIA COMMUNITY COLLEGES
CHANCELLOR'S OFFICE
1102 Q STREET
SACRAMENTO, CA 95814-6511
(916) 445-8752
HTTP://WWW.CCCCO.EDU

March 24, 2004

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: CSM 02-TC-35
Santa Monica Community College District, Claimant
Public Contracts

Dear Ms. Higashi:

As an interested state agency, the Chancellor's Office has reviewed the above-referenced test claim in light of the following questions addressing key issues before the Commission:

1.Do the subject statutes or regulations result in a mandated new program or a mandated higher level of service within an existing program upon local entities within the meaning of section 6, article XIIIB of the California Constitution and section 17514 of the Government Code? If so, are costs associated with the mandate reimbursable?

2.Do any of the provisions of Government Code section 17556 preclude the Commission from finding that the provisions of the subject statutes or regulations impose a reimbursable state-mandated program upon local entities?

This test claim ("Claim") alleges mandated costs reimbursable by the state for community college district activities in complying with public contracting requirements. Test Claimant Santa Monica Community College District ("Claimant") alleges that reimbursable mandated costs arise from a variety of Public Contract Code sections, one Business and Professions Code section, and regulations that were adopted by the Board of Governors of the California Community Colleges and that appear in title 5 of the California Code of Regulations.

A number of the provisions that are presented as part of this Claim do not represent reimbursable mandates. Two primary recurring themes govern these provisions.

1. Numerous provisions are optional. Claimant is not required to engage in the conduct but may choose to do so. An optional choice negates the finding of a state mandate.

The California Supreme Court recently addressed the circumstances that will give rise to a mandate for purposes of reimbursement. (*Department of Finance v. Commission on State Mandates*, Kern High School, Real Party in Interest, (2003) 30 Cal.4th 727.) In that case, the Kern High School District sought reimbursement for the costs of preparing notices and agenda items related to certain programs it offered. The Supreme Court found that no mandates exist where a district voluntarily participates in a program.

The California Supreme Court noted that where an entity "elects" to participate in a program, there is no legal compulsion at issue, and therefore, there is no mandated cost: "Accordingly, no reimbursable state mandate exists with regard to any of these programs based upon a theory that such costs were incurred under legal compulsion." (*Id.*, at 745.)

Under *Kern High School,* Claimant's election to participate voluntarily in certain activities renders the conduct optional. If there are costs associated with that optional conduct, it is not compensable as a state mandate because no mandate exists.

2. Several Public Contract Code sections supporting this Claim existed prior to January 1, 1975, as Education Code sections. To the extent any mandates predated January 1, 1975 they are not eligible for reimbursement.

"Costs mandated by the state" do not include costs associated with statutes that were enacted prior to January 1, 1975. (Gov. Code, § 17514.) Statutory requirements that existed before January 1, 1975, cannot be the basis for reimbursement.

A number of provisions that currently appear in the Public Contract Code previously existed in the Education Code. Because the Education Code has been reorganized several times, it is important to trace statutory requirements to their original sources. Some sections that now appear in the Public Contract Code originally resided in the Education Code prior to the 1976 comprehensive code reorganization. Any Public Contract Code sections that originated in the Education Code before January 1975 cannot represent "costs mandated by the state" under Government Code, section 17514.

Claim 1A. Local Agency Public Construction Act, Articles 1 and 2. Public Contract Code, sections 20100 et seq.

In Claim 1A, Claimant refers to the Local Agency Public Construction Act, Articles 1 and 2, for the proposition that the Act requires community college districts "to establish, periodically update and maintain policies and procedures to implement the requirements of the law pertaining to public contracts." (Claim, page 93.) Thereafter, in Claims 1M – 1U. Claimant challenges specific Public Contract Code sections.

We will address Claim 1A by addressing the specific provisions described by Claimant. (See Claims 1M – 1U below.)

Claim 1B. Public Contract Code, section 3300. This section requires public entities to specify what contractor's license is required for a project when it issues a notice inviting bids for a public project.

Because the licensing of contractors is a highly regulated and specialized area, we are uncertain as to whether the identification of the necessary license is a "program" within the state mandate requirements. That is, the California Supreme Court has determined that a "program" carries out a governmental function and must "impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.) To the extent that all owners/builders should determine that a contractor's license is necessary, there would appear to be no unique governmental program at issue. However, the requirement to specify the necessary contractor's license in the bid notice may constitute a mandated cost, although including such information in a bid invitation would appear to involve a de minimus expense.

Claim 1C. Public Contract Code, section 6610. This section requires public agencies that invite formal bids for public projects and that require mandatory prebid site visits, conferences, or other mandatory pre-bid meetings, to include the time, date, and location of these visits, conferences or meetings in the notice inviting formal bids.

The obligation to provide notice of visits, conferences, or meetings appears to be conditioned on whether a public agency opts to have such mandatory meetings. Accordingly, associated costs are also optional under *Kern High School* and they are ineligible for reimbursement.

Claims 1D – 1F. Public Contract Code, section 7104. This section requires local public entities with public works projects that involve digging trenches or other excavations below four feet under the surface to include specific provisions in the public works contract. The contractual provisions include requiring the public entity to investigate certain conditions once they are discovered.

Our review suggests that the required contract provision and specific investigative actions may create a mandated cost for entities with such projects.

Claim 1G. Public Contract Code, section 7107. This section governs the disbursement of retention proceeds withheld from any payment by a public entity to the original contractor or withheld from any payment by the original contractor to a subcontractor. The section applies to contracts entered into on or after January 1, 1993.

Civil Code, section 3260.1 relates to construction in general and permits withholding from "the progress payment an amount not to exceed 150 percent of the disputed amount." This is the language Claimant asserts creates a state mandate. (Claim, page 95.) However, it appears that this retention standard is generally applicable, and therefore does not fit within the scope of a "program" as defined in *County of Los Angeles*, supra because no uniquely governmental function is involved. Additionally, the balance of the claimed mandate that relates to a charge of 2% and litigation remedies when a public entity fails to make timely retention payments, lies within the discretion of the district. That is, these costs can be avoided by making timely payments. Under *Kern High School*, a district's decision not to make timely payments is optional, and cannot serve as the basis for a reimbursable cost.

This part of the Claim should be rejected.

Claim 1H. Public Contract Code, section 7109. This section applies to public works contracts awarded after January 1, 1996. The section states that it is the intent of the Legislature that a public entity may undertake certain activities (e.g., establish a program to deter graffiti) if it determines that a project may be vulnerable to graffiti.

Claimant asserts that the section requires it to undertake these activities. However, section 7109 merely states that if a determination of vulnerability to graffiti is made, it is the Legislature's intention (as opposed to a requirement) that entities take action. Both the initial public entity determination and all of the suggested actions are framed as permissive.

This section creates no mandates, and any Claim based on its provisions should be denied.

Claim 1I. Public Contract Code, section 9203. This section prescribes limits on progress payments that may be made on certain contracts that exceed $5,000. The effect is to prevent full payment until the project is completed.

This section was added by stats. 1990, c. 694. Legislative Counsel's Digest for the underlying bill indicates that "This bill would transfer certain public works contract provisions from the Government Code to the Public Contract Code without substantive change."

We cannot determine from the bill whether section 9203 previously existed in the Government Code or whether its original provisions predated January 1, 1975. If the original provisions predated January 1, 1975, no state mandate can be found. (Government Code, section 17514.) Our greatly reduced resources do not permit a further exploration of early Government Code provisions, but we recommend the Commission's further review.

Claim 1J. Public Contract Code, section 10299. This section authorizes the Director of General Services to enter into master agreements for various services to enhance the state's buying power. The Director may also offer procurement services to school districts, and such districts would be authorized to use the master agreements without competitive bidding.

The section creates no mandates for community college districts. It is the Director of General Services who enters into the master agreements. Participation in the agreements is purely optional. Based on *Kern High School*, supra, such discretionary activities cannot give rise to a mandate claim. In fact, the option to use the master agreements in lieu of competitive bidding should result in savings for participants.

This part of the Claim should be denied.

Claim 1K. Public Contract Code, section 12109. This section allows the Director of General Services to make the services of the Department of General Services available to tax-supported agencies, including school districts.

The section creates no mandates for Claimant because it is not required to use the offered services. Based on *Kern High School*, Claimant's optional choices cannot serve as the basis for a mandate claim.

Any claim based on this section should be denied.

Claim 1L. Business and Professions Code, section 7028.15. This section establishes the misdemeanor of submitting a bid to a public agency without having a required license to perform the proposed work. The section also requires local agencies to verify licensure before awarding a bid.

The requirement to verify licensure appears to create a state-mandated cost.

Claims 1M – 1Q. Public Contract Code, section 20101. This section allows public entities to require prospective bidders to provide standardized questionnaires and financial statements. It also allows public entities to adopt and apply a uniform system for rating bidders. Finally, it allows public entities to establish processes for prequalifying bidders.

Because the activities described in section 20101 are permissive, under *Kern High School*, no state mandate is created should Claimant choose to apply the section. Any Claim based on this section should be denied.

Claim 1R. Public Contract Code, section 20102. This section provides that where a public entity prepares plans and specifications for use in a formal or informal bid process but then determines to use day labor, it must still follow the plans and specifications, unless a justification for changes exists.

Claimant appears to argue that when it plans something, its use of those plans becomes a state mandate separate from any requirement to prepare the plans and specifications. First, we believe that all construction projects, not just public works, must be based on plans and following the plans. Accordingly, even if a requirement is found in such a proposition, it is not a requirement placed on local government to serve a governmental function that is different from generally accepted practices.

Second, there is no greater obligation created under this section when an entity opts to perform the work by day's labor rather than bid the project. Claimant would be obligated to follow its plans if it bid the project, so no additional or different obligation is created. Finally, even if an additional or different obligation were created when an entity chooses to use day labor, that obligation arises from the entity's choice. Such a choice would fall under *Kern High School* such that no mandate is created.

For the foregoing reasons, any Claim based on this section should be rejected.

Claim 1S. Public Contract Code, section 20103.5. When federal funds are involved in a contract, prior to making the first payment under the contract, the public agency must ensure that the contractor was properly licensed at the time the contract was awarded.

Business and Professions Code, section 7028.15, cited by Claimant as Claim 1L, requires local agencies to verify licensure before awarding a bid. Accordingly, the requirement of Public Contract Code, section 20103.5 appears to already have been satisfied through actions required under Business and Professions Code, section 7028.15.

Verification of licensure appears to create a mandate. It also appears to be appropriate to ensure that reimbursement is not duplicated when comparable mandates appear in more than one state statute.

Claims 1T – 1U. Public Contract Code, section 20103.6. This section requires local agencies that wish to require architects to indemnify and hold them harmless from liability to include in the request for proposals or bid invitations for architectural design services a disclosure that such a provision is required. If an entity fails to include the disclosure, it is prevented from requiring the indemnification, it may reopen the selection process, or it can reach mutual agreement with the architect for such a provision.

There is no requirement that an indemnification provision be included in the described contract, only that if an entity wants such a provision, it must include notice that such a provision will be required. Seeking indemnification is optional. If Claimant decides to exercise that option, all actions that are attendant to that choice are also optional, and under *Kern High School,* are not reimbursable mandates.

This part of the Claim should be rejected.

Claim 1V. Public Contract Code, section 20103.8. This section appears in Article 1.3 (Award of Contracts). It allows local agencies to require that bids include items that may be added or deducted from the scope of a project. Such a process allows flexibility, depending on the availability of funds at the time of the bid award. If additive or deductive items are included, the local agency must advise potential bidders which of four methods set out in the statute will be used to determine the lowest bid. If the local agency fails to identify a method, the method set out in subdivision (a) must be used.

The choice to require bids to include additions or deductions is in the discretion of the local agency. If the local agency chooses to require such bid elements, it must either notify prospective bidders of the means for determining the low bid, or use a statutorily prescribed method for doing so. These requirements, however, result from the local agency's initial decision to require additive or deductive elements. Once Claimant chooses the option regarding additions or deductions, any related requirements also result from Claimant's choice. Under *Kern High School*, these are not reimbursable mandates.

Any Claim based on this section should be denied.

Claim 1W. Public Contract Code, section 20104. This section appears in Article 1.5 (Resolution of Construction Claims). It provides that the Article applies to public works claims between a contractor and a local agency of $375,000 or less. The Article does not apply if the public

agency has elected arbitration under other provisions of the Public Contract Code. The plans or specifications must include the provisions of the article or a summary thereof.

As noted in the section, public agencies may choose to proceed under this Article or under the arbitration proceedings. The requirement that the provisions of the article or a summary of those provisions be included in the plans or specifications only becomes a requirement if the public agency chooses to proceed under this article. Under *Kern High School,* options that an entity chooses cannot be the basis of a mandate claim.

Claims 1X – 1AA. Public Contract Code, section 20104.2. This section establishes various timelines for the contractor to present a written contract claim and for the local agency to respond. The section also provides for a meet and confer conference to resolve disputes.

As noted above, for Claim 1W, the provisions of this section depend on the local agency's choice to use this process or an arbitration process. Because all of the requirements of this section flow from an optional selection by the agency between available processes, there is no mandate. Moreover, Claimant has not even made a showing that this process was used.

Claims 1BB – 1CC. Public Contract Code, section 20104.4. This section relates to civil actions pursued under Article 1.5. The Court may submit the matter to nonbinding mediation unless the parties waive mediation. Judicial arbitration may be imposed. Parties may seek a trial de novo following an arbitration award.

As noted above, the application of this section depends on the local agency's choice of process. It is not clear whether nonbinding mediation choices or judicial arbitration affect a local agency differently than nonpublic parties. If Claimant is treated the same as nonpublic parties, no mandate exists. We do not have expertise in this area and do not have the resources to exhaustively research the general question of mediation and judicial arbitration in connection with construction contracts, but the Commission may wish to research this further. We also note that the section prohibits the payment of arbitration fees or expenses from state (or county) funds.

Claim 1DD. Public Contract Code, section 20104.6. This section requires a local agency to pay the legal interest rate on any arbitration award or judgment.

This section does not create an obligation that is confined to Claimant. Payment of the legal rate of interest on unsatisfied judgments generally begins on the date of entry of the judgment, regardless of the status of the party as a public entity. (Code of Civil Procedure, section 685.020.)

Thus, the payment of a legal interest rate on an award or judgment has general application and does not impose "unique requirements on local governments and . . . apply generally to all residents and entities in the state" and thus do not impose a new program or higher level of service upon Claimant. (*County of Los Angeles, supra.*) For that reason, any Claim based on this section should be rejected.

Claims 1EE – 1FF. Public Contract Code, section 20104.50. This section appears in Article 1.7 (Modifications; Performance; Payment). This section requires a local agency to pay interest on outstanding receipts that it fails to pay on time. Generally, if an undisputed receipt is submitted to the local agency, the agency must make at least a progress payment within 30 days.

The payment of its debts within a reasonable time frame should lie within Claimant's ability. If Claimant chooses not to pay within a reasonable time, interest may be imposed. However, it appears that the interest is not a mandate because its payment can be avoided by payment of the obligations. Under *Kern High School*, no mandate is present because the payment of interest is based on Claimant's choice to delay payment.

This part of the Claim should be rejected.

Claim 1GG – 1HH. Public Contract Code, section 20107. This section appears in Article 2 (Schools – State School Building Aid Law of 1949). Claimant asserts that it requires bidders to present their bids under sealed cover and provide security. It also requires a return of security to unsuccessful bidders. Article 2 applies to contracts that are subject to Article 1 of Chapter 4 of Part 10 of Division 1 of Title 1 of the Education Code. (Public Contract Code, section 20105.) The provisions start at section 15700 of the Education Code.

There is no indication that community college districts are subject to sections 15700 et seq. of the Education Code, so they are not subject to section 20107. As indicated in Education Code, section 15701, Director means "the Director of Education for kindergarten and grades 1 to 12, inclusive," and "grade level" is defined in terms of grades up to and including grade 12.

Claims 3E – 3F, below, address a similar provision for community colleges.

Any Claim under this section should be rejected.

Claim 1II. Public Contract Code, section 22300. This section requires a provision in bid invitations and contracts permitting the substitution of securities. Certain federally financed contracts are not covered.

It appears that requiring additional language in bid invitations and contracts may create a nominal mandate.

Claims 2A-2O pertain to school districts rather than community college districts and are not included in the Claim that was submitted by the Santa Monica Community College District.

Claim 3A. Public Contract Code, sections 20650 et seq. This Claim introduces the portion of the Public Contract Code that applies to community college districts. Section 20650 merely states that the provisions of the article apply to community college districts. Claimant asserts particularized mandated costs under specific sections that appear as Claims 3E through 3M of the Claim, and those sections are addressed in detail below.

Claim 3B-3C. Public Contract Code, section 2000(a) and 20111. These sections address participation by minority business enterprises and women business enterprises in contracts.

There are two reasons for rejecting any Claim based on these provisions.

1. The provisions do not apply to community college districts. Claimant assumes that the addition of the term "school district" to the definition of "local agency" at section 2000(d) means that "community college districts became subject to its provisions. . . ." (Claim, page 78.) Claimant also incorrectly assumes that section 20111 requires community college districts to comply with section 2000.

Claimant asserts that "Chapter 538, Statutes of 1988, Section 2, amended Public Contract Code Section 20111 to require school districts, for the first time, to let contracts in accordance with any requirements established by the board pursuant to subdivision (a) of Public Contract Code Section 2000." (Test Claim, pages 78-79.) Claimant includes a footnote at this point in the Claim to Government Code, section 17519 which defines "school district" to include "community college district." (Claim, footnote 82.)

However, the definition of "school district" in the cited Government Code section exists solely for the purpose of identifying entities that may file state mandate claims. Although "community college districts" are included in the definition of "school districts" in Government Code, section 17519, community college districts are not usually considered school districts for substantive purposes. Thus, Education Code, section 80 provides "'Any school district' and 'all school districts' mean school districts of every kind or class, except a community college district." (Emphasis added.) Under Education Code provisions, community college districts are generally not considered school districts.

It is also clear that the reference to "school districts" in Public Contract Code, section 20111 does not include community college districts. Section 20111 appears in Article 3 of Chapter 1 (Local Agency Public Construction Act) of Part 3 (Contracting by Local Agencies) of Division 2 (General Provisions) of the Public Contract Code. Chapter 1 includes 76 articles. Different articles apply to different public entities. Article 3 applies to School Districts. By contrast, Article 41 applies to Community College Districts; its provisions begin with section 20650. So, a reference to "school districts" in Article 3 does not encompass community college districts that are addressed in Article 41.

The fact that Article 3 does not apply to community college districts is underscored by section 20110. Section 20110 provides: "The provisions of this part shall apply to contracts awarded by school districts subject to Part 21 (commencing with Section 35000) of Division 3 of Title 2 of the Education Code." Part 21 of the Education Code addresses elementary and secondary education. Community college districts do not award contracts under these Education Code sections.

By contrast, Article 41 of the Public Contract Code begins with section 20650 that provides "The provisions of this article shall apply to contracts by community college districts as provided for

in Part 49 (commencing with Section 81000) of the Education Code." Part 49 of the Education Code addresses postsecondary education. Community college districts do award contracts under these Education Code sections.

Any Claim made by Complainant on the basis of Public Contract Code, section 20110 should be denied because the provisions do not apply to community college districts.

2. The provisions do not create a mandate. Section 2000(a) provides in pertinent part ". . . any local agency may require that a contract be awarded to the lowest responsible bidder who also does either of the following. . . ." The balance of the language relates to the inclusion of minority business enterprises and women business enterprises in contracts.

The foregoing establishes the provisions as discretionary, because districts are permitted, but not required to follow them. Even if section 2000 applied to community college districts, under *Kern High School*, there would be no mandate because the actions are voluntary.

These sections do not represent reimbursable mandates.
Claim 3D. Public Contract Code, section 2001. This section requires persons making a bid or offering to perform a contract to provide certain information.

As noted above, section 2000 does not apply to community college districts and includes only voluntary provisions. Section 2001 applies to entities that choose to follow section 2000, so its provisions are voluntary as to Claimant and reimbursement is unavailable under *Kern High School.*

Additionally, section 2001 was added by Stats. 1993, c. 1032 (Assembly Bill 340). AB 340 also made it unlawful for a person to knowingly and intentionally provide false information related to his/her status as a minority, woman, or disabled veteran business enterprise. SEC.8 of AB 340 provided: "No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction."

Government Code, section 17556(g) prohibits a finding of a reimbursable mandate if "the statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction." Accordingly, any costs appear to fall within the provisions of section 17556(g) so as to preclude a claim for state mandated costs.

For the foregoing reasons, any Claim under this section should be rejected.

Claims 3E – 3F. Public Contract Code, section 20651. This section requires letting certain contracts in excess of $50,000 to the lowest responsible bidder, having bidders for public works contracts of $15,000 or more be submitted under seal and accompanied by a specified form of security, and returning the security of unsuccessful bidders.

The requirement for competitive bidding was enacted prior to 1967. We lack the resources to trace the provision to its inception. However, as of 1967, districts were required to let contracts for work to be done above $2500 and for materials or supplies of over $4000 to be let by competitive bidding. (See former Education Code, section 15951, attached.) The bidding thresholds have increased over the years, but that should not alter the mandate, that originated prior to January 1, 1975, and which therefore cannot serve as the basis for a state mandate. Incidentally, because subdivision (d) requires the Board of Governors to annually adjust the $50,000 threshold for inflation, the original $50,000 threshold now stands at $60,900.

Similarly, as indicated in former Education Code, section 15951, districts were also obligated to have bidders provide security. The forms of security were not specified, but the obligation preexisted 1967 and cannot serve as the basis for a mandate.

Public Contract Code, section 20652 allows community college districts to authorize any public corporation or public agency, such as a city or county, to secure data-processing equipment, materials, supplies, equipment, automotive vehicles, tractors and other personal property for the district using its own procurement system. In such a case, the community college district does not need to engage in competitive bidding. Therefore, assuming that such alternatives are available to Claimant without the need to engage in any competitive bidding process, the choice to do so is voluntary and cannot be the basis of a mandated cost.

Public Contract Code, sections 10298 and 10299 allow for the purchase of materials, supplies, and equipment through the Department of General Services without competitive bidding. Again, to the extent that Claimant chooses to engage in its own competitive bidding processes when it could secure items through alternate means that do not require competitive bidding, the obligations of competitive bidding are voluntarily assumed, and cannot be the basis for a mandated cost claim under *Kern High School.*

No Claim should be based on this section.

Claims 3G-3J, Public Contract Code, section 20651.5. This section describes the use of standardized questionnaires and financial statements for prospective bidders for contracts under section 20651.

This section does not create any mandates. The initial sentence confirms that the use of standardized questionnaires and financial statements is purely optional to the districts: "The governing board of any community college district may require each prospective bidder for a contract, as described under Section 20651, to complete and submit to the district a standardized questionnaire and financial statement. . . ." Only if districts choose to require such forms does the section even apply. Based on *Kern High School*, this section creates no mandate because the conduct is purely voluntary.

Any Claim based on this section should be denied.

Claims 3K-3L, Public Contract Code, section 20657. This section requires districts to retain records of funds expended on its projects. It also permits districts to secure informal bids for smaller projects up to the limits that trigger competitive bidding obligations. If informal bids are secured, notice to contractors must be provided.

The obligation to maintain public documents is a basic obligation of public entities that we do not believe is created by this section.

Public Contract Code, section 20655 also allows districts to make repairs, alterations, improvements, and the like by day labor or by force account so long as the projects do not involve a great expenditure of time. Larger districts with FTES greater than 15,000 may use this option for projects that do not exceed 750 hours or when the cost of materials is not over $21,000. Accordingly, Claimant is not required to use informal bidding under section 20657 in these instances, and its choice to use competitive bidding cannot support a claim for reimbursement of a state mandate. Because a choice is involved, under *Kern High School*, no mandate is present.

Claim 3M, Public Contract Code, section 20659. This section requires that all contract changes or alterations be in writing.

The requirement for written change orders/alterations predated January 1, 1975, and cannot therefore be the basis of a state mandate. (Government Code, section 17514.) The requirement of section 20659 has remained substantially the same since it was added to the Education Code as section 15963 in 1961. (See former Education Code, section 15963, attached.)

Any Claim based on this section's requirement should be denied.

Claims 4A-4K. California Code of Regulations, sections 59500 et seq. These regulations were adopted by the Board of Governors of the California Community Colleges. Claimant asserts that the regulations create mandates including a requirement to establish and maintain policies, undertaking efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises, contributing to systemwide goals, and assessing the status of its contractors.

The regulations include no mandates because all community college district activities are purely optional. Section 59500 states "However, each district shall have flexibility to determine whether or not to seek participation by minority, women, and disabled veteran business enterprises for any given contract." Section 59505(a) provides in pertinent part "If a district elects to apply MBE/WBE/DVBE goals to any contract . . . ." Section 59505(c) provides that "The district may also elect to seek . . . ." Any district that chooses not to consider any participation goals has no obligations under the regulations. As provided in *Kern High School*, supra, voluntary activities cannot serve as the basis for mandate claims.

Any Claims based on these regulations should be denied.

We hope the foregoing information is useful to you.

Sincerely,

Frederick E. Harris

FREDERICK E. HARRIS, Assistant Vice Chancellor
College Finance and Facilities Planning

DEPARTMENT OF FINANCE

ARNOLD SCHWARZENEGGER, GOVERNOR

915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

April 16, 2004

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of July 3, 2003, the Department of Finance has reviewed the test claim submitted by the Clovis Unified School District and Santa Monica Community College District (claimant) asking the Commission to determine whether specified costs incurred under various statutes and codes are reimbursable state mandated costs (Claim No. CSM-02-TC-35 "Public Contracts K-14").

As a result of our review, we have concluded that the activities and requirements cited in this test claim do not constitute a State reimbursable mandate. We base this conclusion on the findings and reasons noted below, but first and foremost, we note that participation in voluntary and discretionary state programs, which may require certain conditions of participation, does not constitute a state mandate. In *Department of Finance v. Commission On State Mandates* (2003) 30 Cal.4th 727, the California Supreme Court confirmed the merits of the argument that where a local government entity voluntarily participates in a statutory program, the State may require the entity to comply with reasonable conditions without providing additional funds to reimburse the entity for increased level of activity.

1) Projects for new construction proposed by school districts and community college districts are discretionary.

Nothing in State law or regulation requires a school district or a community college district to construct additional facilities. Instead, the law provides school districts with flexibility, discretion, and choice over the manner in which districts elect to house their student populations. For example, school districts have the discretion to operate year round multi-track schools or two kindergarten sessions per day, use portable classrooms, or transport students to under-used schools. Community colleges can offer night/weekend classes or lease offsite facilities. It is the district's voluntary decision to construct a facility rather than using an aforementioned alternative that forced the district to carry out the activities required under the Local Agency Public Construction Act. Therefore, the costs of complying with the Local Agency Public Construction Act are not reimbursable.

2) The costs incurred complying with the Local Agency Public Construction Act are allowable costs for the use of modernization and new construction grants provided by the State Allocation Board (school districts) and capital outlay appropriations in the State budget act (community college districts).

The State Allocation Board provides modernization and new construction grants through State School Facilities Program to cover the State's share of all necessary project cos

would include costs incurred complying with the Local Agency Public Construction Act. The State's share is typically 50 percent for new construction and 60 percent for modernization, but may be up to 100 percent if a district receives financial hardship funding.

The State budget act appropriates capital outlay funds for community college districts to construct and modernize facilities. These funds can cover up to 100 percent of the projects costs and require no matching funds. Therefore, funding received from the State would offset any necessary costs of the Local Agency Public Construction Act for modernization and new construction projects should the commission find that any activities are a reimbursable mandate.

Moreover, we note that participation in the state's new construction and modernization programs, as well as the use of capital outlay funds by community college districts, is a voluntary and discretionary action resulting from a request initiated by the school or community college district.

3) School districts and community college districts receive funding from the State for deferred maintenance projects.

The State School Deferred Maintenance Program and the Community Colleges Facility Deferred Maintenance and Special Repair Program provide State-matching funds, on a dollar-for-dollar basis, to assist school and community college districts with expenditures for major repair or replacement of existing school building components. Therefore, any projects funded through the State School Deferred Maintenance Program or the Community Colleges Facility Deferred Maintenance and Special Repair Program would have received funding to cover the State's share of any necessary costs of the Local Agency Public Construction Act.

Further, we note that participation in these programs is also voluntary and discretionary; thus, compliance with the Local Agency Public Construction Act would not constitute a state mandate.

4) School districts have the authority to charge development fees to finance construction projects.

Chapter 6 of Part 10.5 of Division 1 of Title 1 of the Education Code authorizes school districts to levy fees against any construction within its district boundaries for the purpose of funding school construction.

Section 17556(d) of the Government Code provides that the Commission on State Mandates shall not find a reimbursable mandate in a statute or executive order if the affected local agencies have authority to levy service charges, fees, or assessments sufficient to pay for the mandated program in the statute or executive order. In its April 1991 decision in *County of Fresno v. State of California* (1991) 53 Cal.3d, 482, the State Supreme Court held that this code section is facially valid under Section 6 of Article XIII B of the California Constitution. Further, in *Kathleen Connell v. Superior Court of Sacramento County* (1997) 59 Cal.App.4th 382, the court found that the fee authority can exist even if it is not economically feasible or practical to implement the fee. Therefore, although the Local Agency Public Construction Act may result in additional costs to school districts, those costs are not reimbursable because the affected districts have the authority to cover those costs through development fees.

5) Comments on Response submitted by the California Community Colleges Chancellor's Office.

We reviewed the California Community Colleges Chancellor's Office letter of March 24, 2004, in response to this test claim, and generally agree with most of the points made in the letter.

However, we make the following comments on those points where we may have a different opinion and, again, we note that the requirements cited in the test claim are only triggered when a district elects to participate in the state's school facility programs.

Claims 1A—1FF and 1II. We concur with the Chancellor's Office on these claims except we believe no mandates exist due to the four reasons listed above. We note that the Chancellor's Office comments are applicable to school districts as well as community college districts.

Claims 1GG—1HH. Public Contract Code, Section 20107. This section appears in Article 2 (Schools – State School Building Aid Law of 1949) and applies to contracts that are subject to Article 1 of Chapter 4 of Part 10 of Division 1 of Title 1 of the Education Code.

The State School Building Aid Law of 1949 established a voluntary program. Districts are not required to apply for apportionments under this article, therefore no mandate exists as per *Department of Finance v. Commission On State Mandates* cited above.

Claim 2A. Public Contract Code, Sections 20110 et seq. Claimant refers to the Local Agency Public Construction Act, Article 3 as requiring school districts "to establish, periodically update and maintain policies and procedures to implement Article 3 of the Act." Nowhere in Article 3 of the Local Agency Public Construction Act is it stated that a school district must establish and periodically update and maintain policies and procedures as stated in the test claim.

Claims 2B—2D. Public Contract Code, Section 2000(a,b), 2001 and 20111. These sections address participation by minority business enterprises and women business enterprises in contracts. The provisions are discretionary and thus do not create a mandate as per *Department of Finance v. Commission On State Mandates.* Section 2000(a) states in part, "... any local agency *may require* that a contract be awarded to the lowest responsible bidder who also does either of the following ..." (emphasis added)

The provisions of section 2000(b) are downstream from the school district's decision to establish requirements for minority and women business enterprises and therefore are not mandates. The provisions of section 2001 are also downstream of the district's choice to require minority and women business enterprises participation so no mandate is created.

Claims 2E—2H. Public Contract Code, Section 20111. This section requires letting certain contracts in excess of $50,000 to the lowest responsible bidder, having bidders for public works contracts of $15,000 or more be submitted under seal and accompanied by a specified form of security, and returning the security of unsuccessful bidders.

We concur with the Chancellor's Office response to claims 3E-3G and note that the response is also applicable to school districts. The requirements for competitive bidding, having bidders provide security, and returning the security of unsuccessful bidders all preexisted 1975 and therefore cannot serve as the basis for a mandate.

Also, Public Contract Code section 20118 allows school district governing boards to authorize by contract, lease, requisition, or purchase order, any public corporation or agency, including any county, city, town, or district, to lease data-processing equipment, purchase materials, supplies, equipment, automotive vehicles, tractors, and other personal property for the district in the manner in which the public corporation or agency is authorized by law to make the leases or purchases. In such a case, the school district does not need to engage in competitive bidding. Therefore, because such alternatives are available to school districts without the need to engage in any competitive bidding process, the choice to do so is voluntary and cannot be the basis of a mandated cost.

Further, Public Contract Code sections 10298 and 10299 allow for the purchase of materials, supplies, and equipment through the Department of General Services without competitive bidding. Therefore, it is discretionary for a school district to use its own competitive bidding process for materials, supplies and equipment and no mandate exists.

Claims 2I—2M. Public Contract Code, Section 20111.5. This section describes the use of standardized questionnaires and financial statements for prospective bidders for contracts under section 20111.

Section 20111.5(a) states in part, "The governing board of the district *may* require that each prospective bidder for a contract, as described under section 20111, complete and submit to the district a standardized questionnaire and financial statement in a form specified by the district ..." (emphasis added). The language is permissive and thus creates no mandates as per *Department of Finance v. Commission On State Mandates.* All the other claims cited under section 20111.5 are downstream activities resulting from the district's choice to require such activities and therefore create no mandates.

Claims 2N—2O. Public Contract Code, Section 20116. This section requires districts to retain records of funds expended on their projects. It also permits districts to secure informal bids for projects that cost up to the limits set forth in the article. We concur with the Chancellor's Office that the obligation to maintain public documents is a basic obligation of public entities that is not created by this section.

Informal bidding for contracts that cost less than the amounts set forth in section 20111 is not required. Section 20116 states, "...Informal bidding *may* be used on work, projects, services, or purchases that cost up to the limits set forth in this article. ..." (emphasis added). Therefore, it is the district's choice to carry out informal bidding and no mandate exists.

Claims 3A—3M. Laws Pertaining to Community College Districts. We concur with the Chancellor's Office response to these claims and that no mandates are created.

Claims 4A—4K. Minority, Women, and Disabled Veteran Business Enterprise Participation. We concur with the Chancellor's Office response to these claims and that no mandates are created.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your July 3, 2003 letter have been provided with copies of this letter via either United States Mail or, in the case of other State agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Walt Schaff, Principal Program Budget Analyst at (916) 445-0328 or Keith Gmeinder, State mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Jeannie Oropeza

Jeannie Oropeza
Program Budget Manager

Attachment

Attachment A

DECLARATION OF WALT SCHAFF
DEPARTMENT OF FINANCE
CLAIM NO. CSM-02-TC-35

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the various statutes and code sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

April 16, 2004
at Sacramento, CA

Walt Schaff

PROOF OF SERVICE

Test Claim Name: Public Contracts K-14
Test Claim Number: CSM-02-TC-35

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 7th Floor, Sacramento, CA 95814.

On April 16, 2004, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 7th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: Michael Havey
3301 C Street, Room 500
Sacramento, CA 95816

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

E-8
Department of Education
Fiscal and Administrative Services Division
Attention: Gerald Shelton
1430 N Street, Suite 2213
Sacramento, CA 95814

G-01
California Community Colleges
Attention: Thomas J. Nussbaum
1102 Q Street, Suite 300
Sacramento, CA 95814

Santa Monica Community College District
Attention: Cheryl Miller
1900 Pico Boulevard
Santa Monica, CA 90405-1628

Shields Consulting Group, Inc.
Attention: Steve Shields
1536 36th Street
Sacramento, CA 95816

Centration, Inc.
Attention: Beth Hunter
8316 Red Oak Street, Suite 101
Rancho Cucamonga, CA 91730

Education Mandated Cost Network
C/O School Services of California
Attention: Dr. Carol Berg, PhD
1121 L Street, Suite 1060
Sacramento, CA 95814

Spector, Middleton, Young, Minney, LLP
Attention: Paul Minney
7 Park Center Drive
Sacramento, CA 95825

Sixten & Associates
Attention: Keith Petersen
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Clovis Unified School District
Attention: Bill McGuire
1450 Herndon
Clovis, CA 93611-0599

Mandate Resource Services
Attention: Harmeet Barkschat
5325 Elkhorn Blvd., Suite 307
Sacramento, CA 95842

Reynolds Consulting Group, Inc.
Attention: Sandy Reynolds, President
P.O. Box 987
Sun City, CA 92586

Steve Smith Enterprises, Inc.
Attention: Steve Smith
One Capitol Mall, Suite 200
Sacramento, CA 95814

San Diego Unified School District
Attention: Arthur Palkowitz
4100 Normal Street, Room 3159
San Diego, CA 92103-8363

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 16, 2004, at Sacramento, California.

Jennifer Nelson

SixTen and Associates
Mandate Reimbursement Services

KEITH B. PETERSEN, MPA, JD, President
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Telephone: (858) 514-8605
Fax: (858) 514-8645
E-Mail: Kbpsixten@aol.com

May 7, 2004

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim 02-TC-35
Clovis Unified School District and
Santa Monica Community College District
Public Contracts (K-14)

Dear Ms. Higashi:

I have received the comments of the Department of Finance ("DOF) dated April 16, 2004 and the Chancellor's Office of the California Community Colleges ("CCC") dated March 24, 2004, to which I now respond on behalf of the test claimants.

The Comments of DOF and CCC are Incompetent and Should be Excluded

Test claimants object to the comments of DOF and CCC, in total, as being legally incompetent and move that they be excluded from the record. Title 2, California Code of Regulations, Section 1183.02(d) requires that any:

> "...written response, opposition, or recommendations and supporting documentation shall be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge or information or belief."

Furthermore, test claimants object to any and all assertions or representations of fact made in the response since DOF and CCC have failed to comply with Title 2, California Code of Regulations, Section 1183.02(c)(1) which requires:

> "If assertions or representations of fact are made (in a response), they must be supported by documentary evidence which shall be submitted with the state agency's response, opposition, or recommendations. All documentary evidence shall be authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so and must be based on the declarant's personal knowledge or information or belief."

In addition, DOF and CCC have cited federal statutes and regulations without attaching a copy thereof in violation of Title 2, California Code of Regulations Section 1183.02, subdivision (c)(2), which requires that written responses, opposition or recommendations on the test claim shall contain:

> "A copy of relevant portions of...federal statutes, and executive orders that may impact the alleged mandate...unless such authorities are also cited in the test claim. The specific chapters, articles, sections, or page numbers must be identified..."

The comments of DOF and CCC do not comply with these essential requirements. Since the Commission cannot use unsworn comments or comments unsupported by declarations, but must make conclusions based upon an analysis of the statutes and facts supported in the record, test claimant requests that the comments and assertions of DOF and CCC not be included in the Staff's analysis.

Part I
Comments Made by Both Respondents

Both DOF and CCC make similar comments as to certain issues. Both also repeat issues throughout their respective comments. Test Claimant will reply to these issues here, applicable to both and applicable to each time they are repeated by respondents.

A. Legal Compulsion is not Necessarily Required for a Finding of a Mandate

DOF and CCC both cite *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727 ("*Kern*") and both misinterpret *Kern* on the issue of legal compulsion. For example, CCC states that the Supreme Court "found that no mandates exist where a district voluntarily participates in a program." There was no such "finding" in "*Kern*"! A finding of legal compulsion is not an absolute prerequisite to a finding of a reimbursable mandate. The controlling case law on the subject of legal compulsion *vis-a-vis* non-legal compulsion is still *City of Sacramento v. State of California* (1990) 51 Cal.3d 51 (hereinafter "*Sacramento II*")

(1) *Sacramento II* Facts:

The adoption of the Social Security Act of 1935 provided for a Federal Unemployment Tax ("FUTA"). FUTA assesses an annual tax on the gross wages paid by covered private employers nationwide. However, employers in a state with a federally "certified" unemployment insurance program receive a "credit" against the federal tax in an amount determined as 90 percent of contributions made to the state system. A "certified" state program also qualifies for federal administrative funds.

California enacted its unemployment insurance system in 1935 and has sought to maintain federal compliance ever since.

In 1976, Congress enacted Public Law number 94-566 which amended FUTA to require, for the first time, that a "certified" state plan include coverage of public employees. States that did not alter their unemployment compensation laws accordingly faced a loss of both the federal tax credit and the administrative subsidy.

In response, the California Legislature adopted Chapter 2, Statutes of 1978 (hereinafter chapter 2/78), to conform to Public Law 94-566, and required the state and all local governments to participate in the state unemployment insurance system on behalf of their employees.

(2) *Sacramento I* Litigation

The City of Sacramento and the County of Los Angeles filed claims with the State Board of Control seeking state subvention of the costs imposed on them by chapter 2/78. The State Board denied the claim. On mandamus, the Sacramento Superior Court overruled the Board and found the costs to be reimbursable. In *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 (hereinafter *Sacramento I*) the Court of Appeal affirmed concluding, *inter alia*, that chapter 2/78 imposed state-mandated costs reimbursable under section 6 of article XIII B. It also held, however, that the potential loss of federal funds and tax credits did not render Public Law 94-566 so coercive as to constitute a "mandate of the federal government" under Section 9(b).[1]

[1] Section 1 of article XIII B limits annual "appropriations". Section 9(b) provides that "appropriations subject to limitation" do not include "appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly."

In other words, *Sacramento I* concluded, *inter alia*, that the loss of federal funds and tax credits did not amount to "compulsion."

(3) *Sacramento II* Litigation

After remand, the case proceeded through the courts again. In *Sacramento II*, the Supreme Court held that the obligations imposed by chapter 2/78 failed to meet the "program" and "service" standards for mandatory subvention because it imposed no "unique" obligation on local governments, nor did it require them to provide new or increased governmental services to the public. The Court of Appeal decision, finding the expenses reimbursable, was overruled.

However, the court also overruled that portion of *Sacramento I* which held that the loss of federal funds and tax credits did not amount to "compulsion."

(d) *Sacramento II* "Compulsion" Reasoning

Plaintiffs argued that the test claim legislation required a clear legal compulsion not present in Public Law 94-566. Defendants responded that the consequences of California's failure to comply with the federal "carrot and stick" scheme were so substantial that the state had no realistic "discretion" to refuse.

In disapproving *Sacramento I*, the court explained:

> "If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty - full, double unemployment taxation by both state and federal governments." (Opinion, at page 74)

Plaintiffs argued that California was not compelled to comply because it could have chosen to terminate its own unemployment insurance system, leaving the state's employers faced only with the federal tax. The court replied to this suggestion:

> "However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends. (¶) ...The alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards." (Opinion, at page 74, emphasis supplied)

In other words, terminating its own system was not an acceptable option because it was so far beyond the realm of practical reality so as to be a draconian response, leaving

the state without discretion. The only reasonable alternative was to comply with the new legislation, since the state was practically "without discretion" to do otherwise.

The Supreme Court in *Sacramento II* concluded by stating that there is no final test for a determination of "mandatory" versus "optional":

> "Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." (Opinion, at page 76)

(e) The "Kern" Case Did Not Change the Standard

In *Kern*, at page 736, the Supreme Court first made it clear that the decision did not hold that legal compulsion was necessary in order to find a reimbursable mandate:

> "For the reasons explained below, although we shall analyze the legal compulsion issue, we find it unnecessary in this case to decide whether a finding of legal compulsion is *necessary* in order to establish a right to reimbursement under article XIII B, section 6,[2] because we conclude that even if there are some circumstances in which a state mandate may be found in the absence of legal compulsion, the circumstances presented in this case do not constitute such a mandate." (Emphasis in the original, underlining supplied)

After concluding that the facts in *Kern* did not rise to the standard of non-legal compulsion, the court reaffirmed that either double taxation or other draconian consequences could result in non-legal compulsion:

> "In sum, the circumstances presented *in the case before us* do not constitute the type of non-legal compulsion that reasonably could

---

[2] This *Kern* disclaimer that "we find it unnecessary in this case to decide whether a finding of legal compulsion is *necessary* in order to establish a right to reimbursement" refutes CCC's statement that the court "found that no mandates exist where a district voluntarily participates in a program."

> constitute, in claimants' phrasing, a 'de facto' reimbursable state mandate. Contrary to the situation that we described in (*Sacramento II*), a claimant that elects to discontinue participation in one of the programs *here at issue* does not face 'certain and severe...penalties' such as 'double...taxation' or other 'draconian' consequences (citation), but simply must adjust to the withdrawal of grant money along with the lifting of program obligations." (Opinion, at page 754, emphasis supplied to illustrate holding is limited to facts presented)

The test for determining the existence of a mandate is whether compliance with the test claim legislation is a matter of true choice, that is, whether participation is truly voluntary. *Hayes v. Commission on State Mandates*, (1992) 11 Cal.App.4th 1564, 1582

The process for such a determination is found in *Sacramento II*, that is, the determination in each case must depend on such factors as the nature and purpose of the program; whether its design suggests an intent to coerce; when district participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal.

Neither DOF or CCC has attempted to apply this test to any portion of the test claim legislation and regulations. Therefore, their arguments lack any foundation when claiming that those statutes and regulations contain no reimbursable mandates because the test claim activities are discretionary.

B. School Construction is not Voluntary

DOF argues that districts are not required to apply for state funds for construction.

School districts and community college districts that need new facilities or modernization projects have, basically, three sources of funds for new facilities and modernization projects: the proceeds of their own district bonds, state funds, and developer fees. Each of the three are needed to do the job.

(1) A District's Ability to Borrow for Needed School Facilities is Strictly Limited

The authority to issue district bonds is found in Chapter 1 of Part 10 in Division 1 of Title 1 of the Education Code, commencing at Section 15100. This authority is strictly limited.

Education Code Section 15100 allows a district, when in its judgment it is advisable,

and requires it, upon a petition of the majority of its qualified electors, to order an election and submit to the electors of the district the question of whether the bonds of the district shall be issued and sold for the purpose of raising money for the purchase of school lots, the building or purchasing of school buildings and the making of alterations or additions to school buildings. Section 15102 provides that such bonded indebtedness shall not exceed 1.25 percent of the taxable property of the district. Section 15106 provides that unified school districts or community college districts may not exceed 2.5 percent of the taxable property of the district.

Chapter 1.5 of Part 10 sets forth the Strict Accountability in Local School Construction Bonds Act of 2000, commencing with Section 15264. ("Proposition 39 bonds") Here again, bonded indebtedness is strictly limited.

Section 15266 provides that the Act is an alternative to authorizing and issuing bonds pursuant to Chapter 1 or Chapter 2 (commencing with Section 15300) when the governing board of a school district or community college district decides, pursuant to a two-thirds vote, to pursue the authorization and issuance of bonds for school facilities. Section 15268 provides that such bonded indebtedness shall not exceed 1.25 percent of the taxable property of the district and may only be issued if the tax rate levied would not exceed thirty dollars ($30) per year per one hundred thousand dollars ($100,000) of taxable property when assessed valuation is projected by the district to increase in accordance with Article XIII A of the California Constitution. Section 15270 provides that districts may not authorize or issue bonds that exceed 2.5 percent of the taxable property of the district and may only be issued if the tax rate levied to meet the requirements of Section 18 of Article XVI of the California Constitution in the case of indebtedness incurred pursuant to this chapter at a single election, by a district, would not exceed sixty dollars ($60) per year per one hundred thousand dollars ($100,000) of taxable property when assessed valuation is projected by the district to increase in accordance with Article XIII A of the California Constitution.

Chapter 2 of Part 10 sets forth the Bonds of School Facilities Improvement Districts Act, commencing with Education Code Section 15300. Here again, bonded indebtedness is strictly limited.

Section 15300 provides that the chapter provides a method for the formation of school facilities improvement districts consisting of a portion of the territory within a school district or community college district and for the issuance of general obligation bonds by the school facilities improvement district. Section 15330 provides that the total amount of bonds issued shall not exceed 1.25 percent of the taxable property of the school facilities improvement district. Section 15334.5 further provides that no bonded indebtedness may be incurred pursuant to this chapter in an amount that would cause

the bonded indebtedness of the territory of the school district or community college district of which the school facilities improvement district is a part, to exceed the limitation of indebtedness specified in Sections 15102 and 15106.

(2) The State's Ability to Fully Fund Needed School Facilities is Limited

The California Research Bureau has published a study entitled "School Facility Financing - A History of the Role of the State Allocation Board and Options for the Distribution of Proposition 1A Funds." (Cohen, Joel, February 1999)[3] In the study, the plight of school districts is described therein as follows:

> "As California enters the 21st Century, its public schools face many challenges. One significant challenge is the serious disrepair of an aging school facility infrastructure. Another challenge is the anticipated growth of nearly 2 million K-12 students during the next decade that will require many districts to build new schools to meet burgeoning student demand." (Cohen, *op.cit.*, at page 1)

This independent study does not say school districts will have the discretion to build new schools, it concludes that districts will be required to build them. The report goes on to say:

> "It is clear that throughout this history there was never enough State money available to school districts for facility construction or repair. In fact, in spite of the $6.7 billion approved by Proposition 1A, experts estimate that an additional $10 billion will be required during the next decade. This paper discusses how the constant shortage of funds caused districts to use 'whatever' means available to them to secure funding. (Cohen, *op.cit.*, at page 2)

The historical path to this situation was explained:

> "With the passage of Proposition 13 in 1978, the State Allocation Board's loan orientation was significantly altered. Under Proposition 13, the amount of tax that property owners paid was limited to no more than one percent of the assessed value of their property. Local property tax

[3] A true and exact copy of the report as it appears on the current website of the California Research Bureau is attached hereto as Exhibit "A" and is incorporated herein by reference.

> revenues diminished, and the burden to fund many local government programs was shifted to the State, including public school construction. Further, local governments lost much of their property taxing authority..." (Cohen, *op.cit.*, at page 7)

Therefore, in the post-Proposition 13 era, school financing became a collective effort:

> "In 1986, the Legislature recognized that resources were scarce and that no one governmental or private entity could finance school construction. It attempted to equalize the burden of school facilities financing between state government, local government and the private sector. This concept was known as the 'three legged stool.' The idea was that the state would provide funds through bonds. Local government would provide its share through special taxes, general obligation, Mello-Roos and other bond proceeds. The private sector would provide funds through developer fees." (Cohen, *op.cit.*, at page 15)

Even with Proposition 1A money, the report still projected a shortfall of available funds for school construction:

> "...by 1998, the backlog of school construction projects that were approved by the State Allocation Board, but unfunded, totaled more than $1.3 billion...there were times during the past five decades when bond money was not available for periods of four or six years. (¶) The Department of Finance has estimated that $16 billion is needed over the next decade for public school construction and rehabilitation....in the end, Proposition 1A was passed....However, while the amount appears to be generous, it will not be enough to meet the entire anticipated need of the state. Based on the Department of Finance projections, the six years following the bond issue will require roughly an additional $10 billion in State money." (Cohen, *op.cit.*, at page 19)

In fact, the worm is growing so large that it will soon swallow the fish:

> "The State's bond capacity may not be able to fund every State infrastructure need, including schools, transportation, prisons and water during the next decade. School facility needs are estimated conservatively at roughly $10 billion, while some estimates have put the figure at $40 billion for the next decade alone. According to the Department of Finance, the State can afford to service approximately $25 billion in additional debt. Thus, school facility financing alone could incur

the entire debt capacity of the State." (Cohen, *op.cit.*, at page 36)

(3) Subsequent Events Have Not Abated the Need

On November 5, 2002, California passed Proposition 47, the Kindergarten-University Public Education Facilities Bond Act of 2002. (Education Code Sections 100600, et seq.) This bond act provided 13.05 billion dollars for school facilities construction. (See: Education Code Section 100620)

On March 2, 2004, California enacted Proposition 55, the Kindergarten-University Public Education Facilities Bond Act of 2004. According to the official ballot information pamphlet[4] prepared by the California Attorney General and published by the California Secretary of State, through September 2004, districts identified a need to construct new schools to house nearly 1 million pupils and modernize schools for an additional 1.1 million pupils. The state cost to address these needs was estimated to be roughly $16 billion, yet only $10 billion is earmarked for K-12 school districts. $2.3 billion is earmarked for "higher education", of which only $920 million is to be allocated to community colleges.

So it can be seen that there still is not enough state money to full satisfy the need for school facilities construction.

For the DOF to argue that school districts and community college districts need not use school facilities funding mechanisms (along with the two other legs of the stool) to build new, and modernize old, schools is so far beyond the realm of practical reality so as not to be seriously considered.

There is another dark aspect to this argument of respondents. Read individually or collectively, the argument is that all state programs are "optional" and school districts and community college districts should build necessary schools and repair dilapidated facilities "on their own" using their own funds.

Since its admission to the Union, California has assumed specific responsibility for a statewide public education system open on equal terms to all. The Constitution in 1849

[4] A true and exact copy of that portion of the ballot information pamphlet relative to Proposition 55 (excluding partisan arguments and text of proposed law) as it appears on the website of the Secretary of State is attached hereto as Exhibit "B" and is incorporated herein by reference.

directed the Legislature to "provide for a system of common schools[5], by which a school shall be kept up and supported in each district." That constitutional command, with the additional proviso that the school maintained by each district be "free", has persisted to the present day. *Butt v. State of California* (1992) 4 Cal.4th 668, 680[6] (Footnote 5, added) In *Butt* the court explained:

> "Accordingly, California courts have adhered to the following principles: Public education is an obligation which the State assumed by the adoption of the Constitution. (Citations) The system of public schools, although administered through local districts created by the Legislature, is 'one system...applicable to all the common schools...' (Citation) In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis. (Citation) 'Management and control of the public schools [is] a matter of state[, not local,] care and supervision...' (citations) The Legislature's 'plenary' power over public education is subject only to constitutional restrictions. (Citations) Local districts are the State's agents for local operation of the common school system (Citations), and the State's ultimate responsibility for public education cannot be delegated to any other entity. (citation)" (Opinion, at pages 680-681)

Then after the court reminded us that, in *Serrano I*[7], the court had struck down the then existing State public school financing scheme, which caused the amount of basic revenues per pupil to vary substantially among the respective districts depending on their taxable property values (Opinion, at page 683), the Supreme Court concluded:

> "It therefore appears well settled that the California Constitution makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students of particular districts. The State itself bears the ultimate authority and

---

[5] The California Community Colleges are postsecondary schools and continue to be a part of the public school system. Education Code Section 66700

[6] Pursuant to Title 2, California Code of Regulations, Section 1183.03(2), a copy of Butt v. State of California is attached hereto as Exhibit "C".

[7] *Serrano v. Priest* (1971) 5 Cal.3d 584

> responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity. (¶)...Whatever the requirements of the free school guaranty, the equal protection clause precludes the State from maintaining its common school system in a manner that denies the students of one district an education basically equivalent to that provided elsewhere throughout the State." (Opinion, at page 685)

The argument that school districts and community college districts need not participate in the various school facilities funding programs referred to in the test claim legislation is tantamount to saying that each district is "on its own" when it comes to needed school construction. Since the quality of school facilities would then depend on the wealth of each individual district, the result would be a violation of the equal protection laws of the State constitution. (Article I, §7, subdivisions (a),(b); Article IV, §16, subdivision (a))

Part II
Replies to Provisions Applicable to Community College Districts And School Districts

The new duties mandated upon school districts, county offices of education and community college districts are set forth in four sections, commencing at page 93 of the test claim. This Part II sets forth new duties required upon school districts, county offices of education and community college districts by the Local Agency Public Construction Act.

Duty 1A

The activities alleged are the requirement to establish, periodically update and maintain policies and procedures to implement the requirements of the laws pertaining to public contracts. CCC does not respond to this activity. DOF concurs in the non-response.

Duty 1B

The new mandated duty requires the specification of the classification of the license which a contractor shall possess at the time a contract is awarded, and including that specification in any plans prepared for a public project and in any notice inviting bids.

CCC argues that "[T]o the extent that all owners/builders "*should determine*" that a contractor's license is necessary" (emphasis supplied), it would be a law of general application, citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56. DOF concurs.

The problem with this argument is that the test claim legislation does not require all other persons and entities in the state to do anything. Perhaps all other owners/builders "should determine" if a contractor is licensed. School districts, county offices of education and community college districts are *required* to do so and are required to include that specification in any plans and in any notice inviting bids.

CCC does agree that the requirement to include that specification in any plans and in any notice inviting bids may constitute a mandated cost.[8] DOF concurs.

Duty 1C

This mandated duty requires the inclusion of the time, date, and location of the mandatory prebid site visit, conference or meeting when a notice inviting formal bids includes such a requirement.

CCC argues that this is a discretionary duty citing "*Kern*". DOF concurs.

For test claimants' reply to all discretionary arguments, see Part 1A, above, commencing at page 2.

Duties 1 D through F

These mandated duties require the inclusion of a clause which requires the contractor to promptly notify the district of certain events when any public works contract involves digging trenches or other excavations that extend deeper than four feet below the surface.

CCC agrees that these activities may create mandated costs. DOF concurs.

Duty 1G

Public Contract Code section 7107 requires districts to release retentions withheld after the completion of a work project and, in the event of a dispute, withholding an amount from the final payment and, in the event of litigation, paying the contractor's attorney's fees and costs should the contractor prevail.

---

[8] CCC argues, however, that the expense of this element of the test claim may be *de minimus*. This, of course, is not a valid objection since all of the elements of a test claim must be totaled to determine if the statutory minimum will be satisfied.

CCC contends the existence of Civil Code section 3260.1 results in the Public Contract Code section to be a law of general application. DOF concurs. CCC errs in that the Civil Code section applies to all progress payments, whereas, the Public Contract Code section applies only to final payments.

CCC also asserts that the litigation provisions lie within the discretion of the district in that the costs can be avoided by making timely payments. DOF concurs. CCC errs in failing to recognize in the real world, payments can be honestly disputed.

Duty 1H

Public Contract Code section 7109 provides that, after a determination that a project may be vulnerable to graffiti, it is the intent of the Legislature that districts take preventative measures.

CCC argues that the provision is discretionary as being only the "intent of the Legislature." DOF concurs. It is to be noted that the "intent" language appears only after the district has already made a determination that a project may be vulnerable to graffiti. It is implausible for the CCC to argue that it is discretionary decision after that determination is made.

For test claimants' reply to all discretionary arguments, see Part 1A, above, commencing at page 2.

Duty 1I

Public Contract Code section 9203 requires districts to retain no less 5 percent of the value of the actual work completed and of the value of material delivered on the ground or stored until final completion and acceptance of the project.

CCC comments that it cannot determine whether section 9203 previously existed in the Government Code or whether its original provisions predated January 1, 1975, and recommends the Commission's (i.e., Commission staff's) further review. DOF concurs.

The instant test claim was filed on June 24, 2003. The Commission's letter inviting comments was dated July 3, 2003. CCC finally submitted its comments on March 24, 2004. Test claimants suggest that if CCC cannot find contradictory evidence in nearly nine months, perhaps it does not exist.

Duty 1J

Public Contract Code section 10299, subdivision (a), allows the Director of the Department of General Services to consolidate the needs of multiple state agencies for information technology goods and services, and to establish contracts, master agreements, multiple award schedules, cooperative agreements, and other types of agreements that leverage the state's buying power.

Subdivision (b) allows districts to utilize those contracts, master agreements, multiple award schedules, cooperative agreements, or other types of agreements established by the department for use by school districts for the acquisition of information technology, goods, and services.

CCC argues that participation in the agreements is purely optional. DOF concurs.

Subdivision (a) allows the director to take advantage of the state's buying power. CCC's suggestion, then, is that taking advantage of the state's buying power is optional. This argument is specious.

For test claimants' reply to all discretionary arguments, see Part 1A, above, commencing at page 2.

Duty 1K

Public Contract Code section 12109 permits the Director of the Department of General Services to make the services of the department under the chapter for the acquisition of information technology goods and services available to school districts.

CCC argues districts are not required to use the offered services. DOF concurs.

CCC ignores section 12100 which requires that all contracts for the acquisition of information technology goods or services, whether by lease or purchase, be made by, or under the supervision of, the Department of General Services.

CCC also ignores the findings of the Legislature in section 12100 that the unique aspects of information technology, and its importance to state programs warrant a separate acquisition authority and that this separate authority should enable the timely acquisition of information technology goods and services in order to meet the state's needs in the most value-effective manner.

In view of these findings, the argument that using these services is discretionary is

specious.

For test claimants' reply to all discretionary arguments, see Part 1A, above, commencing at page 2.

Duty 1L

Business and Professions Code Section 7028.15, subdivision (e), requires districts to verify that a contractor was properly licensed when the contractor submitted a bid with the district before awarding a contract or issuing a purchase order to that contractor.

CCC agrees that this requirement creates a state mandated cost. DOF concurs.

Duties 1M through 1Q

Public Contract Code section 20101 and its subdivisions, provide for a uniform system to evaluate the ability, competency and integrity of bidders on public works projects.

CCC argues that these activities are permissive. DOF concurs.

Public Contract Code sections 20101, et seq., are part of the Local Agency Public Construction Act, enacted by Chapter 972, Statutes of 1999. Section 1, an uncodified portion of the Act, provides:

> "The Legislature hereby finds and declares that the establishment by public agencies of a uniform system to evaluate the ability, competency, and integrity of bidders on public works projects is in the public interest, will result in the construction of public works projects of the highest quality for the lowest costs, and is in furtherance of the objectives stated in Section 100 of the Public Contract Code."

In view of the finding and declaration of the Legislature that the Act will result in the construction of public works of the highest quality and for the lowest costs, the argument that section 20101 is permissive is not well taken.

For test claimants' reply to all discretionary arguments, see Part 1A, above, commencing at page 2.

Duty 1R

Public Contract Code section 20102 provides that, where plans and specifications have

been prepared by a district in order for a public project to be put out for formal or informal bid, and, subsequently, the public agency elects to perform the work by day's labor, the public agency shall perform the work in strict accordance with these same plans and specifications. Revisions of the plans and specifications may be made once a justification detailing the specific reasons for the change or changes has been approved by the public agency or its project director and a copy of the change and its justification is placed in the project file.

CCC argues that it "believes" that all construction projects, not just public works, must be based upon plans and that there is no greater obligation created under section 20102 then when a district originally opts to perform the work by day's labor. DOF concurs.

CCC ignores the obvious public policy statement, that is, once a project is initiated and plans and specifications are created according to strict public standards, that those strict standards shall also be applied to the same job performed by day's labor.

For test claimants' reply to all discretionary arguments, see Part 1A, above, commencing at page 2.

Duty 1S

Public Contract Code section 20103.5 provides that in all contracts subject to this part where federal funds are involved, no bid submitted shall be invalidated by the failure of the bidder to be licensed in accordance with the laws of this state. However, at the time the contract is awarded, the contractor shall be properly licensed in accordance with the laws of this state. The first payment for work or material under any contract shall not be made unless and until the Registrar of Contractors verifies to the agency that the records of the Contractors' State License Board indicate that the contractor was properly licensed at the time the contract was awarded.

CCC first argues that the activities required by section 20103.5 may be duplicative of Business and Professions Code section 7028.15. DOF concurs. The problem with this argument, other than not being part of Government Code Section 17556, is that subdivision (a)(2) of section 7028.15 specifically excepts a case where the bid is submitted on a state project governed by Section 20103.5 of the Public Contract Code.

Otherwise, CCC agrees that the activities required by Public Contract Code section 20103.5 appear to create a reimbursable state mandate. DOF concurs.

Duties 1T and 1U

Public Contract Code section 20103.6 states that a district shall, in the procurement of architectural design services requiring an expenditure in excess of ten thousand dollars ($10,000), include in any request for proposals for those services or invitations to bid a disclosure of any contract provision that would require the contracting architect to indemnify and hold harmless the local agency against any and all liability, whether or not caused by the activity of the contracting architect. Subdivision (b) sets forth requirements in the event a district fails to comply.

CCC argues that seeking indemnification is optional. DOF concurs.

CCC has overlooked the requirement in the section that a district shall disclose such a contract provision. Any suggestion by CCC that seeking indemnification is optional ignores the real life financial disasters which can result when an accident or catastrophe, through no fault of a district, occurs and the district is subjected to multi-million dollar claims.

For test claimants' reply to all discretionary arguments, see Part 1A, above, commencing at page 2.

Duty 1V

Public Contract Code section 23108.8 provides that a district may require a bid for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted and the bid solicitation shall specify which one of four methods will be used to determine the lowest bid.

CCC argues that requiring bids to include additions or deductions is in the discretion of the district. DOF concurs.

Public Contract Code sections 20101, et seq., set forth the Local Agency Public Construction Act, enacted by Chapter 972, Statutes of 1999. Section 1, an uncodified portion of the Act, provides:

> "The Legislature hereby finds and declares that the establishment by public agencies of a uniform system to evaluate the ability, competency, and integrity of bidders on public works projects is in the public interest, will result in the construction of public works projects of the highest quality for the lowest costs, and is in furtherance of the objectives stated in

Section 100 of the Public Contract Code."

In view of the finding and declaration of the Legislature that the Act will result in the construction of public works of the highest quality and for the lowest costs, the argument that section 23108.8 is permissive is not well taken.

For test claimants' reply to all discretionary arguments, see Part 1A, above, commencing at page 2.

Duty 1W

Public Contract Code section 20104 is part of Article 1.5 of the Local Agency Public Construction Act which provides for the resolution of construction claims. Subdivision (c) provides that the provisions of the article or a summary thereof shall be set forth in the plans or specifications for any work which may give rise to a claim under this article.

CCC states that the Article does not apply to districts who have elected to resolve the dispute by way of arbitration. Therefore, CCC, argues that the decision is optional.

"Either/or" is never optional. A district is required to do one or the other. "Either/or not" is optional. Here, a district is required to comply with the section or elect arbitration.

The Local Agency Public Construction Act, was enacted by Chapter 972, Statutes of 1999. Section 1, an uncodified portion of the Act, provides:

> "The Legislature hereby finds and declares that the establishment by public agencies of a uniform system to evaluate the ability, competency, and integrity of bidders on public works projects is in the public interest, will result in the construction of public works projects of the highest quality for the lowest costs, and is in furtherance of the objectives stated in Section 100 of the Public Contract Code."

In view of the finding and declaration of the Legislature that the Act will result in the construction of public works of the highest quality and for the lowest cost, the argument that section 20104 is permissive is not well taken.

Duties 1X through 1AA

Public Contract Code section 20104.2, and its subdivisions, provide procedural requirements when a contractor files a claim or lawsuit against a district.

CCC first refers back to its argument against Duty 1W regarding a purported choice between arbitration and the due process requirements. DOF concurs. Test Claimant refers to its reply to Duty 1W and incorporates it here by reference.

CCC also claims that a finding of a reimbursable mandate should be denied because test claimants have not made a showing that this process was used.

A test claimant acts as a representative of all districts in the State. There is no requirement that a test claimant has incurred all or any of the costs alleged.

The regulations for test claims are found in Title 2, California Code of Regulations Section 1183. Subdivision (e) sets forth the requirements for the content of a test claim. Under subparagraph (3), a written narrative must contain what activities were required under prior law or executive order and what new program or higher level of service is required under the statute or executive alleged to contain or impact a mandate. There is no requirement that the test claim statute or executive order impose a new program or higher level of service solely on the test claimant, only that a narrative describes what new program or higher level of service is required of potential claimants.

Under subparagraph (5) of Title 2, California Code of Regulations Section 1183, subdivision (e), a test claim is required to contain a statement that actual and/or estimated costs which result from the alleged mandate exceed a minimum amount. There is no requirement that the test claimant has incurred any costs, only that the alleged mandate will result in the minimum cost.

Duties 1BB and 1CC

Public Contract Code section 20104.4 provides procedures to be followed for all civil actions filed to resolve claims subject to Article 1.5 (Resolution of Construction Claims), including court ordered nonbinding mediation and, if the matter then remains in dispute, the case shall be submitted to judicial arbitration. In the event of a trial *de novo* after arbitration, a plaintiff that does not obtain a more favorable judgment shall, in addition to payment of costs and fees under that chapter, pay the attorney's fees of the other party arising out of the trial *de novo*.

CCC comments that it is not clear whether the procedure affects districts differently than nonpublic parties and suggests that the Commission (i.e., Commission staff) may wish to research this further. DOF concurs.

Test claimants suggest that if a same or similar law already applied to school districts and community college districts, there would have been no need to enact section

20104.4. Since the objection is not one of those set forth in Government Code Section 17556, the objection must be disregarded in any event.

Duty 1DD

Public Contract Code section 20104.6, subdivision (b), provides that in any suit filed under Section 20104.4, the local agency shall pay interest at the legal rate on any arbitration award or judgment and that interest shall begin to accrue on the date the suit is filed in a court of law.

CCC, citing section 685.020 of the Code of Civil Procedure, argues that this section does not create an obligation confined to test claimants.

Under Code of Civil Procedure section 685.020 interest commences to accrue on a money judgment on the date of entry of the judgment.

The differences are apparent: (1) under the Public Contract Code interest accrues on arbitration awards, whereas under the Code of Civil Procedure interest does not accrue on arbitration awards; and (2) under the Public Contract Code interest accrues on the date suit is filed, whereas under the Code of Civil Procedure interest does not begin to accrue until the date of entry of judgment. Section 20104.6 mandates new programs or higher levels of service.

Duties 1EE and 1FF

Public Contract Code section 20104.50, subdivision (b), provides that a district which fails to make any progress payment within 30 days after receipt of an undisputed and properly submitted payment request from a contractor on a construction contract shall pay interest to the contractor equivalent to the legal rate.

CCC argues that the payment of a district's debts should lie within test claimant's ability and, if a test claimant "chooses" not to pay, it is a discretionary act. DOF concurs.

CCC misses the point. Regardless of the "business morality" of paying or not paying, prior to the enactment of section 20104.50 districts were not required to pay interest on progress payments; and after the enactment of section 20104.50 they are required to pay interest. It is a new program.

Public Contract Code section 20104.50, subdivision (c), requires a district, upon receipt of a payment request, to both (a) review each payment request as soon as practicable after receipt for the purpose of determining that the payment request is a proper

payment request, and (2) return any payment request determined not to be a proper payment request suitable for payment to the contractor as soon as practicable, but not later than seven days, after receipt, accompanied by a document setting forth in writing the reasons why the payment request is not proper.

CCC does not address these new mandated activities.

Duties 1GG and 1HH

Public Contract Code section 20107 requires that all bids for construction work be presented under sealed cover and shall be accompanied by one of four forms of bidder's security, that the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the school district beyond 60 days from the time the award is made.

CCC correctly notes that the provision applies to school districts, but not to community college districts. DOF concurs.

DOF adds an argument that districts are not required to apply for apportionments and, therefore, the test claim activities are discretionary.

For test claimants' reply to all discretionary arguments, see Part 1A, above, commencing at page 2. For test claimants' reply to the argument that districts are not required to apply for apportionments, see Part 1B, above, commencing at page 6.

Duty 1II

Public Contract Code section 22300 provides that provisions shall be included in any invitation for bid and in any contract documents to permit the substitution of securities for any moneys withheld to ensure performance under a contract. Alternatively, the contractor may request and the owner shall make payment of retentions earned directly to an escrow agent at the expense of the contractor.

CCC concedes that this requirement may create a mandate. DOF concurs.

Part III
Replies to Provisions Applicable Only to Community College Districts

Duty 3A

The test claim alleges that community college districts are required to establish,

periodically update and maintain policies and procedures to implement Article 41 of the Local Agency Public Construction Act.

CCC does not contest this allegation. DOF concurs.

Duties 3B and 3C

Public Contract Code section 2000, subdivision (a), provides that any local agency may require that a contract be awarded to the lowest responsible bidder who also does either of the following: (1) meets goals and requirements established by the local agency relating to participation in the contract by minority business enterprises and women business enterprises and (2) makes a good faith effort, prior to the time bids are opened, to comply with the goals and requirements established by the local agency relating to participation in the contract by minority or women business enterprises.

Subdivision (d) defines "local agency" as used in this section, to include a school district, or other district (further defined as an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries). Education in our society is considered to be a peculiarly governmental function and administered by local agencies to provide service to the public. *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 172 Therefore, community college districts would also be included within the definition of "other districts."

CCC contends that the definition of "local agency" to include a "school district" or "other district" (as defined) does not include community college districts. DOF concurs.

The test claim cites Government Code Section 17519 which defines "school district" to mean any school district, community college district, or county superintendent of schools. CCC contends, without authority, that this Government Code section exists solely for the purpose of identifying entities that may file state mandate claims. CCC does not address the Public Contract Code definition which also includes any "other district" (further defined as an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries).

Test claimant refers CCC and DOF to Education Code section 66700 which provides that the California Community Colleges are postsecondary schools and shall continue to be part of the public school system of this state.

CCC also correctly notes that community college districts are not subject to Education

Code 20111. Duty 3B[9] should be read to strike the words "and 20111". This correction by redaction has no effect on the remaining content of the paragraph.

Finally, CCC argues that the provisions of section 2000 do not create a mandate because they are discretionary.

For test claimants' reply to all discretionary arguments, see Part 1A, above, commencing at page 2.

Duty 3D

Public Contract Code section 2001 requires local agencies, as defined in subdivision (d) of Section 2000, that require contracts to be awarded to the lowest responsible bidder meeting, or making a good faith effort to meet, participation goals for minority, women, or disabled veteran business enterprises, shall provide in the general conditions under which bids will be received, that any person making a bid or offer to perform a contract shall, in his or her bid or offer, set forth specified information.

CCC again argues that the provisions of the section do not create a mandate because they are discretionary.

For test claimants' reply to all discretionary arguments, see Part 1A, above, commencing at page 2.

Public Contract Code section 2001 was added by Chapter 1032, Statutes of 1993, Section 4. Section 6 added Public Contract Code section 10115.10 which provides that it shall be unlawful to commit certain fraudulent acts when obtaining acceptance or certification as a minority, women, or disabled veteran business enterprise for the purposes of this article. Section 8 provides, in part:

> "No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction..."

Citing Government Code Section 17556(g), CCC agues that a finding of a reimbursable

[9] Test claim, at page 111, line 5

mandate is prohibited. DOF concurs.

First of all, any findings of the Legislature as to whether any section constitutes a state mandate are irrelevant. The Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce section 6 of the California Constitution, article XIII B. Thus, the statutory scheme contemplates that the Commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Thus, any legislative findings are irrelevant to the issue of whether a state mandate exists. *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817-1818; *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 818-819

Legislative disclaimers, findings and budget control language are no defense to reimbursement. These efforts are merely transparent attempts to do indirectly that which cannot lawfully be done directly. Carmel Valley Fire Protection District v. State of California (1987) 190 Cal.App.3d 521, 541-544 (Rejecting nearly identical language, at page 542)

Secondly, section 6 of the Act and Public Contract Code section 10115.10, which refers to a crime, applies only "for the purposes of this article." "This article" refers to Article 1 of Chapter 1 of Part 2 - the State Contract Act, which does not apply to school districts or community college districts and is not included in the test claim. The relevant Public Contract Code section 2001 is found in Chapter 2 of Part 1.

Finally, subdivision (g) of Government Code Section 17556 provides:

> "The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:...
>
> (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction." (Emphasis supplied)

Since the test claim does not include any portion of the statute relating directly to the enforcement of a crime or infraction, the argument of CCC is without merit.

Duties 3E and 3F

Public Contract Code section 20651, subdivision (a) requires community college districts to let any contracts involving an expenditure of more than fifty thousand dollars

($50,000) for specified purposes to the lowest responsible bidder who shall give security as the district requires, or else reject all bids. Subdivision (b) requires the district to let any contract for a public project, as defined in subdivision (c) of Section 22002, involving an expenditure of fifteen thousand dollars ($15,000) or more to the lowest responsible bidder who shall give security as the board requires, or else reject all bids. All bids for construction work shall be presented under sealed cover and shall be accompanied by one of several listed forms of security, and upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

CCC contends that the requirement for competitive bidding and security was enacted prior to 1967 and cites former Education Code section 15951, which it states is attached. DOF concurs.

The attachment was not part of the e-mail transmission received by test claimants, but the text of former section 15951 is found in footnote 2, at page 4, of the test claim:

> "The governing board of any school district shall let any contracts involving an expenditure of more than five thousand dollars ($5,000) for work to be done or more than eight thousand dollars ($8,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise." Education Code Section 15951, as amended by Chapter 321, Statutes of 1973, Section 1

The current version of this requirement is now found in section 20651. It differs from the pre-1975 version in that:

(1) Now, the section also applies to equipment and not just materials or supplies.

(2) Now, the section also applies to services, except construction services.

(3) Now, the section also applies to repairs, including maintenance, that are not a public project as defined.

(4) Now, the section also requires that all bids for construction work be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security: cash, a cashier's check made payable to the community college district, a certified check, or a bidder's bond executed by an admitted

surety insurer.

(5) Now, the section also requires, upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

A comparison of the prior statute and the current statute shows that the post-1974 amendments have created new programs or higher levels of service.

Duties 3G through 3J

CCC makes no comments as to Duty 3G which pertains to the return of security to unsuccessful bidders.

As to Duties 3H through 3J, Public Contract Code section 20651.5, subdivision (a) provides that a community college district may require each prospective bidder for a contract to complete and submit a standardized questionnaire and financial statement, including a complete statement of the prospective bidder's financial ability and experience in performing public works. Subdivision (b) requires districts to adopt and apply a uniform system of rating bidders on the basis of the completed questionnaires and financial statements.

CCC argues that the use of these provisions is a discretionary act. DOF concurs.

The Local Agency Public Construction Act, was enacted by Chapter 972, Statutes of 1999. Section 1, an uncodified portion of the Act, provides:

> "The Legislature hereby finds and declares that the establishment by public agencies of a uniform system to evaluate the ability, competency, and integrity of bidders on public works projects is in the public interest, will result in the construction of public works projects of the highest quality for the lowest costs, and is in furtherance of the objectives stated in Section 100 of the Public Contract Code."

In view of the finding and declaration of the Legislature that the ability, competency, and integrity of bidders on public works projects is in the public interest and will result in the construction of public works of the highest quality and for the lowest cost, the argument that compliance with section 20651.5 is discretionary is not well taken.

For test claimants' reply to all discretionary arguments, see Part 1A, above,

commencing at page 2.

Duties 3K and 3L

Public Contract Code section 20657 requires community college districts to maintain job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California Community College Budget and Accounting Manual for a period of not less than three years after completion of the project. The section also requires districts, for the purpose of securing informal bids, to publish annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. All contractors included on the informal bidding list shall be given notice of all informal bid projects, in any manner as the district deems appropriate.

As to the first portion of the requirements, CCC argues that the obligation to maintain public documents is a basic obligation of public entities. This is not one of the recognized objections found in Government Code Section 17556. Section 20657 states that districts shall maintain these specific records in a specific manner for a specific time period. An objection that there is some form of general practice to maintain public documents does not prevent a finding of a new mandate or higher level or service. In addition Government Code section 17565 provides that if a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the school district for those costs incurred after the operative date of the mandate.

CCC does not discuss the second portion of the requirements pertaining to publishing a notice inviting contractors to register to be notified of future informal bidding projects and that all contractors included on the informal bidding list shall be given notice of all informal bid projects, in any manner as the district deems appropriate.

Duties 4A through 4K

CCC quotes one sentence of Title 5, California Code of Regulations Section 59500 in support of its conclusion the test claim regulations "include no mandates because all community college district activities are purely optional." DOF concurs.

By relying on one sentence, CCC misconstrues its own regulations.

The first sentence of section 59500(a) provides:

> "The California Community Colleges *shall* provide opportunities for minority, women, and disabled veteran business enterprise participation in the award of district contracts consistent with this Subchapter." (Emphasis supplied)

There is nothing discretionary here, colleges *shall* provide these opportunities. The second sentence goes on to say:

> "The statewide goal for such participation is not less than 15 percent minority business enterprise participation, not less than 5 percent women business enterprise participation, and not less than 3 percent disabled veteran business enterprise participation of the dollar amount expended by all districts each year for construction, professional services, materials, supplies, equipment, alternation (sic), repair, or improvement."

The first sentence makes minority participation mandatory. The second sentence sets goals for that participation by setting minimums stated in percentages of dollar amount expended. In other words, the minimum goals are mandatory, but the requirement is not mandatory for every project, so long as the mandatory minimum goals are achieved.

The next sentence (the one quoted by CCC) provides:

> "However, each district shall have flexibility to determine whether or not to seek participation by minority, women, and disabled veteran business enterprises *for any given contract*." (Emphasis supplied)

The three sentences, read together, clearly indicate that community college districts are required to provide opportunities for minority, women and disabled veteran business enterprise participation in the award of district contracts, in a minimum amount measured in percentages of dollar amounts awarded, and that a district shall have flexibility in deciding which contracts will be used as vehicles of compliance.

Part IV
Replies to Provisions Applicable Only to School Districts

Duty 2A

At paragraph 2A, the test claim alleges, pursuant to the Local Agency Public Construction Act, a duty to establish, periodically update and maintain policies and procedures to implement Article 3 of the Act.

DOF argues that nowhere in the Article is it stated that a school district must establish and periodically update and maintain policies and procedures as stated in the test claim.

The reasons school districts perform these activities is to preserve order and encourage sound business practices. The absence of policies and procedures promote chaos. The duties alleged follow similar language in the boilerplate of most Commission approved parameters and guidelines.

Duties 2B through 2D

Public Contract Code section 2000, subdivision (a), provides that any local agency may require that a contract be awarded to the lowest responsible bidder who also does either of the following: (1) meets goals and requirements established by the local agency relating to participation in the contract by minority business enterprises and women business enterprises and (2) makes a good faith effort, prior to the time bids are opened, to comply with the goals and requirements established by the local agency relating to participation in the contract by minority or women business enterprises.

Subdivision (d) defines "local agency" as used in this section, to include a school district.

DOF contends that these new duties are discretionary.

For test claimants' reply to all discretionary arguments, see Part 1A, above, commencing at page 2.

Duties 2E through 2H

Public Contract Code section 20111, subdivision (a) requires school districts to let any contracts involving an expenditure of more than fifty thousand dollars ($50,000) for specified purposes to the lowest responsible bidder who shall give security as the district requires, or else reject all bids. Subdivision (b) requires the district to let any contract for a public project, as defined in subdivision (c) of Section 22002, involving an expenditure of fifteen thousand dollars ($15,000) or more to the lowest responsible bidder who shall give security as the board requires, or else reject all bids. All bids for construction work shall be presented under sealed cover and shall be accompanied by one of several listed forms of security, and upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

DOF contends that these requirements for competitive bidding and security preexisted 1975, without the citation of any authority. The statute to which DOF refers is former section 15951 which is found in footnote 2, at page 4, of the test claim:

> "The governing board of any school district shall let any contracts involving an expenditure of more than five thousand dollars ($5,000) for work to be done or more than eight thousand dollars ($8,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise." Education Code Section 15951, as amended by Chapter 321, Statutes of 1973, Section 1

The current version of this requirement is now found in section 20111. It differs from the pre-1975 version in that:

(1) Now, the section also applies to equipment and not just materials or supplies.

(2) Now, the section also applies to services, except construction services.

(3) Now, the section also applies to repairs, including maintenance, that are not a public project as defined.

(4) Now, the section also requires that all bids for construction work be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security: cash, a cashier's check made payable to the community college district, a certified check, or a bidder's bond executed by an admitted surety insurer.

(5) Now, the section also requires, upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the district beyond 60 days from the time the award is made.

A comparison of the prior statute and the current statute shows that the post-1974 amendments have created new programs or higher levels of service.

Duties 2I through 2M

Public Contract Code section 20111.5 and its subdivisions, provide for a uniform system to evaluate the ability, competency and integrity of bidders on public works

projects.

DOF argues that these activities are permissive.

Public Contract Code sections 20101, et seq., are found in the Local Agency Public Construction Act, enacted by Chapter 972, Statutes of 1999. Section 1, an uncodified portion of the Act, provides:

> "The Legislature hereby finds and declares that the establishment by public agencies of a uniform system to evaluate the ability, competency, and integrity of bidders on public works projects is in the public interest, will result in the construction of public works projects of the highest quality for the lowest costs, and is in furtherance of the objectives stated in Section 100 of the Public Contract Code."

In view of the finding and declaration of the Legislature that the Act will result in the construction of public works of the highest quality and for the lowest costs, the argument that the activities of section 20111.5 are permissive is not well taken.

For test claimants' reply to all discretionary arguments, see Part 1A, above, commencing at page 2.

Duties 2N and 2O

Public Contract Code section 20116 requires school districts to maintain job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the most recent edition of the California School Accounting Manual for a period of not less than three years after completion of the project. The section also requires districts, for the purpose of securing informal bids, to publish annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. All contractors included on the informal bidding list shall be given notice of all informal bid projects, in any manner as the district deems appropriate.

As to the first portion of the requirements, DOF argues that the obligation to maintain public documents is a basic obligation of public entities. This is not one of the recognized objections found in Government Code Section 17556. Section 20116 states that districts shall maintain these specific records in a specific manner for a specific time period. An objection that there is some form of general practice to maintain public documents does not prevent a finding of a new mandate or higher level or service. In

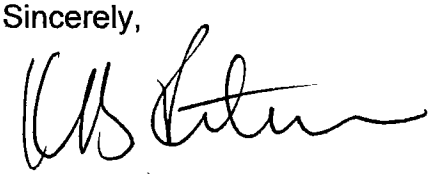
addition Government Code section 17565 provides that if a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the school district for those costs incurred after the operative date of the mandate.

DOF does not discuss the second portion of the requirements pertaining to publishing a notice inviting contractors to register to be notified of future informal bidding projects and that all contractors included on the informal bidding list shall be given notice of all informal bid projects, in any manner as the district deems appropriate.

CERTIFICATION

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information or belief.

Sincerely,



Keith B. Petersen

C: Per Mailing List Attached

DECLARATION OF SERVICE

RE: Public Contracts (K-14) 02-TC-35
CLAIMANT: Clovis Unified School District and
Santa Monica Community College District

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimant(s). I am 18 years of age or older and not a party to the within entitled matter.

On the date indicated below, I served the attached: letter of May 7, 2004, addressed as follows:

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

FAX: (916) 445-0278

AND per mailing list attached

☒ **U.S. MAIL:** I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.

☐ **OTHER SERVICE:** I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

(Describe)

☐ **FACSIMILE TRANSMISSION:** On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.

☐ A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

☐ **PERSONAL SERVICE:** By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 5/7/04, at San Diego, California.

Diane Bramwell

Original List Date: 6/26/2003
Last Updated:
List Print Date: 06/27/2003
Claim Number: 02-TC-35
Issue: Public Contracts (K-14)

Mailing Information: Completeness Determination

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Keith B. Petersen
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Claimant Representative
Tel: (858) 514-8605
Fax: (858) 514-8645

Mr. Bill McGuire
Clovis Unified School District
1450 Herndon Avenue
Clovis, CA 93611-0599

Claimant
Tel: (559) 327-9000
Fax: (559) 327-9129

Dr. Carol Berg
Education Mandated Cost Network
1121 L Street, Suite 1060
Sacramento, CA 95814

Tel: (916) 446-7517
Fax: (916) 446-2011

Mr. Paul Minney
Spector, Middleton, Young & Minney, LLP
7 Park Center Drive
Sacramento, CA 95825

Tel: (916) 646-1400
Fax: (916) 646-1300

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Tel: (916) 727-1350
Fax: (916) 727-1734

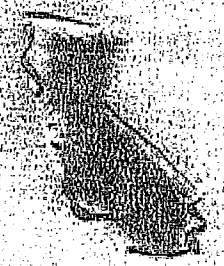
Ms. Sandy Reynolds
Reynolds Consulting Group, Inc.
P.O. Box 987
Sun City, CA 92586

Tel: (909) 672-9964
Fax: (909) 672-9963

Mr. Steve Smith Mandated Cost Systems, Inc. 11130 Sun Center Drive, Suite 100 Rancho Cordova, CA 95670	Tel: Fax:	(916) 669-0888 (916) 669-0889
Mr. Arthur Palkowitz San Diego Unified School District 4100 Normal Street, Room 3159 San Diego, CA 92103-8363	Tel: Fax:	(619) 725-7565 (619) 725-7569
Mr. Steve Shields Shields Consulting Group, Inc. 1536 36th Street Sacramento, CA 95816	Tel: Fax:	(916) 454-7310 (916) 454-7312
Ms. Beth Hunter Centration, Inc. 8316 Red Oak Street, Suite 101 Rancho Cucamonga, CA 91730	Tel: Fax:	(866) 481-2642 (866) 481-5383
Mr. Gerald Shelton California Department of Education (E-08) Fiscal and Administrative Services Division 1430 N Street, Suite 2213 Sacramento, CA 95814	Tel: Fax:	(916) 445-0554 (916) 327-8306
Mr. Michael Havey State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 500 Sacramento, CA 95816	Tel: Fax:	(916) 445-8757 (916) 323-4807
Mr. Keith Gmeinder Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Tel: Fax:	(916) 445-8913 (916) 327-0225
Ms. Cheryl Miller Santa Monica Community College District 1900 Pico Blvd. Santa Monica, CA 90405-1628	**Claimant** Tel: Fax:	 (310) 434-4221 (310) 434-4256
Mr. Thomas J. Nussbaum California Community Colleges 1102 Q Street, Suite 300 Sacramento, CA 95814-6549	Tel: Fax:	(916) 445-2738 (916) 323-8245

EXHIBIT "A"
SCHOOL FACILITY FINANCING
CALIFORNIA RESEARCH BUREAU

CRB



CALIFORNIA
STATE LIBRARY
FOUNDED 1850

California Research Bureau
900 N Street, Suite 300
PO Box 942837
Sacramento, CA 94237-0001
(916) 653-7843 phone
(916) 654-5829 fax

School Facility Financing

A History of the Role of the State Allocation Board and Options for the Distribution of Proposition 1A Funds

By Joel Cohen

Prepared at the Request of Senator Quentin Kopp

FEBRUARY 1999

CRB 99-01

School Facility Financing

A History of the Role of the State Allocation Board and Options for the Distribution of Proposition 1A Funds

By Joel Cohen

Prepared at the Request of
Senator Quentin Kopp

FEBRUARY 1999

CRB 99-01

CONTENTS

EXECUTIVE SUMMARY 1

REQUEST FOR RESEARCH 3

INTRODUCTION—THE PASSAGE OF PROPOSITION 1A 3

HISTORY OF THE STATE ALLOCATION BOARD AND ITS ROLE IN SCHOOL FACILITY FINANCING 5

- COMPOSITION OF THE BOARD 5
- POLICY REQUIREMENTS 5
- STATE ALLOCATION BOARD STAFF 6
- OUTSIDE INFLUENCE 6
- EVOLUTION OF STATE ALLOCATION BOARD PROGRAMS—FROM LOANS TO GRANTS 6
  - *Proposition 13* 7

HISTORY OF SCHOOL BOND INITIATIVES—A CYCLE OF UNDER-FUNDING 9

- STATE AS A BANK—THE LOAN PROGRAM 1949-1978 9
- THE FIRST LOAN PROGRAM BOND INITIATIVES 9
- THE EARLY 1970S 10
  - *A Changing Paradigm* 11
  - *Leroy Greene State School Building Lease Purchase Law* 11
- THE PROPOSITION 13 EPOCH 1978-1986 12
  - *Proposition 13—Local Governments and School Districts Fiscally Stymied* 12
  - *Post Proposition 13* 12
  - *Effects of Proposition 13 on the Lease Purchase Program* 13
  - *A Recession Further Complicates School Facility Financing* 13
  - *A New System for Funding School Construction* 13
  - *Multi-Track Year-Round Education* 14
  - *1986 Lease Purchase Program* 14
  - *A Growing Shortfall and Greater Scrutiny* 15
  - *School Financing as a Collective Effort—The Three Legged Stool* 15
- THE 1990S—COMPLICATED FUNDING PROGRAMS 16
  - *State Bond Efforts of the Nineties* 17
  - *Attempts to Ease Passage for Local Bonds* 18
  - *1996 School Bond Issuance - Finally More Money* 18
  - *Class Size Reduction Causes Greater Housing Needs* 19
  - *Never Enough Money—Still a Shortfall* 19

THE PROGRAMS 21

- THE GROWTH AND MODERNIZATION PROGRAMS 21
  - *Process for Receiving Growth and Modernization Funds* 21
    - Planning Phase 21
    - Site Development Phase 22
    - Construction Phase 22
- THE DEFERRED MAINTENANCE PROGRAM 23
  - *Deferred Maintenance Application Process* 23
- THE YEAR-ROUND AIR CONDITIONING/INSULATION PROGRAM 24
  - *Year-Round Schools Air Conditioning/Insulation Application Process* 24
- THE STATE RELOCATABLE CLASSROOM PROGRAM 24
  - *Relocatable Classroom Application Process* 25

THE UNUSED SITE PROGRAM 25
THE OFFICE OF PUBLIC SCHOOL CONSTRUCTION STAFF REVIEW AND THE STATE ALLOCATION BOARD'S APPEALS PROCESS 25

PROPOSITION 1A—A POSSIBLE FIX TO SAB PROCESS PROBLEMS 27

TOTAL RESOURCE ALLOCATION PROVISIONS OF PROPOSITION 1A 27
COMPONENTS OF PROPOSITION 1A 28
PROPOSITION 1A IMPROVES THE RESOURCE ALLOCATION SYSTEM OF THE STATE ALLOCATION BOARD . 28
Simplification *31*
Consolidation *31*
A More Open Process *31*

PITFALLS IN THE PROCESS PRIOR TO PROPOSITION 1A 33

PROCESS STREAMLINED RECENTLY 33
SCHOOL DISTRICTS IN LINE STAND ON SHIFTING SANDS 34
Broad Classification Decisions *34*
Specific School District Decisions *34*

OPTIONS FOR IMPROVING THE SCHOOL FACILITY FINANCING SYSTEM 35

A SEPARATE LIST FOR SMALL AND RURAL SCHOOL DISTRICTS 35
ANNUAL REPORT AND INDEPENDENT ACCOUNTING 35
ON-LINE TECHNICAL ASSISTANCE 35
A SPECIAL GENERAL FUND APPROPRIATION FOR SCHOOL CONSTRUCTION 36

APPENDIX A 37

SCHOOL DISTRICT FINANCING MECHANISMS 37
Local General Obligation Bonds *37*
Developer Fees *37*
Certificates of Participation *37*
Mello-Roos *38*

ENDNOTES 39

EXECUTIVE SUMMARY

As California enters the 21st Century, its public schools face many challenges. One significant challenge is the serious disrepair of an aging school facility infrastructure. Another challenge is the anticipated growth of nearly 2 million K-12 students during the next decade that will require many districts to build new schools to meet burgeoning student demand. Recognizing the substantial need for infrastructure, in November 1998, California voters passed Proposition 1A, a bond measure that provides $6.7 billion for public K-12 school construction and repair.

This measure establishes two new programs for the disbursement of bond funds and simplifies the application process by which schools apply for school construction resources. This change in programs, and in the methods by which funds are allocated, is important to the people of the State, as school districts, many of which have facilities in serious disrepair or require new construction, vie for their portion of the $6.7 billion pie.

Historically, the process by which schools applied for and received construction funds was cumbersome and complex. Furthermore, the research suggests that school districts that were sophisticated and knowledgeable about the complicated school facilities construction process were the most successful in securing funding – often at the expense of less sophisticated and uninformed school districts. Proposition 1A corrects much of this dynamic by simplifying the application and administrative processes, thereby creating a more level playing field for all school districts.

In order to understand the significance and relevance of this new process and its concomitant programs, however, it is useful to review the history of school construction financing in California and to understand the various pitfalls that existed under previous programs so as to avoid similar pitfalls in the future. This paper discusses that history and highlights the problems with preexisting programs.

It begins with an examination of the State Allocation Board and its staff (the Office of Public School Construction). Specifically, it reviews the role of the Board which is responsible for establishing policies for the distribution of school facility financing funds. It discusses how the Board, which was established in 1947, has evolved during the past five decades from one that set policy for various *loan* programs to one that today sets policy for *grant* programs.

The paper also discusses how various externalities—legislative or voter imposed initiatives, such as Proposition 13—have affected the Board's policies and procedures. The paper notes that the Board changed its policies often, and its policy shifts created an untenable dynamic for school districts as they attempted to secure funding. In particular, the paper highlights how districts were forced to weave their way through a complex, bureaucratic maze of applications, forms, and plans; and how this dynamic forced school districts to employ sophisticated personnel, or to contract with savvy consultants, in order to secure state financing for their construction projects.

This paper also presents a history of bond initiatives during the past five decades. It is clear that throughout this history there was never enough State money available to school districts for facility construction or repair. In fact, in spite of the $6.7 billion approved by Proposition 1A, experts estimate that an additional $10 billion will be required during the next decade. This paper discusses how the constant shortage of funds caused districts to use "whatever" means available to them to secure funding.

Voters have consistently been generous in approving the vast majority of statewide bond initiatives. Only three bond proposals out of 24 have failed in the past 50 years, and those that failed did so during times of recession. However, it is not clear how much additional debt voters will be willing to incur. This has especially been true since the passage of Proposition 13 in 1978, when the State began taking on a larger role in supporting school construction then it had before. To that end, this paper discusses how Proposition 1A creates a mechanism for school districts to tap state resources, and how school districts may need to tap other sources of facility funding.

Proposition 1A forges a partnership between the State and school districts for financing the construction and repair of their schools. Under its new programs, the State will provide 50 percent of the cost associated with building new schools, and provide 80 percent of the cost associated with modernizing existing facilities. It requires school districts to match state resources. However, school districts that are unable to offer this match can receive hardship funds based on prescriptive criteria. This paper provides details regarding these new programs and compares them to programs previously administered by the State Allocation Board. It also discusses how the Board is required to respond to district requests.

Proposition 1A is not the only impetus behind simplifying the school facility financing process. Concurrently, the Office of Public School Construction has rewritten the application process for funds to make it more user-friendly to school districts and has even offered applications and program information via the Internet. This paper discusses these changes.

The paper concludes with options that the Governor and the Legislature may wish to consider, including: offering protection to small and rural school districts when bond funds are exhausted; requiring annual financial reporting by the State Allocation Board; providing an on-line technical support for program applicants; and redeveloping the State funding source for school facility construction and rehabilitation.

REQUEST FOR RESEARCH

Programs and administrative procedures in Proposition 1A may produce significant changes to the previous programs and the manner by which the State Allocation Board distributes resources for school facility construction. In light of these changes, Senator Quentin Kopp requested that the California Research Bureau provide research on the following topics:

- A history of the State Allocation Board. How was the board's funding program intended to work and how has it evolved?

- An explanation of the State Allocation Board process. How does the State Allocation Board work? What are the procedures and criteria for receiving allocations? How are priorities set?

INTRODUCTION—THE PASSAGE OF PROPOSITION 1A

On November 3, 1998, California voters passed Proposition 1A - a $9.2 billion school bond initiative, and the largest of its kind passed in our nation's history. Over the next four years, revenues from Proposition 1A's general obligation bonds will provide $6.7 billion to public K-12 schools and $2.5 billion to public colleges and universities for the purposes of constructing new facilities and repairing existing ones.

The State Allocation Board will have the responsibility for determining a fair means of distributing the $6.7 billion available to K–12 schools. Many experts feel that developing such a system will be a daunting task, in spite of the fact that Proposition 1A/Senate Bill 50 is very prescriptive regarding the allocation of its bond funds.

This paper begins with a history and a discussion of the role of the State Allocation Board. Next, it examines the 24 state bond initiatives since 1947 and discusses how the Board has evolved its policies for distributing resources generated by these bond efforts. It then presents an overview of Proposition 1A and how this initiative creates a new allocation program that differs from previous ones. The paper also discusses the various problems that existed within the State Allocation Board's previous resource allocation systems and how Proposition 1A addresses these problems. It concludes with a section that offers options that the Legislature may wish to consider regarding the policies that the State Allocation Board should use for the equitable distribution of bond funds.

HISTORY OF THE STATE ALLOCATION BOARD AND ITS ROLE IN SCHOOL FACILITY FINANCING

There is a long and complex history regarding public school construction in California. This paper begins a review of the history in 1947[1] when the state legislature created the State Allocation Board.[2] Chapter 243, Statutes of 1947, established the State Allocation Board[3] as a successor to the Post War Public Works Review Board. That statute specifically authorized the board to allocate funds for building and repairing schools. In addition, it designated the State Allocation Board to make allocations for public works projects when no other state officer or agency had authority to appropriate state or federal funds.[4] Although it had many other fund allocation requirements during its five-decade history, the State Allocation Board today allocates funds only for school construction and renovation.

Composition of the Board

The State Allocation Board is comprised of seven members: two Senate members appointed by the Senate Rules Committee; two Assembly members appointed by the Speaker of the Assembly; the Director of the Department of General Services or his/her designee; the Director of the Department of Finance or his/her designee; and the Superintendent of Public Instruction or his/her designee. This appointment structure has existed since the Board's inception in 1947.[5]

Although its basic appointment structure is set in statute, its actual membership changes over time. One member, Senator Leroy Greene, served on the Board for over 20 years. Some Board members have served for only one meeting, while others have served an entire legislative session.

The four legislatively appointed State Allocation Board members provide a strong policy influence to the State Allocation Board. Through them, other members of the Legislature have input into the Board's policy and decision-making processes.

Policy Requirements

Members of the State Allocation Board are charged to formulate fair systems for determining priorities among project proposals. Prior to the passage of Proposition 1A/SB 50 in 1998, the Board was responsible for developing a fair and equitable appeals process that addressed the "special needs" of school districts. Such "special needs" included disaster relief, inability to secure matching funds, or inability to locate affordable property.

Board members also had extraordinary power to set school facility financing policy. Although the Board falls under the auspices of the State Administrative Procedures Act, it has often ignored the Act's provisions. It was common that board policies were changed from meeting to meeting, and that these new policies were not readily made public.[6] Therefore, school districts that were uninformed of existing policy operated at a distinct disadvantage. They may not have known the appropriate procedures for receiving

financing approval. Conversely, school districts that utilized hired consultants or had staff that regularly monitored the Board's actions knew exactly what mechanisms and procedures would be necessary for them to secure funding.

State Allocation Board Staff

The Office of Public School Construction (formerly the Office of Local Assistance), within the Department of General Services, was and continues to be responsible for providing staff work that is necessary to carry out the policies and implement the various programs of the State Allocation Board. The State Allocation Board is responsible for policies regarding the allocation of funds for building new schools and for repairing, upgrading, and rehabilitating old ones.

The Office of Public School Construction staff is also responsible for disseminating to school districts information regarding board policy and programs. Under its previous programs, the staff was responsible for making recommendations to the State Allocation Board regarding various appeals made by school districts that may have been denied funding, or that may have required special funding consideration. To that end, the Office of Public School Construction staff influenced where school districts fell on the long queue of project proposals considered and passed by the State Allocation Board. Staff also could have influenced Board decisions by advocating for specific school district projects.

Outside Influence

The State Allocation Board and the Office of Public School Construction staff have also been influenced by a variety of external interest groups. These include, but are not limited to, private school facility financing consultants, school board members, school administrators, teachers, parents, developers, California Building Industry Association, financial institutions, and other members of the Legislature. In addition, various state agencies with influence included the Division of State Architect, Department of Finance, and the Department of Education. These interests groups played and are likely to play a significant role in determining funding for projects that may have been denied or required special consideration. Consultants in particular, whether employed by or on contract with school districts, played an active role in the process. Many of these consultants, whose offices are in the same building as that of the Office of Public School Construction, influenced decisions of both the Office of Public School Construction staff and the State Allocation Board. Consultants were current on Board policies and procedures, and were highly sophisticated about the complicated processes that school districts must follow in order to obtain funding. They have been instrumental in shepherding proposals through the complex maze of funding phases - application to construction. School districts that did not contract with such advocates were often at a competitive disadvantage.

Evolution of State Allocation Board Programs—From Loans to Grants

The State Allocation Board has evolved markedly during the past five decades. Initially, its school programs provided resources to school districts via *loan programs* in which

districts were required to repay their assistance with property tax revenues. In addition, school districts used local school bonds to finance their various construction projects. In both cases, a two-thirds popular vote was required.

Proposition 13

With the passage of Proposition 13 in 1978, the State Allocation Board's loan orientation was significantly altered. Under Proposition 13, the amount of tax that property owners paid was limited to no more than one percent of the assessed value of their property. Local property tax revenues diminished, and the burden to fund many local government programs was shifted to the State, including public school construction. Further, local governments lost much of their property taxing authority, and the Legislature and Governor were forced to rethink how school districts could repay their existing loans to the State Allocation Board.

Recognizing that many school districts faced bankruptcy by being unable to service their loans, the Legislature in 1979 directed the State Allocation Board to allow school districts four options: (1) withhold payments on their loans; (2) temporarily delay their payments; (3) pay only a portion of their loan obligations; (4) or not pay back their loans at all. Further, with the implementation of these options, the Legislature required that the State Allocation Board shift its policy focus from a *loan-based* program to a *grant-based* program. This shift to grant-based programs remains today.

HISTORY OF SCHOOL BOND INITIATIVES—A CYCLE OF UNDER-FUNDING

The electorate of the state has been ultimately responsible for determining the availability of resources for school construction. The electorate must have confidence in the state's economy, and perceive a need for new and upgraded schools. Without such assurances, the electorate can and has rejected various bond efforts. Since 1949, voters have been asked to approve 24 bond measures related to school construction and renovation, and have passed 21 of these proposals. However, an interesting history follows regarding the content of these initiatives.

State as a Bank—The Loan Program 1949-1978

Legislation enacted in 1949[7] and 1952[8] established a loan-grant program "to aid school districts of the State in providing necessary and adequate school sites and buildings for the pupils of the public school system."[9] During this time period, the first baby boomers entered school, and for the next two decades, California public school enrollment increased by roughly 300 percent.[10] The Legislature recognized that many school districts faced substantial enrollment growth, while lacking the bond debt capacity that was necessary to finance large building programs. In fact, many school districts had reached their financial capacity to service the bonds that they previously incurred.

As a result, the Legislature developed a program to provide loans to school districts that were approaching or were likely to exceed their legal level of bonded indebtedness.[11] This new program was financed through State general obligation bonds. This program also required building construction standards and placed fiscal controls on the districts, including maximum cost standards and square feet per pupil limitations.[12] School districts, however, retained control over the design and construction of their facilities. Districts that wanted to participate in the state loan program were required to receive approval from two-thirds of their district's electorate in order to incur the debt. A surcharge on the local property tax provided revenues to service the loan debt.

The State formula provided that the total amount due on some loans would be less than the total amount of the actual loan. Some experts believe that the state's willingness to forgive part of school district loans through this formula was a precursor to the state grant program discussed below.

The First Loan Program Bond Initiatives

In 1949, the state issued its first bond proposal for education facilities financing[13] in the amount of $250 million.[14] This first initiative also began a cycle of inadequate funding. In that year, the Legislature thought that $400 million was necessary (over what school districts could afford above their debt limits) to meet the need of school districts that were facing enrollment growth from the new generation of baby boomers. However, after substantial debate, the bond proposal was reduced to $250 million, because the sponsors thought, "the people would not vote for such a large sum at one time."[15] In arguments

against the bond, opponents argued that $250 million was insufficient. Therefore, absent full funding, voters should reject the initiative. The measure passed.

In 1952, another school construction bond of $185 million was put before the voters. Proponents of this initiative stated that the amount was "extremely" conservative. A comprehensive study by the State Department of Education at that time revealed that $198 million was needed, while the Department of Finance estimated the need at $250 million. Again, the amount of needed resources surpassed the amount proposed, and the cycle of chronically under-funded facility financing for schools continued.

To further exacerbate the shortfall, the 1952 proposition, along with subsequent propositions offered in 1956, 1958, and 1960, included "poison pill" language that limited the Legislature's ability to appropriate any additional funds for school construction beyond that in the various propositions.[16] If the Legislature approved any additional resources for school construction, the amount of bonds that were sold would be reduced by an amount equal to the additional appropriation. After 1960, however, bond proposals excluded the language that precluded the Legislature from raising additional capital outlay funds.

During a two-decade period, the State Allocation Board administered this program as a bank. Resources from the state were limited, and many school districts were uncomfortable with the concept of borrowing money from the state, rather than from their local constituents. Further, since school districts were obligated to reach full bond indebtedness before applying for state loans, many did not participate. For these reasons, many school districts chose not to build facilities until their bonding capacity grew. Hence, many school districts found themselves chasing dollars after their schools were overcrowded—a situation not unlike today.

The Early 1970s

As a result of a major earthquake in the San Fernando Valley (Sylmar) in 1971, the state authorized $30 million[17] for a new program to finance the rehabilitation and construction of earthquake safe schools,[18] and for the renovation of buildings that the earthquake damaged.[19] This program was known as the School Buildings Safety Fund. Like its predecessor programs, the 1971 Act created a state loan program for eligible school districts. The Act also included provisions to forgive loans for school districts that had reached their bonding capacity. The 1971 program was augmented by a 1972 state bond initiative of $350 million of which $250 million was set aside for structural repairs due to earthquakes.[20] This latter bond initiative also provided a method for financing buildings in districts that did not meet the criteria of the program that was initiated in 1971,[21] and it required the State Allocation Board to first approve those applications from school districts for earthquake repairs. The State Allocation Board gave second consideration to funding projects for other types of repairs or upgrades. Hence, the Board began a new system for not only new construction but also repairs, as well as a system that set priorities.

A Changing Paradigm

From 1970 to 1980, public school enrollment statewide decreased by roughly one percent per year.[22] Reductions in both immigration and domestic in-migration to the state, as well as a decrease in the state's birth rate caused this decline. During this decade, there were sufficient resources available from local property tax revenues and from the state's loan program to meet the various rehabilitation needs especially of those school districts that were experiencing enrollment declines. The State Allocation Board thus shifted its loan program emphasis from new construction to rehabilitation, and to upgrading unsafe facilities that were damaged due to the 1971 earthquake.[23]

Nevertheless, some school districts continued to experience enrollment growth in response to suburban housing development.[24] In spite of such growth patterns, the State Allocation Board set its priorities to favor rehabilitation projects over new construction. The Board's orientation accentuated the differences between growing school districts and those that required rehabilitation, and caused an unequal state spending system that favored property rich urban districts over fiscally poor and growing suburban districts.[25]

To counter the State Allocation Board's orientation toward urban rehabilitation, growing suburban school districts recognized that in order to fund new school construction, they would have to depend almost entirely on their local property tax base. As more people demanded affordable housing in suburban neighborhoods, developers accommodated them by building numerous suburban housing units. The sheer increase in the number of suburban homes added significant resources to the property tax base, thereby benefiting the school districts that served those communities. Furthermore, the ongoing demand for suburban housing caused the prices of homes in these areas to increase precipitously, adding even more resources to the property tax base. Although school districts could have requested to reduce those tax rates that supported them to a minimum amount, they did not. Most districts kept their rates steady, and some even increased them. Homeowners, unhappy about menacing property taxes, sought relief. In 1972, the Legislature enacted a multi-year package, funded by the state's general fund, of $1.2 billion for school operation to be allocated over a three-year period and to serve as property tax relief.[26] In spite of this legislation, property taxes remained relatively high to cover local bond debt, and continued to be the primary source for school construction for growing school districts. Concurrently, the state continued to loan money to enrollment-static school districts for the purpose of rehabilitation.

Leroy Greene State School Building Lease Purchase Law

In 1976, the Leroy Greene State School Building Lease Purchase Law was signed into legislation.[27] This law established a state fund to provide loans to school districts for reconstruction, modernization, and replacement of school facilities that were more than 30 years old. The Act significantly altered the state's role in how school facilities construction was financed. Specifically, the state would no longer loan money; but it would finance school construction based on a leasing model.[28] Although the legislation was passed, the voters of the State remained unconvinced that more money was needed to

improve schools. Consequently, they did not pass the bond initiative that was necessary to fund the Lease Purchase Program.

The 1976 Act had specific language that created "priority points" for school districts that would apply for state funding. This was the first time that the State Allocation Board used a point system for creating a queue of approved projects. Priority points were given based on the number of unhoused students in the district, the rate of student enrollment growth, and how much rehabilitation a facility needed. Further, the Board instituted a first-come, first-served policy in which each accepted school district's application was stamped with a time and date.

Under the previous program, the state loaned money to school districts to build their facilities, and the school districts owned their property. Under the Greene legislation, however, the State maintained a lien on the property for the duration of the loan via a lease purchase agreement.[29] The State wanted to preclude school districts from purchasing land on a speculative basis using State money, only to sell the State funded property at a profit at a later date. This meant that the state would control the disposition of any school facility that it financed until the school district repaid its obligation on the lease.

The Proposition 13 Epoch 1978-1986

Proposition 13—Local Governments and School Districts Fiscally Stymied

With its passage, Proposition 13 eliminated the ability of local school districts to levy additional special property taxes to pay off their facility indebtedness. Proposition 13 capped the ad valorem tax rate on real property at one percent of its value, thereby reducing the income from property taxes to such an extent that it virtually eliminated this source as a means for lease payments. Proposition 13 also prohibited the electorate of a school district from authorizing a tax over-ride to pay debt service on bonds for the purpose of constructing needed school facilities.

To exacerbate this problem, the voters soundly defeated school construction bonds in both 1976 and 1978. They were two of only three[30] state general obligation bonds rejected by voters since 1947. The non-passage of these two successive bond initiatives, coupled with suburban enrollment growth, caused a statewide shortfall of $550 million[31] that was needed for school construction projects throughout the state in 1978.

Post Proposition 13

The limitations set by Proposition 13 caused school districts, counties and cities to turn to the state, which had a $3.8 billion surplus, to fill the gap.[32] In 1979, lawmakers approved a $2.7 billion (in 1978 dollars) "bailout" plan to assist schools and local governments.[33] Within a year, the state surplus was reduced to roughly $1 billion. Furthermore, the state had taken on a larger role as a funding source for school operations and capital improvement. To that end, it expected school districts to conform to its programs and projects.[34]

Effects of Proposition 13 on the Lease Purchase Program

In 1979, legislation implementing Proposition 13 included provisions for restructuring the State's Lease Purchase Program.[35] School districts that received funds from the state were required to pay rent to the State as low as $1 per year, creating an "unofficial" grant program.[36] In addition, school districts were to contribute up to 10% of the project's cost from local funds.[37] However, many school districts could not raise these matching funds through local bonds. They requested that the State fund their entire projects. The State Allocation Board created a waiting list of projects.

A Recession Further Complicates School Facility Financing

Beginning in 1982, California was in a recession that lasted until 1984. During this time period, the State's budget surplus was expended. School districts' recession experiences were complicated by the fact that student enrollments again began to increase again.[38] Approximately 60 percent of California's 1,034 districts at the time projected annual growth rates of over two percent between 1980-81 and 1983-84, with some districts projecting a doubling in their enrollment.[39] At the same time, estimates indicated that over one-third of the State's school buildings were over 30 years old and many needed substantial rehabilitation.[40] The Coalition for Adequate School Housing (CASH) estimated that the one-time cost of rehabilitating these older facilities would be $1.9 billion.[41] Further, CASH estimated that school districts would need an additional $400 million annually for the next five years for building and repairing school buildings. Since the State was in recession, such funds were not available. Thus the State had to rethink how it would prioritize its school facilities projects.

A New System for Funding School Construction

In light of the backlog of applications for state funds, the Office of Local Assistance (now known as the Office of Public School Construction) designed a numerical ranking system that used "priority points" to determine a school district's eligibility for funds. This system gave priority to school districts who had students who were "unhoused," and special consideration was given to how districts used certain facilities.[42] The more points a project application received, the higher on the list it was placed. Recognizing that school districts were facing enrollment growth and required further rehabilitation, the Legislature in 1982 authorized a general fund appropriation of $200 million for school construction projects. This amount was later reduced to $100 million.[43]

Further, in order to ease the burden that many school districts felt because of the recession, the State loosened the repayment schedule for its lease-purchase program. School districts were allowed, for 10 years, to pay one percent of the cost of state funded lease-purchase projects, rather than the 10 percent they initially were required to pay.[44] Again, the State Legislature and the State Allocation Board moved away from a loan program and more toward a grant program.

Multi-Track Year-Round Education

Recognizing that the State had very limited bond resources, the Legislature wanted a more cost-effective facilities financing incentive system for school districts. That system would force districts to use their space more efficiently. In response to the shift in policy, the Legislature passed Chapter 498, Statute of 1983. This statute encouraged school districts that were experiencing growth pressure to adopt multi-track year-round education (MTYRE) programs. MTYRE programs enroll students in several tracks throughout the entire calendar year. At any given time, one track is on vacation, but vacation periods are short in duration.[45] The MTYRE program allows a more intensive use of existing facilities, thereby reducing the need for new facilities in growing districts.

School districts received an immediate financial return if they participated in the MTYRE program. A school district that redirected its students into a MTYRE program received a grant of up to 10 percent[46] of the cost that would be necessary to build a new facility not to exceed $125 per student.[47] School districts that participated in MTYRE were eligible for air conditioning and insulation in their buildings.

In 1988, as pressure for state financing continued, the Legislature required that top priority for financing new construction projects be given to districts that used multi-track year-round education programs. School districts that offered MTYRE and were willing to match 50 percent of their construction costs received a funding priority from the State Allocation Board.[48] This put other school districts that could not meet these MTYRE and funding criteria at a distinct disadvantage. These latter school districts sought relief from the voters in 1986. Small school districts were one exception to the MTYRE requirement.

1986 Lease Purchase Program

In 1986, the voters approved Proposition 46. Proposition 46 amended Proposition 13[49] by restoring to local governments, including school districts, the ability to issue general obligation bonds and to levy a property tax increase to pay the debt service subject to a two-thirds vote of the local electorate.[50] This amendment allowed school districts to augment the one-percent cap on property taxes and to secure additional bond indebtedness to build and improve their schools.[51]

Passage of Proposition 46 helped, but did not solve school districts' financing problems. Many school districts were unable to secure the necessary two-thirds vote to authorize local funding, and still relied on state funding to assist them. Further, the federal government in 1986 passed legislation that required each state to remove friable asbestos from their educational facilities – another charge that the school districts could ill afford.

California adopted similar asbestos standards to those established by the federal government in 1986; however, few school districts reported their estimated costs for removing the substance. In light of the need to remove the asbestos, and in order to address the growing backlog of proposed school construction projects, voters passed Proposition 79 in 1988 - an $800 million bond initiative. It specifically set aside $100 million to cover asbestos removal.[52]

A Growing Shortfall and Greater Scrutiny

There is no doubt that from 1982 to 1988 state support for public school construction was limited and difficult to secure. The demand for new school facilities, for modernization, and for asbestos removal was great.[53] As of June 1, 1986, applications that were submitted by school districts to the State Allocation Board for state funding of *new school construction* projects alone totaled roughly $1.3 billion. In addition, applications for state funding for *reconstruction or rehabilitation* of school facilities totaled over $991 million.[54] Total demand for school facility improvement in 1986 was nearly $2.3 billion - an amount that significantly outweighed the $800 million voters approved in that year's bond initiative.[55] Even with a boost of funding of $150 million per year from Tidelands revenues in fiscal years 1984 and 1985, the Lease Purchase Program fell short.[56] By 1988, the shortfall had grown to $4 billion, in spite of the fact that voters had approved $2.5 billion in bond money from 1982-1988.

The State Allocation Board was forced to scrutinize every request for school construction funding, recognizing that absent a major infusion of State bond money, most districts would not receive funding for their projects. This scrutiny created an extremely competitive environment for the limited resources that were available to the schools. Many participants believe that school districts that contracted with knowledgeable consultants, or had district staff who were familiar with the State Allocation Board's policies and criteria, were the most successful in securing a high ranking place in the queue for resources, once those funds become available.

There is no definitive research or data that support this belief. Consultants are not required to report their involvement in the application process. However, there is substantial anecdotal evidence to support the assertion.

School Financing as a Collective Effort—The Three Legged Stool

In 1986, the Legislature recognized that resources were scarce and that no one governmental or private entity could finance school construction. It attempted to equalize the burden of school facilities financing between state government, local government and the private sector.[57] This concept was known as the "three legged stool." The idea was that the state would provide funds through bonds. Local government would provide its share through special taxes, general obligation, Mello-Roos and other bond proceeds. The private sector would provide funds through developer fees. Appendix A describes funding alternatives for these latter two legs of the stool.

The "three legged stool," however, never quite worked. For example, to assure that developers would not fund a disproportionate share of the cost to build schools, the Legislature, in 1986, capped the amount new homebuyers would pay for developer fees at $1.50 per square foot, and empowered the State Allocation Board to raise the cap by a certain amount each year. However, school districts found a loophole around the cap by requesting that cities impose a fee on their behalf, and cities imposed rates on some

developers that exceeded those allowed.[58] California courts upheld these fees in the Mira, Hart, Murrieta court cases.

Until the recent passage of Proposition 1A, many local governments have imposed developer fees that exceed those allowed by the Board. For example, in 1987, fees in San Diego and Orange counties reached a high of $8700 per house.[59] By 1990, total development fees for some homes reached $30,000.[60] Statewide, developer fees have increased from $31 million in 1978 to $200 million in 1997.

In 1998, the State Allocation Board increased the fee to $1.93 per square foot.[61] With the passage of Proposition 1A in November 1998, however, local governments have apparently lost their ability to increase their fees beyond those determined by the State Allocation Board. Further conflict is likely.

The 1990s—Complicated Funding Programs

In the fall of 1990, the Legislature passed legislation that created two programs that provided additional financial incentives for schools to offer year-round education.[62] The first of these programs provided a one-time grant to school districts to ease the expense of changing from traditional nine-month programs to year-round tracks. The second program provided an "operating grant" of between 50 percent and 90 percent of the amount districts saved the state by not having to build new schools. At the recommendation of the Office of the Legislative Analyst, the Legislature repealed the 1982 and 1986 incentive programs discussed above.[63]

In response to the 1990 legislation, the State Allocation Board developed a new priority system for allocating lease purchase money. Under this new system, the Board apportioned funds based on a combination of when an application was received and how many priority points it garnered. Through a complex formula, priority points were given to schools that had a significant number of "unhoused students," or had substantial rehabilitation needs. This procedure might have worked well if the state could have financed all applications in a timely manner. However, the demand for state money increased to the point where districts without special priorities could expect to wait years for the state to finance their projects.

The program was in effect for only one year when the Legislature repealed the program and created yet another system for allocating state money.[64] In 1991, the Legislature defined six priorities for funding. First priority was given to districts that had a "substantial"[65] enrollment in multi-track schedules, and that were paying at least 50 percent of the construction costs for their new schools. Second priority went to districts with a "substantial" year-round enrollment and that wanted the state to pay the entire cost of any new construction for their year-round schools. The remaining four priority levels took into consideration factors for those schools who did not meet the "substantial enrollment" criteria outlined above, or were unable to match state resources.

The complex set of formulas made it difficult for school districts to completely understand what criteria would best serve them. Further, throughout this period, the Board was

required to implement new programs and redefine its priorities. For example, in 1990 the Legislature created a program that was adopted by State Allocation Board for school districts that could not find adequate land on which to build a school. Known as the Space Saver Program, it was designed to assist urban school districts that could not obtain adequate acreage for a school campus. The first space saver school, developed in 1993, is scheduled to be completed in Spring 2000 in the Santa Ana Unified School District, in a former shopping mall.[66]

Another example of shifting priorities took place in 1996 when the Legislature mandated the Board to redirect its third highest priority to class size reduction from a previous focus on child-care facilities.[67] A third took place at the end of 1997 when the priority points system was replaced by a first-come, first served system. While there were exceptions to this rule, money was offered first to school districts willing to cover some of the costs associated with constructing or repairing facilities. Schools that could not afford to cover the remaining 50 percent were placed on a separate list.

Such shifts in policy, coupled with the significant complexity of formulas that drove the priority point system, along with the sporadic creation of new programs, caused many school districts to depend on outside consultants. These consultants understood the many policy changes that the Board enacted – sometimes on a monthly basis. They were also knowledgeable of new programs, and clearly understood the workings of the staff who carried forth the Board's policies. Without the assistance of consultants, school districts were unable to keep track of policy changes and special considerations enacted by the Board. Further, while the Board and its staff advised school districts regarding changes in their policies in a regularly published document, it did not provide a centralized source of materials, such as an up-to-date handbook. Consequently, school district personnel were often uninformed about the various nuances of the programs administered by the Board.

State Bond Efforts of the Nineties

As the State Allocation Board shifted its focus and policies throughout the early 1990s, Californians approved state school bond initiatives in 1990 for $1.6 billion and in 1992 for $2.8 billion. In one of its 1992 reports, the Department of Finance reported that statewide K-12 enrollment was estimated to grow by 200,000 new students per year for at least five years,[68] and that an estimated $3 billion would be needed annually for new school construction.[69] However, in spite of growing enrollments and a significant demand for facility rehabilitation, in 1994, the electorate rejected a $1 billion bond initiative. The State was in a recession.

A lack of State bond funds was not the only problem associated with the allocation of school construction funds. The Auditor General reported in 1991 that the Office of Local Assistance mismanaged state funds. It detailed that construction funds loaned to school districts were not recovered; that districts overpaid on some projects and failed to collect the overage; that it dispersed funds without proper documentation; and that it failed to conduct required close-out audits on construction projects.[70]

As a result of this audit, the Office of Public School Construction in concert with the State Allocation Board developed stringent internal and external audits and fiscal controls. These control mechanisms included increasing the detail of financial review of projects, prohibiting school districts from participating in the program unless a balance was not due, and no longer receiving rent checks for portable classrooms.[71]

Attempts to Ease Passage for Local Bonds

Recognizing that the State would be unable to fund the entire backlog of school construction proposals, Governor Pete Wilson in 1992 proposed a constitutional amendment to reduce the requirement for the passage of local bonds from two-thirds to a simple majority.[72] The idea was that local governments should have to meet the same 50 percent requirement as the State for passing bonds. Further, there was strong sentiment in the Wilson administration that local governments should pay an increased share of school construction costs. However, the Legislature rejected his plan.[73] Other attempts in recent years to reduce the vote for passage of local bonds from two-thirds to something less have also failed.[74]

1996 School Bond Issuance - Finally More Money

Proposition 203, passed by the voters in March 1996, provided $2.065 billion for school facility construction. However, the Legislature at the time estimated that school districts would need $7 billion in construction funds to meet enrollment growth that was anticipated during the next five years.[75] This $7 billion did not include the needs of Los Angeles Unified School District (LAUSD), which had 20 percent of the state's student population. At the time, LAUSD alone needed $3 billion to upgrade and modernize its schools.[76] Clearly, anticipated demand for State funds substantially exceeded available resources.

To respond to the many school district proposals, the State Allocation Board followed its general priority points policy. However, many school districts, recognizing that they would not receive funding for years because of their position in the funding queue, and because of the limited amount of resources that were available, resorted to creative means to try to secure funding for their projects. For example, some schools districts sought special consideration for funds by requesting emergency allocations. Such a tactic would allow a school district to receive funds immediately.[77] Other school districts used the appeals process to argue that their projects were needed more than those of other school districts that were higher in the queue.[78]

This cannibalistic dynamic caused a fair amount of resentment among those school districts that were bumped from a relatively high position in the queue by those districts that sought emergency relief or special consideration. Further, it was clear that the most sophisticated school districts found a variety of tactics that would secure the funding of their projects. These tactics are described in greater detail later in this paper under the section that describes how the Board processed its applications.

Class Size Reduction Causes Greater Housing Needs

The distribution of funds from Proposition 203 was further complicated by the Governor's Class Size Reduction Initiative. In particular, the State Allocation Board earmarked $95 million for the purpose of purchasing 2,500 portable classrooms for schools that were facing severe classroom shortages. This was in addition to $200 million that the Department of Education had available for assisting schools in purchasing such facilities. The Office of Public School Construction determined that a total of 17,500 classrooms were needed to accommodate class size reduction, and that there was only enough money to fund less than half of the estimated need.[79] The State Allocation Board reinterpreted Proposition 203 by creating a new Portables Purchase Program at the expense of their other programs. This caused some school districts to again get bumped in the queue for funding.

Never Enough Money—Still a Shortfall

Since1947, the electorate has approved all but three State bond initiatives. In spite of the voters' tendency to support various bond initiatives, by 1998, the backlog of school construction projects that were approved by the State Allocation Board, but unfunded, totaled more than $1.3 billion. Although the voters have been generous by approving bond initiatives roughly every two years,[80] there were times during the past five decades when bond money was not available for periods of four or six years.[81]

The Department of Finance has estimated that $16 billion is needed over the next decade for public school construction and rehabilitation.[82] Various bond proposals in 1997 and 1998 were circulated that considered multiple-year bond issuances. The California Teachers Association and the California Building Industry Association presented a plan to issue $2 billion a year for 10 years.[83] Governor Wilson proposed $2 billion a year for four consecutive years. In the end, Proposition 1A was passed. It provides $6.7 billion over a four-year period. However, while the amount appears generous, it will not be enough to meet the entire anticipated need of the state. Based on the Department of Finance projections, the six years following this bond issue will require roughly an additional $10 billion in State money.

Table 1 on page 18 shows the history of state school bond initiatives from 1949 to 1998. In the next sections of this report, we discuss the various programs, the complicated application process used by the State Allocation Board that school districts had to endure to secure funding, and how Proposition 1A attempts to simplify this process.

Table 1 - STATE SCHOOL CONSTRUCTION BONDS		
Title of Bond Initiative	**Date & Year of Election**	**Funds Authorized**
School Building Aid Law of 1949	November 8, 1949	$250,000,000
School Building Aid Law of 1952	November 4, 1952	$185,000,000
School Building Aid Law of 1952	November 2, 1954	$100,000,000
School Building Aid Law of 1952	November 4, 1958	$220,000,000
School Building Aid Law of 1952	June 7, 1960	$300,000,000
School Building Aid Law of 1952	June 5, 1962	$200,000,000
School Building Aid Law of 1952	November 3, 1964	$260,000,000
School Building Aid Law of 1952	June 7, 1966	A)$275,000,000
School Building Aid Law of 1952	June 6, 1972	B)$350,000,000
School Building Aid Law of 1952 And Earthquake	November 5, 1974	$150,000,000
School Building Lease-Purchase Bond Law of 1976 (Failed)	June 8, 1976	$200,000,000
School Building Aid Law of 1978 (Failed)	June 6, 1978	$350,000,000
School Building Lease-Purchase Bond Law of 1982	November 2, 1982	$500,000,000
School Building Lease-Purchase Bond Law of 1984	November 6, 1984	$450,000,000
Green-Hughes School Building Lease-Purchase	November 4, 1986	$800,000,000
School Facilities Bond Act of 1988	June 7, 1988	$800,000,000
1988 School Facilities Bond Act	November 8, 1988	$800,000,000
1990 School Facilities Bond Act	June 5, 1990	$800,000,000
School Facilities Bond Act of 1990	November 6, 1990	$800,000,000
School Facilities Bond Act of 1992	June 2, 1992	$1,900,000,000
1992 School Facilities Bond Act	November 3, 1992	$900,000,000
Safe Schools Act of 1994 (Failed)	June 7, 1994	$1,000,000,000
Public Education Facilities Bond Act of 1996, Proposition 203	March 1996	C)$3,000,000,000
Class-size Reduction Kindergarten-University Public Education Facilities Bond Act of 1998, Proposition 1A	November 3, 1998	D)$9,200,000,000

Bonds in [bold] failed to receive a majority of votes.

A) New amount of 1966 bond authorization available for regular program is $185.5 million after deducting $35 million reserved for compensatory education facilities, $9.5 million for regional occupational centers, and $35 million for rehabilitation and replacement of earthquake damaged and unsafe schools.

B) Up to 250 million dollars earmarked for rehabilitation and replacement of unsafe schools.

C) One billion dollars earmarked for higher education facilities

D) Two and one-half billion dollars is allocated for higher education.

THE PROGRAMS

Prior to the approval of Proposition 1A, the State Allocation Board oversaw six active programs associated with school facility construction, repair, and remodeling. These six programs made up the Lease-Purchase Program that was discussed earlier in this paper. This section briefly describes these programs, discusses how the State Allocation Board set priorities for school district projects, explains how the Office of Public School Construction staff reviewed and acted upon district proposals, and how the State Allocation Board considered district appeals. The purpose is to advise the reader of not only the process and administration of allocation, but also some of the pitfalls that existed under the old system. Perhaps these pitfalls of the old system can be avoided when allocating Proposition 1A resources.

The Growth and Modernization Programs

The Growth and Modernization Programs allocated funds to school districts for building new schools (Growth Program) and for repairing existing facilities (Modernization Program). School districts qualified for the Growth Program based on an "allowable building standards" formula.

For its Growth Program, the State Allocation Board developed standards for the amount of space that was necessary to house students based on a district's number of ADA (Average Daily Attendance).[84] The Modernization Program provided funds to school districts for nonstructural improvements to permanent school facilities that were more than 30 years old, and for portable buildings that were more than 20 years old. Such nonstructural improvements included interior partitions, air conditioning, plumbing, lighting and electrical systems.

The Modernization Program provided funding for up to 25 percent of the replacement value of the building. Under some circumstances, districts could use additional funds beyond the 25 percent for handicap access compliance, including elevators when appropriate, and for alternate energy systems.

School districts could apply to this program by offering to match state funds and be listed as "Priority One," or they could ask the State to fund their entire project and be listed as "Priority Two."

Process for Receiving Growth and Modernization Funds

School districts that applied for growth and/or modernization funds were required to follow nine steps in three critical areas - planning, site selection and construction. Each of these three critical areas provided a separate and gradual funding stream for the school's project.

Planning Phase

During the planning phase, a district was required to complete four forms that demonstrated that it was eligible for either the growth or modernization program.

Eligibility to participate in the programs was based on enrollment patterns or the age and condition of those schools that required modernization. If a district met these standards, it moved on to the "site development phase."

Site Development Phase

Selecting a school site was critical. If a school district was participating in the modernization program, it would move to the next phase. The site would have to be safe and able to support the school's curriculum. An adequate site would have to meet certain standards with respect to size and location. Site review could take a school district months (if not years) to investigate. Under the growth program, a school district arranged a search committee to locate available properties and narrowed its search to three sites. In addition, the school district held public hearings regarding the impact of the lands to be used for educational purposes, and notified neighbors about possible site use. A representative from the Department of Education visited three selected sites to review and determine which was the most suitable site based on criteria including, but not limited to: street traffic safety; traffic congestion; geological hazards; and other environmental issues. All school districts followed a similar process for site selection whether they financed the project themselves, or requested State funding.[85]

Some school districts were unable to build new schools because they could not secure appropriate properties. This was especially true in urban and industrial areas where vacant land was not readily available or was extremely expensive.[86]

Once a district found an appropriate property, it was required to prepare a site development plan that included architectural and engineering drawings, along with building contract agreements. Districts were required to follow strict site development, plan development, and construction cost guidelines in order to be eligible for state funds.[87] Once these guidelines were met, the district proceeded to the construction phase.

Construction Phase

Every construction project received an allowance for site development and to erect a building. The eligible costs associated with construction for these programs were classified into several broad categories: building construction; site development; energy conservation; and supplemental funding for multi-story construction. In addition, facility funding included adjustment costs associated with geographic and regional differences, or the demolition of an existing structure.

A project architect for each contract developed final plans and documents as part of the project's final stage. These documents were used to establish a construction budget. The Division of the State Architect approved and monitored the district's final plans. After review, a construction apportionment was recommended to the State Allocation Board, which in turn authorized the distribution of funds. Upon completion of all regulatory oversight, the district was allowed to break ground.

The Deferred Maintenance Program

The Deferred Maintenance Program provided a 50 percent State match to assist school districts with expenditures for major repair or replacement of school buildings. Such repairs or replacements were for plumbing, heating, air conditioning, electrical systems, roofing, interior and exterior painting, and floor systems. School districts were required to place one and one-half percent of their general funds into an escrow account in order to receive a State match. For school districts that could not fit the parameters of the modernization program, the deferred maintenance program was the only alternative to receive State assistance.

The State also provided critical hardship funds to repair buildings that might seriously affect the health and/or safety of pupils. When available funding was insufficient to fully fund all hardship requests in any given year, the State Allocation Board created a priority list. However, the State Allocation Board often made exceptions to its list.

The Deferred Maintenance Program differed from the modernization program in that school districts were required to submit a five-year plan as to how their projects would be implemented. The plan displayed a rank for each project, and identified those projects that the school district would likely fund.

Deferred Maintenance Application Process

Based on the most recent available material, the deferred maintenance program had 13 steps, and a school district needed to complete several forms and documents. The 13 steps were divided into categories including a letter of interest, application process, critical hardship project documentation, and fund release.

A school district notified the Office of Public School Construction each year if it wanted to participate. Upon receipt of the initial letter, the Office of Public School Construction would send the district a request for its five-year plan of maintenance needs and an "Annual Application for Funds."

The school district would then provide the OPSC with a list of items scheduled for major repair or replacement,[88] along with its five-year implementation plan. When the district received state funds, it could only expend those resources for those items on the list. It could not redirect any resources toward administrative overhead, repair and maintenance of furniture, ongoing preventative maintenance, energy conservation, landscaping and irrigation, athletic stadium equipment, drapery or blackout curtains, testing underground storage tanks for leaks, or chalkboards.

Once the Office of Public School Construction approved a school district's list of projects it allocated funds accordingly. In cases of hardship, OPSC would visit the school prior to allocating funds. The district's governing board controlled and was responsible for all deferred maintenance funds. These funds were placed in a special escrow account.

The Year-Round Air Conditioning/Insulation Program

The Year-Round Air Conditioning/Insulation Program (ACI) began in 1986, as an incentive program for schools to operate during the summer.[89] In order to participate in the program, a school district was required to have a plan for Multi-Track Year-Round Education, or have 10 percent of its students enrolled in a Multi-Track Year-Round Education program. The ACI program assisted school districts by providing resources for air conditioning and insulation.

Year-Round Schools Air Conditioning/Insulation Application Process

The application process for the ACI program differed slightly for those school districts that had a year-round program from those that were planning a year-round program. However, regardless of their status, school districts were required to complete eleven stages in two phases to receive funding. If a school district had an air conditioning system that needed repair, it could not apply to this program, but could apply for funds under the deferred maintenance program.

A school district completed forms that included information on the buildings and spaces that would be affected, along with a report regarding the project's anticipated start-date. In addition, another application was required that provided information on whether the school site was experiencing enrollment growth, and whether some level of modernization was already in progress. Further, a school district that was not on a year-round schedule was required to show how its year-round calendar would be used. If the district was approved for funding, various allowances were provided to the district.[90] In addition to these allowances, the state would provide funds for gas and electric service, general site development, and air conditioning/insulation construction.

Items that were not covered by this program included costs for heating, window solar film, classroom doors and hardware, re-roofing, lighting, security, interior housing, fire alarm systems, unrelated repairs, installations, and painting.

The State Relocatable Classroom Program

The Relocatable Classroom program was designed to meet the needs of school districts that were impacted by excessive growth or unforeseen classroom emergencies. The State Allocation Board allocated funds for the acquisition, installation, and relocation of safe portable classroom facilities. The State maintained a fleet of 5,000 furnished classrooms that could be leased to school districts for $4,000 per year. Hardship cases could lease portables for $2,000 per year. These portable units were available on a first-come, first-served basis. However, there was no maximum amount of time a school district could keep the portables, and districts were not required to return them. Thus, some school districts have kept the portables indefinitely.

Relocatable Classroom Application Process

In order to participate in either relocatable classroom program, a school district was responsible for site preparation costs including electrical hookup, plumbing connection, a State Architect approved plan, insurance and maintenance. After approval by the Board, the district would be reimbursed for the cost of architect fees, electrical hookup, furniture and equipment, and plumbing installation. However, reimbursements were capped at $9,450 per classroom.

The Unused Site Program

The Unused Site Program was established in 1974 as part of the General Lease–Purchase umbrella. It required school districts and county superintendents of schools to pay a fee for district properties that were not used for "official" school purposes. "Official" school purpose was defined as being used for K-12 education, continuing or adult education, special education, childcare, or administration of any educational units.

This program did not provide funds directly to schools. However, resources generated from the fees that districts paid for unused facilities were used to cover deferred maintenance costs and to service the debt on the state's various school construction bonds. Since the Board simply administered the return of funds to the state, the funds could not be redirected to other programs administered by the Board. Proposition 1A eliminates their fee requirements.

The Office of Public School Construction Staff Review and The State Allocation Board's Appeals Process

The State Allocation Board meets roughly 11 times a year. At each meeting the Board reviews and approves about 200 applications for funding. Prior to the State Allocation Board's review, the Office of Public School Construction staff processes all applications. Before Proposition 1A, the approval processes for the programs, except for the growth and modernization programs, were straightforward. Either a school district's application fit a program's description for reimbursement, or it did not. Due to the complicated nature of the Growth and Modernization programs, "special considerations," or project applications that did not fit in the parameters of the program were placed in a different category. The State Allocation Board approved roughly 90 percent of all growth and modernization projects without special consideration. Issues requiring special consideration could include peculiarities of the proposed site, or the costs associated with a project. The applications were divided into special consents or "specials," and appeals. Both types permitted the Office of Public School Construction staff great latitude in the decision-making process, as they investigated and evaluated school district applications on a case-by-case basis.

A "special" occurred when OPSC staff reviewed a school district's application that did not meet the standards of the program, and determined that an exception should be made. This agreement may have required several meetings between the school district's administration and the OPSC staff. With OPSC staff recommendation, which may have

been inconsistent with State Allocation Board policy, this application would be brought before the State Allocation Board for review. This category was normally granted approval in one action.

An appeal occurred when OPSC staff reviewed a school district's application that did not meet the standards of the program, and determined an exception should not be made. If after several meetings an agreement could not be reached, the school district would bring its case before the State Allocation Board. An appeal was granted only on a case-by-case basis. At times, legislators have spoken on behalf of school districts at Board meetings.[91] The difference in the two types of special considerations was that a school district or its representative would have to defend its actions in an appeal. However, as already noted, only those people who kept up with the process and policy changes were adept enough to tackle an appeal. Therefore, a school district seeking an appeal before the State Allocation Board might seek help from legislators that represented them, or hire consultants. For instance, in the May 1998 State Allocation Board meeting, a well-versed school finance consultant appeared on behalf of the Apple Valley Unified School District. Apple Valley hired both a construction manager and a general contractor to erect its new school, in the face of board policies allowing a school district to hire only one such position. On behalf of the school district, the consultant addressed the State Allocation Board, and pointed out that in five other cases the State Allocation Board had voted in favor of a school district that hired both a general contractor and a construction manager.[92]

Less seasoned district representatives would not have known that the State Allocation Board had already set a precedent for funding projects that include both a construction manager and a general contractor.[93] The OPSC staff was not knowledgeable on this issue and therefore could not be a source of information.

PROPOSITION 1A—A POSSIBLE FIX TO SAB PROCESS PROBLEMS

Proposition 1A not only authorizes an additional $6.7 billion to K-12 schools, but it also offers a fix to several of the process problems discussed above. It replaces the provisions of the previous Lease-Purchase Program. This section discusses (1) the resource allocation provisions of the legislation; (2) the programmatic components of the legislation; and (3) how the legislation improves the resource allocation process over that which existed under previous bond programs.

Total Resource Allocation Provisions of Proposition 1A

The resource allocation system in Proposition 1A is specific and detailed. Bond proceeds are to be allocated in 2 two-year cycles: $3.35 billion available immediately; and $3.35 billion available after July 2, 2000. Of the $3.35 billion that is immediately available, $1.35 billion is earmarked for new construction, $800 million for modernization, $500 million for hardship cases, and $700 million for class-size reduction.

For the second $3.35 billion distribution, $1.55 billion will be available for new construction, $1.3 billion for modernization, and $500 million for hardship cases. There are no resources in the second allocation for class-size reduction.

School districts receive funding for their projects based on a per pupil formula. The formula is based on a statewide average cost for construction, adjusted each January for inflation. The figures are based on unhoused [94]average daily attendance (ADA). The per pupil ADA formula is as follows:

	Growth	Modernization
Elementary	$5,200	$2,496
Middle School	$5,500	$2,640
High School	$7,200	$3,456

It is anticipated that the initial $1.35 billion available for new construction during the first round of allocations will be insufficient to meet the needs of those school districts that are facing substantial enrollment growth. Proposition 1A establishes a priority point system for new construction projects when State bond resources are exhausted.[95] The Office of Public School Construction will process applications on a first-come, first-served basis from subsequent bond offerings.

In addition to the provisions outlined above, school districts that receive bond proceeds are required to set aside three percent of their general funds each year for 20 years for the purpose of deferred maintenance.

Components of Proposition 1A

Proposition 1A establishes three categories for funding. The first is the Growth Program, in which the State finances half the cost of new construction and the school district the other half. The second is the Modernization Program, in which 80 percent of the cost of rehabilitation is provided by the state and 20 percent by the school district. The third category is "hardship," in which the State funds up to 100 percent of the cost for emergency needs, or an increased proportion of its share for new construction or modernization.[96]

Proposition 1A holds harmless those school districts that received State Allocation Board approval for the construction phase of their projects (under the previous Priority 1 - able to provide a 50 percent match). They will receive growth and modernization funds, but under the rubric of the previous "Lease Purchase Program." This grant is supplemented by land costs, site development, and other adjustments.

Another new provision of the Proposition is that school districts can seek modernization resources after a facility is 25 years old, rather than 30 years under the previous program.

Schools districts that had received prior Board approval for Priority 2 projects (100 percent state funding) will have to either indicate their ability to finance 50 percent of their proposed projects or reapply under one of the new programs. If the school district cannot meet the provisions of the new programs, it can apply as a "hardship" case.

The California Supreme Court ruled in 1991 that cities and counties could limit housing development on the basis of the supply of classrooms.[97] Proposition 1A suspends, until 2006, the Court's ruling.[98] With the passage of Proposition 1A, school districts will not be able to limit new housing construction based on a rationale that school facilities do not exist. However, in 2006, if adequate bond funds for new construction are not available, cities and counties can once again deny development. Further, as discussed earlier, the Proposition permits the school board to increase developer fees to up to $1.93 per square foot.[99] Proposition 1A sets up a system where fees can be levied of up to 50 percent and 100 percent of the costs associated with building a school by developers under certain circumstances.

Proposition 1A Improves the Resource Allocation System of the State Allocation Board

Proposition 1A makes several changes to the programs administered by the State Allocation Board. It attempts to simplify the process of applying for funds, consolidates the Board's previous six programs into two, and attempts to create a more equitable funding system. It also makes the State Allocation Board and the Office of Public School Construction staff more accountable for their actions. Table 2 presents the differences between the Board's previous Lease Purchase Program, and the new programs that are initiated by Proposition 1A.

Table 2 - Comparison of Lease Purchase Program to Proposition 1A Programs

	LEASE PURCHASE PROGRAM	SCHOOL FACILITIES PROGRAM PROP 1A
FUNDING FACILITIES	Priority 1 projects-growth and modernization-received 50 percent funding based on actual costs from the state. Priority 2 projects-growth and modernization-received 100 percent funding form the state.	Growth projects receive 50 percent funding based on a per pupil formula from the state. Modernization projects receive 80% funding from the state. Hardship projects can receive up to 100 percent of funding from the state based on three broad categories financial, physical and excessive costs.
CONSTRUCTION EXCESSIVE COSTS & COST SAVINGS	Some excessive costs (i.e., change orders) were reimbursed by the state. Cost savings were returned to the state.	Excessive costs are not reimbursed by the state and school districts keep costs savings.
MODERNIZATION PROJECTS	Buildings must be at least 30 years old.	Buildings must be at least 25 years old.
PROJECT APPROVAL	Projects were approved three times in conjunction with the planning, site acquisition and construction phases.	Projects receive one approval (except hardships that receive two approvals).
FUND ALLOCATION	Funds were allotted after each phase.	Funds are allotted only after DSA approves plans, unless there is a hardship.
MAINTENANCE OF FACILITIES	Required school districts to set aside two percent of their general fund for ongoing maintenance.	Requires school districts to set aside three percent of their general funds for 20 years for ongoing maintenance.
PROPERTY LIENS	State maintains a lien to properties it funds.	State does not hold liens, and existing liens are released.
ARCHITECTURAL APPROVAL	Division of State Architect approved all plans.	The Division of State Architect or a state approved private engineering firm may approve plans.

	LEASE PURCHASE PROGRAM	SCHOOL FACILITIES PROGRAM PROP 1A
DEVELOPER FEES	The cap on fees was $1.93 per square foot; however, cities or counties could levy a higher fee and pass it to schools districts.	The cap on fees is $1.93 per square foot, adjusted biannually. Fees may be assessed up to 50 percent of the costs of a project if a school district has accessed other forms of financing including Mello-Roos, G. O. bonds, and parcel taxes. In order to increase fees, school districts must meet two of four criteria, including MTYRE, local school bond positive votes of 50 + 1 percent, 20 percent of students are housed in portables, 15 percent of bond debt used.
WHEN STATE FUNDS RUN DRY	Projects were placed on a pending state-funding list or charged a city-based developer fee.	Modernization projects may be placed on a pending state-funding list. Growth projects may be placed on a priority points list, or the school district may collect 100 percent of financing from a developer.
CONTAINING DEVELOPMENT (MIRA, HART MURRIETA COURT CASES)	Cities and counties on behalf of school districts were able to contain residential development by suspending the building of new facilities.	School districts can not request cities or counties to prohibit residential development based on a lack of funds or school facilities until 2006.
ARCHITECT & CONSTRUCTION MANAGEMENT FEES	Percentage caps on fees based on size of projects	No caps.
MODERNIZATION PROGRAM	Provides funding to building over 30 years old, and portables over 25 years old. Calculations done on a district basis.	Provides funding for buildings over 25 years old and portables over 20 years old. Provides funding on a site-specific basis.
AIRCONDITIONING-ASBESTOS PROGRAM	Allotted funds specifically to install AC and remove asbestos.	These are now incorporated in the modernization program.

Simplification

To further simplify the process, the Proposition reduced the number of school facility financing phases from three to one.[100] This is now possible because school districts receive a flat grant from the State based on the number of students they enroll, rather than on the estimated cost of a project. Under the previous program, each phase of a project was evaluated independently; thus the cost to the State for any given project could change. Under the new program, a school district receives a single grant for a single project, and cannot request that the state fund additional need beyond the original request.[101]

The Proposition also explicitly requires that the State Allocation Board initiate a public hearing process that notices any policy changes considered by the Board. It requires that the Board make available to school districts written up-to-date documentation that clearly explains its policies, and specifically describes how its new programs work.

Consolidation

Until Proposition 1A, the State Allocation Board administered as many as 13 programs. The most current six are discussed above. With the enactment of Proposition 1A, the number of programs has been reduced to two, along with a special category for hardship cases. This consolidation of programs makes it easier for school districts to choose a program that best suits their needs. It precludes the type of creative tactics that school districts were forced to pursue to match their projects to the right program in order for them to receive funding.

A More Open Process

The Proposition causes a major shift in policy direction for the State Allocation Board. Under its previous programs, the Board funded both new construction and modernization on a 50/50 matching basis. Under Proposition 1A, the Board is required to fund modernization projects more generously than new construction projects, in that the State will fund 80 percent of the cost for modernization compared to 50 percent for new construction.

Another major outcome of Proposition 1A is that the State Allocation Board no longer has the authority to offer grants to school districts that may seek funds for special projects without any real statutory framework. Now school districts must demonstrate that they meet specific hardship criteria set out in the new law. The practical effect of this change will depend on how the Board interprets this provision.

Previous legislation implicitly required that the State Allocation Board follow guidelines set forth in the Administrative Procedures Act (APA); however, the Board did not do so. Proposition 1A explicitly requires the Board to follow APA guidelines. This means that any change in policy or regulation considered by the Board must be properly noticed to the public before the Board can act. This requirement, if the Board follows the full spirit, will allow school districts to be fully informed of Board policies and procedures, as well as its rules and regulations.

PITFALLS IN THE PROCESS PRIOR TO PROPOSITION 1A

This section discusses the State Allocation Board's attempts to improve its system and the pitfalls that existed under the previous programs.

Until recently, rules governing the application process were labor-intensive, both for school districts and the state agency personnel (including the Office of Public School Construction and the Division of the State Architect). In 1989, the Legislature received a report outlining the complex application.[102] The report identified 54 steps school districts had to perform in order to receive application approval and eventual financing. In addition, the process required 24 separate forms.

Process Streamlined Recently

Since 1992, the OPSC has tried to be more efficient. Changes implemented by OPSC included: simplified and streamlined applications; improved response time for application review; improved policy information dissemination; and school districts were empowered to complete their own applications.

The most concrete indication that the Office of Public School Construction was becoming more efficient was in the application process. The application process for the Growth Program was reduced from 54 steps to nine. In addition, the number of forms that were needed to apply for funding was reduced from 24 to four.

School districts complained and begged for applications to be checked and approved for a State Allocation Board meeting agenda in an expeditious fashion. As part of the efficiency movement, the Office of Public School Construction set a goal to reduce the time from when a school district filed a completed application until it was placed on a State Allocation Board meeting agenda from over 400 days to 60 days.[103] Prior to Proposition 1A, applications on average still took longer than the 60 days to be reviewed. However, the office's efficiency achievement by reducing application review days is noteworthy.

In addition, the Office of Public School Construction worked more closely with school districts in the decision making process and provided greater leeway. In particular, school district personnel could self-certify certain information pertaining to a project rather than rely on state agency personnel. The self-certification process removed the time a school district would wait for a response from the Office of Public School Construction. It thereby shortened the application process.

Under its previous programs, it was difficult for school districts to get information pertaining to the funding process from the Office of Local Assistance (OLA) staff or from written materials. The Office of Public School Construction is now more service-oriented.[104] One can obtain information in person or from the office's Internet site.[105] In fact, the staff of the Office of Public School Construction is continually placing more information on the Internet. This information includes an automated project tracking system, Senate Bill 50 regulations, office contacts, and old board policy changes.

School Districts in Line Stand on Shifting Sands

Under the previous allocation system, school districts that completed their applications and were placed in queue were never guaranteed funding in the order their applications were received. The State Allocation Board dictated that school district applications were placed in an unfunded application list on a first-come/first-served basis. However, there were four general ways that school district applications could be "bumped" up or down in the queue.

Broad Classification Decisions

The first way a school district could get bumped was if the State Allocation Board decided to redirect its emphasis and fund a broad category of projects. For instance, the SAB could decide to fund all application projects from small school districts (no matter where they were in queue). If a school district was large, hundreds of proposed school projects could jump ahead in the funding queue.

The second way a school district could get bumped was if the State Allocation Board shifted the specific funding program allocations. Thus, for example, the State Allocation Board could decide to shift funds earmarked for the Growth Program to the State Portable Classroom Program.

Specific School District Decisions

The third way a school district could get bumped was if another school district application in queue with a later application filing date appealed to the State Allocation Board to change its application filing date to be ahead of other school districts. That school district application would be funded first.

The fourth way a school district could get bumped was if an emergency situation occurred and a school district requested critical hardship money from the State Allocation Board. The Board could provide these funds when available.

The application process requires equity and balance in order to ensure fair competition by school districts for State funds. The process needs to be flexible enough to handle emergency situations, yet firm enough to prohibit jockeying among school districts for better placement in the queue.

Proposition 1A halts the movement of funds from one program to another. However, the other examples are still feasible. Jockeying of school districts by consultants for better placement in line may continue to occur. This is especially true as Proposition 1A cannot handle the pent up demand for State funds. The next section discusses options that the Legislature may consider in order to improve this system.

OPTIONS FOR IMPROVING THE SCHOOL FACILITY FINANCING SYSTEM

A Separate List for Small and Rural School Districts

When the Proposition 1A funds are exhausted, new construction project applications will receive priority points for future funding. Small and rural school districts may require separate lists to ensure that they are placed near the front of a funding queue. This is necessary because there is no guarantee that the entire queue would receive future funding. Small and rural school districts, based on the current priority points system, may not receive enough priority points to approach the front of the queue. Larger school district applications, with greater per pupil need, may be able to position themselves high enough in the queue for funding by receiving favorable OPSC evaluations. Proposition 1A allows schools to skip to higher positions in the funding queue if they score higher priority points based on their number of unhoused students or if they can demonstrate a special hardship. *The Legislature may wish to create a separate list for small and rural school districts to create a more equitable system.*

Annual Report and Independent Accounting

In the early 1990s, many state agencies, boards, and commissions, because of budget cuts, postponed writing annual reports to the Legislature. These reports provided financial and policy information to the public. The State Allocation Board was one government entity that has not prepared regular audited reports of its programs' operations and expenditures for public review. The State Allocation Board will receive $6.7 billion over the next four years to fund school construction projects. *The Legislature may wish to require the Board to prepare for the Governor and Legislature an annual report that details how and to whom bond funds were distributed. The Legislature may wish to require that an independent accounting firm or the State Auditor General prepare the Board's report.*

On-Line Technical Assistance

Although the application and funding process administered by the Office of Public School Construction has been streamlined and simplified in recent years, certain components of the process are still cumbersome. The process should be simple enough that school districts do not need to hire consultants or lobbyists to advise them or to shepherd their proposals. *The Legislature may wish to pass legislation that would require the OPSC to develop a technical assistance program to provide school districts with the necessary information and advice they need in order to qualify for and receive bond funds. Such a system could include an automated Internet help-line.*

A Special General Fund Appropriation for School Construction

The State's bond capacity may not be able to fund every State infrastructure need, including schools, transportation, prisons, and water during the next decade. School facility needs are estimated conservatively at roughly $10 billion, while some estimates have put the figure at $40 billion for the next decade alone. According to the Department of Finance, the State can afford to service approximately $25 billion in additional debt. Thus, school facility financing alone could incur the entire debt capacity of the State. *The Legislature may wish to create a special appropriation fund for public school capital outlay as part of the State General Fund to augment the State's bond programs. In addition, the State may wish to design a school construction reserve fund, which is funded from budget surplus revenues.*

APPENDIX A

School District Financing Mechanisms

In addition to state bond funds, school districts have a variety of other alternatives for funding school construction. These include developer fees, certificate of participation, general obligation bonds, and Mello-Roos taxes. Also, a developer may simply build a school rather than consider other financing alternatives.

Local General Obligation Bonds

In 1986, after an eight-year hiatus, school districts could once again use general obligation bonds to finance school facilities. Bonds are a favorable method of financing, even though they require a two-thirds vote and proceeds cannot be used for items such as buses and furnishings. In 1986, 14 school districts offered bond initiatives. In 1987 and 1988, this number grew to 51 and 54 school districts, respectively. In November 1998, 36 school districts held bond elections.[106]

Developer Fees

In 1978, the Wilsona School District was the first to use developer fees. These fees added about $2,000 to the cost of a typical home in the Lancaster area. While school districts were exacting developer fees, there was no statute that explicitly permitted this activity. The Legislature standardized the authority by giving school districts direct authority to charge developer fees. School districts welcomed developer fees especially because they did not require an election, and the funds associated with the fees could be used for a wide variety of facilities that were associated with enrollment growth. In response to a growing number of complaints from developers, the Legislature capped the amount that could be collected in 1986. Proposition 1A prohibited local agencies from using the inadequacy of school facilities as a reason for not approving housing development projects. The authority to raise developer fees was placed with the State Allocation Board. However, developer fees generally are not enough to cover the full costs of constructing a school.

Certificates of Participation

Certificates of Participation (COPs) are another, though complicated, tool for districts to raise money without voter consent. The most common arrangement is that the district leases a new school owned by another government agency or a nonprofit agency, which in turn raises the capital to build the school by selling shares (certificates of participation). In the long run, lien revenues COPs are remarkably like bonds. One disadvantage of the COP arrangement is that it does not provide a new revenue source for the lease payments. Funds usually come from the school district's general fund.

Mello-Roos

The Mello-Roos Community Facilities Act, established in 1982, authorized school districts and local governments to form "community facilities districts." Subject to the approval of two-thirds of the voters, these special districts could sell bonds to raise revenues for the purpose of financing new buildings, or to rehabilitate existing school facilities. A majority of Mello-Roos districts are created in inhabitable areas that are proposed for development where voting is by the landowners. The district sets a specific tax per house.

ENDNOTES

[1] Chapter 243, Statutes of 1947.

[2] If a school district wants state funding for construction or repair of a school, it must apply to the State Allocation Board for the money. There are school districts that repair and construct school buildings without the assistance of the State Allocation Board (i.e., San Diego Unified School District, San Luis Unified School District). However, this report will focus on a school district that requires state support.

[3] Chapter 243, Statutes of 1947. Initially, the State Allocation Board administered a number of Public Works programs for the State ranging from housing and employment assistance to school facilities construction. Various programs include: the Postwar Planning and Acquisition, Construction and Employment Act, Veterans Temporary Housing, State School Building Construction Programs, Emergency Relief Programs, and Community Assistance Programs (State Allocation Annual Report 1983-1984, p. 1).

[4] California Government Code 15502.

[5] Government Code 15490.

[6] While the State Allocation Board submitted policy changes to school districts, an up-to-date handbook was not made available. In addition, turnover of board members and school administrators may lead to ignorance of programs and the program changes.

[7] Amendments to the Constitution, Proposition 1, November 8, 1949.

[8] Amendments to the Constitution, Proposition 4, November 4, 1952.

[9] Op.cit.

[10] California School K-12 enrollment grew from 1.689 million students in 1950, to 4.633 million students in 1970 (State of California. Department of Education. Education Demographics Unit. CBEDS Data Collection. "Enrollment in California Public Schools 1950 through 1997").

[11] This is defined by California Education Code, Section 15102, as the legal limit of debt that a school district can incur based on the assessed value of property in that school district.

[12] Known as the State School Building Aid Program. The Legislature determined qualifications in order for school districts to participate in this program. They include the following provisions:

1. To qualify for a loan from the State a school district must have voted local bonds to 95 percent of its bonding ability.
2. Borrowing districts financially able to do so must repay the money to the State. Terms of 30 or 40 years of repayments are provided.
3. No money can be borrowed by a school district unless the proposed loan is approved by two-thirds vote of the electors of the district.
4. School construction, financed in any part by State loans will be subject to cost controls to be established by State Allocation Board (includes restrictions on the number of square feet of construction allowed per pupil).

[13] Amendments to the Constitution Propositions together with Arguments, Proposition 1, November 8, 1949. This bond issue was for $250 million.

[14] Voters set the initiative process in motion in 1911 under reform-minded Governor Hiram Johnson. Los Angeles Times. "State's Voters Face Longest List of Issues in 66 Years; November 8 Ballot to Carry Maze of 29 Propositions." July 7, 1988, p. 1-1.

[15] Amendments to the Constitution Propositions together with Arguments, Proposition 1, November 8, 1949. This bond issue was for $250 million.

[16] Amendments to the Constitution, Special Election, June 7, 1960, Proposition 2, Part II, Appendix. p. 2.

[17] School Building Safety Fund, December 1971.

[18] The Field Act, that mandates that school construction is able to withstand earthquakes, has yet to dictate how to build an indestructible building.

[19] Propositions and Proposed Laws, Together with Arguments, Primary Election Tuesday, June 6, 1972, p. 1.

[20] Ibid.

[21] State Allocation Board Report to the Legislature 1972-1973 Fiscal Year, p. 3.

[22] Public school K-12 enrollment declined from 4.457 million students in 1970 to 3.942 million students in 1980. (State of California. Department of Finance. Demographic Research Unit. 1997 Series California Public K-12 Graded Enrollment).

[23] Op.cit., p. 2.
[24] Ibid.
[25] Property rich communities often have more poor people than property poor communities. The presence of commercial and industrial development can make an otherwise poor district "rich" in its tax base. Conversely, affluent communities often discourage industrial development that would make them property rich, but environmentally poorer. The lack of correlation between poor people and property poor districts is often overlooked in discussions of school finance issues. Even though the distinction has been known for a long time. Campbell, Colin D.; Fischel, William A. National Tax Journal "Preferences for School Finance Systems; Voters Versus Judges." Footnotes from Helen Ladd. "Statewide Taxation of Commercial and Industrial Property for Education." National Tax Journal (June 1976): 143-153.
[26] Goff, Tom. "Passage of Tax Reform School Financing Bill Urged by Riles." Los Angeles Times, July 19, 1972, p. I-1.
[27] Section 17700 et al., Education Code.
[28] Property values were increasing dramatically all over the State. This model stopped school districts from speculating on land that was financed by the State.
[29] Op.cit., p. 2.
[30] Proposition 1 of 1978 was defeated 65 percent to 35 percent. Propositions from 1976, 1978 and 1994.
[31] Proposition 1 of 1976 would have provided $250 million, and Proposition 1 of 1978 would have provided $300 million.
[32] Shultz, Jim. "Major Firms Gained Most With Prop. 13." Sacramento Bee, September 13, 1997, p. F-1.
[33] Ibid.
[34] Karmin, Bennett. California's Bankrupt Schools." New York Times, July 17, 1983, pp. 4-21. Linsey, Robert. "San Jose Schools Declare Insolvency in Wake of Tax Revolt." The New York Times, June 30, 1983, p. A–14. However, some school districts that were academically and fiscally well managed prior to Proposition 13 faced problems. In 1983, the San Jose Unified School District filed for bankruptcy. The National School Boards Association stated that it was the first insolvency of a large school district since the depression. The San Jose Unified School District, at the time, held a reputation for excellence in education. It ranked 14th in the state in the ratio of students to teachers, and its teachers' salaries ranked second highest in Santa Clara County. However, since Proposition 13, the school district set aside maintenance and construction projects, laid off teachers and non-teaching administration, until it could not make further reductions and still continue to pay its staff.
[35] Chapter 282, Statutes of 1979. State School Building Lease Purchase Bond Law of 1984—Voter Pamphlet Analysis.
[36] While the loan program was still on the books, the state made exceptions to aid school districts.
[37] California Education Code, Sections 17730.2, 17732. However, the Attorney General cited that 10 percent of local funds to cover the costs associated with facility development is not required. Coalition for Adequate School Housing. CASH Register, November 1984, p. 3.
[38] California Department of Education. CBEDS Data Collection. Education Demographics Unit. 1998.
[39] Coalition for Adequate School Housing. CASH Register, September 1982, p. 1.
[40] Ibid.
[41] Coalition for Adequate School Housing. CASH Register, December 1982, p. 2., (in 1980-81 dollars).
[42] This evaluation was amended annually. The State developed a formula that was based on standards that considered how a facility was used and how many pupils were unhoused. In some years, the State gave preference to unhoused pupils, while in other years, the state gave first consideration to how a facility was used. Facility use included childcare, before and after school programs, adult education, and traditional K-12 programming.
[43] Savage, David. "Resolution Brings Tax Cuts, Schools Told." Los Angeles Times, October 15, 1982, p. B1.
[44] Assembly Bill 62, Chapter 820, Statutes of 1982.
[45] California Department of Education. California Year-Round Education Directory 1997-98.
[46] For example, a school district that needed to build a new elementary school that cost $4 million could receive $400,000 from the state if it chose to redirect students to existing facilities that incorporated the MTYRE program.

[47] Chapter 886, Statutes of 1986, added provisions that capped the grant at $125 per student.

[48] School districts that could not offer to cover any expenses (now referred to as a Priority 2) could conceivably wait years. MTYRE continues today, and has been a successful program. In 1997, more than 1.19 million or about 22 percent of California students attended schools with year-round calendars. The State Department of Education estimates that the MTYRE program has saved that State more than $1.8 billion in construction costs since its inception. In 1997-98, $66 million was allocated from the "mega item" of the state budget. About $40 million was sent to Los Angeles Unified School District to cover the reported 40,872 excess students. However, once students are "excess," they can not be counted as students for the Office of Public School Construction in the erection of new facilities. Approximately 102,000 students are "excess." While the program has provided relief for school construction, it remains a controversy whether educationally the program is successful.

[49] Proposition 46 on the June 1986 Ballot.

[50] Greene-Hughes School Building Lease-Purchase Bond Law of 1986 Voter Pamphlet.

[51] Proposition 46: Property Taxation, June 3, 1986.

[52] DeWolfe, Evelyn. "Schools Get Low Marks for Asbestos." Los Angeles Times, January 8, 1989.

[53] School enrollment bottomed to 4.089 million students in 1983, the same population amount that occurred in 1964. By 1986, student population increased to 4.377 million. California Department of Education. Education Demographics Unit. CBEDS. 1998.

[54] Op.cit.

[55] Op.cit.

[56] State Allocation Board Report to the Legislature 1984-85, 1985-86, Fiscal Years.

[57] AB 2926, Statutes of 1986.

[58] These were referred to as the Mira, Hart, Murrieta court cases.

[59] Later that year, fees were capped by the Legislature at $1.50 per square foot on residential units statewide.

[60] Fulton, William, "California Pulls Out the Stops; Cities Cope with Government Budget Deficit." American Planning Association, p. 24, October 1992. About one-third going to school districts.

[61] Cummings, Judith. "CA Turns to Developer Fees." The New York Times, January 16, 1987, p. A-15.

[62] Chapter 1261, Statutes of 1990.

[63] Legislative Analyst's Office, p. 23. "Building Schools in California: What Role Should the State Take in Local Capital Development?" Linda Herbert. Jesse Marvin Unruh Assembly Fellowship Journal, Volume II, 1991, pp. 1-4.

[64] Op.cit.

[65] Substantial enrollments are defined as at least 30 percent of the district's enrollment in kindergarten or any of the grades one to six, inclusive, or 40 percent of the students in the high school attendance area, see Education Code, Section 17717.7g.

[66] Conversation with Mike Vail, on January 21, 1999. Mr. Vail is the Assistant Superintendent of Facilities and Governmental Relations at the Santa Ana Unified School District.

[67] The class size reduction program reduced the ratio of students to teachers in kindergarten to third grades. It exacerbated the obstacles for school districts that were growing in size, but lacked facilities to house the new students. School districts that were not growing had to provide additional classroom space to account for smaller ratios of teachers to students in kindergarten to third grades. The State Allocation Board provided portable classrooms to cover the smaller-sized classes. The State Allocation Board estimates that thousands more classrooms are needed.

[68] Department of Finance, School Populations Projections. 1998.

[69] Jacobs, Paul. "Backers of Education Cite Jobs, Overcrowding." Los Angeles Times, May 27, 1992.

[70] Auditor General of California. "Some School Construction Funds are Improperly Used and not Maximized." January 1991.

[71] County of Sacramento Superior/Municipal Court, Court #97F05608, CJIS XREF #250593.

[72] Vrana, Deborah. "Assembly Rejects Plan in California to Ease Passage of School Bonds." The Bond Buyer, January 27, 1992.

[73] The passage required a two-thirds vote by the legislature.

[74] November 1993, Proposition 170 failed by 70 percent.

[75] Colvin, Richard Lee. "Bond Victory Heartening to Educators." Los Angeles Times, March 28, 1996, p. A1. Anderluh, Deborah, Sacramento Bee, March 31, 1996, p. A1. Of the $7 billion, $1.6 billion was estimated for overhauls of buildings over 30 years old, and $5.6 billion for new construction and classroom additions.

[76] Colvin, Richard Lee. "The California Vote (a Series)." Los Angeles Times, March 19, 1996, p. A3.

[77] If a school district has an application with the SAB to repair its roof and the roof is not fixed in a reasonable period of time, further structural damage may occur. This new or additional damage could bump the project to the top of the list.

[78] See the sub-section entitled "School Districts in Line Stand on Shifting Sands."

[79] Bazar, Emily and Jane Ferris. "Money for Portable Classrooms." Sacramento Bee, September 26, 1996.

[80] State bonds were proposed biannually in 1988, 1990, and 1992.

[81] In 1976 and 1978 bond measures were defeated by the electorate.

[82] "Lawmakers Scrap Over Billions in School Bonds." California Public Finance, May 5, 1997, p. 1.

[83] "Huge School Bond Mulled" California Public Finance, September 8, 1997, p. 1.

[84] This included the type of facility and the number of teaching stations (classrooms).

[85] The Department of Education, School Facilities Planning Division is responsible for site review and site plan review and is required to recommend all school locations for new schools and additions to schools site regardless of the funding source.

[86] For example, in 1988, the Los Angeles Unified School District wanted to rehabilitate a hotel into a school. The State Allocation Board paid $48 million to an escrow account in an attempt to hold the price to acquire the Ambassador Hotel. When the school district and State Allocation Board realized that the site was not acceptable and decided to back out of the contract, they found that the developer had removed the money placed in the escrow account. In addition, when the district attempted to backpedal out of the contract, the owner sued for a breach of contract. Currently, there are negotiations between the school district and the owner of the property, Donald Trump.

[87] A school district was responsible for developing detailed cost estimates for the proposed school or addition. Site support costs provided funds for the preparation of environmental impact documents, development of relocation reports, determination of relocation claims, and negotiation of site purchases. The state reimburses up to 85 percent of the amount expended for eligible sites.

[88] This list was limited to those school facility components that have approached or exceeded their normal life expectancy.

[89] Applications for projects and appeals with correspondence from Carol A. Fisher, Apple Valley Unified School District, Author.

[90] Reimbursable fees and costs related to plans include architect fees, Division of State Architect/ORS Plan Check fee, CDE Plan Check Fee, Preliminary Tests (like soil, foundation, and exploratory borings) and other fees, for instance, advertising construction bids, and printing of plans.

[91] Pascual, Psyche. "Funding to Build High School Finally Approved By State." Los Angeles Times, June 17, 1993.

[92] Understanding the board's other five opinions would be difficult to track if not impossible to uncover.

[93] To evaluate the State Allocation Board's policies and procedures, it was necessary to obtain the State Allocation Board Handbook. The Handbook contains procedures and policies for reviewing and criteria for approving applications from school districts for bond funds to build new schools. When this report was initiated, the Handbook that the State Allocation Board provided was dated 1995, but contained policies adopted in 1993. Further, the State Allocation Board changes its policies and procedures often, and has no administrative process by which it updates its Handbook. An up-to-date, comprehensive list of policies and procedures was not available in any other format. A new handbook for the Lease Purchase Program was available on line - however, it also suffered from a lack of regular updating. The State Allocation Board meets every month and, hypothetically, policy changes can occur each month. Prior to Proposition 1A, despite being subject to the Administrative Procedures Act, the State Allocation Board had no public notice or participation requirements for the procedures by which it changes its policies. Only long-term policies are published in the California Regulatory Notice Register. Such policies included contracting and affirmative action requirements. Furthermore, staff reported that policies change so frequently, that it would be impossible to include relevant policies in the reporter or any other document.

[94] The number of students above the maximum number set by CDE to be in a classroom.

[95] The priority points ranking mechanism is based on, among other things, the percentage of currently and projected unhoused students relative to the total population of the applicant district or attendance area.

[96] In hardship cases, the State will fund more than 50 percent of new construction if a school district is unable to come up with its 50 percent match and had gone through a reasonable effort. Similarly, districts that are unable to offer a 20 percent match for modernization can seek relief from the State. Financial hardship is defined for those school districts that cannot afford to build, repair, or replace facilities because of fiscal restrictions (for example, an inability to match state funding because of an inability to pass local bonds or a lack of bonding capacity). Facility hardship can also apply to school districts that lack adequate housing for their pupils due to a lack of health and public safety conditions; or because of a natural disaster, traffic safety, or the remote geographic location of pupils (i.e., rural). Excessive costs may be attributed to geographic location, size of project, the cost associated with a new project in urban locations that may require high security or toxic cleanup, and sites that may require seismic retrofitting.

[97] The State Supreme Court ruled that school districts that were unable to accommodate enrollment growth could ask their city and county councils to limit real estate developers from building additional housing. Some developers found it necessary to offer additional resources (land or money) to get support from school districts and city councils for their projects.

[98] In three legal challenges, the courts have ruled that cities were not precluded from making zoning or other land-use decisions, because of the availability of classroom space, see Mira Development Corporation v. City of San Diego, William S. Hart Union High School District v. Regional Planning Commission of the County of Los Angeles, Murietta Valley Unified School District v. County of Riverside. The practical effect of the rulings was that cities could limit development on the basis of the supply of classrooms. Some developers found it necessary to offer additional resources, land or money, to get support from school districts and city councils for their projects.

[99] If the State expends all of its Proposition 1A resources prior to 2006, school districts can ask developers to pay 100 percent of site acquisition and school construction costs. In order to receive developer support under these conditions, school districts must participate in the Multi-Track Year-Round Education program. The Proposition includes language that the State may reimburse developers for up to 50 percent of their costs if subsequent bond funds become available.

[100] Under the old program, school districts had three application phases for each of their projects – planning, site, and construction. Under the new program, there is only one application phase for the entire project proposal, except under hardship provisions.

[101] However, once the funds are distributed to the school district, the school district keeps the interest accrued on the funds.

[102] Price Waterhouse. Joint Legislative Budget Committee Office of the Legislative Analyst. Final Report of the Study of the School Facilities Application Process. January 10, 1988.

[103] One streamlined step is the self-certification process in the Lease Purchase Program.

[104] However, in light of the office's accomplishments, the author had to request information routinely more than once.

[105] www.dgs.ca.gov/opsc.

[106] School Services of California.

APPENDIX A

School District Financing Mechanisms

In addition to state bond funds, school districts have a variety of other alternatives for funding school construction. These include developer fees, certificate of participation, general obligation bonds, and Mello-Roos taxes. Also, a developer may simply build a school rather than consider other financing alternatives.

Local General Obligation Bonds

In 1986, after an eight-year hiatus, school districts could once again use general obligation bonds to finance school facilities. Bonds are a favorable method of financing, even though they require a two-thirds vote and proceeds cannot be used for items such as buses and furnishings. In 1986, 14 school districts offered bond initiatives. In 1987 and 1988, this number grew to 51 and 54 school districts, respectively. In November 1998, 36 school districts held bond elections.[106]

Developer Fees

In 1978, the Wilsona School District was the first to use developer fees. These fees added about $2,000 to the cost of a typical home in the Lancaster area. While school districts were exacting developer fees, there was no statute that explicitly permitted this activity. The Legislature standardized the authority by giving school districts direct authority to charge developer fees. School districts welcomed developer fees especially because they did not require an election, and the funds associated with the fees could be used for a wide variety of facilities that were associated with enrollment growth. In response to a growing number of complaints from developers, the Legislature capped the amount that could be collected in 1986. Proposition 1A prohibited local agencies from using the inadequacy of school facilities as a reason for not approving housing development projects. The authority to raise developer fees was placed with the State Allocation Board. However, developer fees generally are not enough to cover the full costs of constructing a school.

Certificates of Participation

Certificates of Participation (COPs) are another, though complicated, tool for districts to raise money without voter consent. The most common arrangement is that the district leases a new school owned by another government agency or a nonprofit agency, which in turn raises the capital to build the school by selling shares (certificates of participation). In the long run, lien revenues COPs are remarkably like bonds. One disadvantage of the COP arrangement is that it does not provide a new revenue source for the lease payments. Funds usually come from the school district's general fund.

Mello-Roos

The Mello-Roos Community Facilities Act, established in 1982, authorized school districts and local governments to form "community facilities districts." Subject to the approval of two-thirds of the voters, these special districts could sell bonds to raise revenues for the purpose of financing new buildings, or to rehabilitate existing school facilities. A majority of Mello-Roos districts are created in inhabitable areas that are proposed for development where voting is by the landowners. The district sets a specific tax per house.

EXHIBIT "B"
PROPOSITION 55 BALLOT MATERIALS

Official Voter Information Guide

California
PRIMARY ELECTION

Propositions

Ballot Measure Summary

Proposition 55
- Analysis
- Arguments and Rebuttals
- Text of Proposed Law

Proposition 56

Proposition 57

Proposition 58

Bond Overview

OFFICIAL TITLE AND SUMMARY
Prepared by the Attorney General

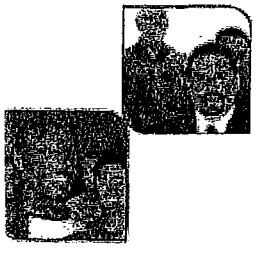
Proposition 55

KINDERGARTEN-UNIVERSITY PUBLIC EDUCATION FACILITIES BOND ACT OF 2004.

- This act provides for a bond issue of twelve billion three hundred million dollars ($12,300,000,000) to fund necessary education facilities to relieve overcrowding and to repair older schools.
- Funds will be targeted to areas of greatest need and must be spent according to strict accountability measures.
- Funds will also be used to upgrade and build new classrooms in the California Community Colleges, the California State University, and the University of California, to provide adequate higher education facilities to accommodate growing student enrollment.
- Appropriates money from General Fund to pay off bonds.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- State costs of about $24.7 billion to pay off both the principal ($12.3 billion) and interest ($12.4 billion) costs on the bonds. Payments of about $823 million per year.



Final Votes Cast by the Legislature on AB 16 (Proposition 55)

Assembly:	Ayes 71	Noes 8
Senate:	Ayes 27	Noes 11

Official Voter Information Guide

California PRIMARY ELECTION

Propositions

Ballot Measure Summary

Proposition 55
- Analysis
- Arguments and Rebuttals
- Text of Proposed Law

Proposition 56

Proposition 57

Proposition 58

Bond Overview

ANALYSIS BY THE LEGISLATIVE ANALYST

Proposition 55

BACKGROUND

Public education in California consists of two distinct systems. One system includes local school districts that provide elementary and secondary (kindergarten through 12th grade, or "K-12") education to about 6.2 million pupils. The other system (commonly referred to as "higher education") includes the California Community Colleges (CCCs), the California State University (CSU), and the University of California (UC). The three segments of higher education provide education programs beyond the 12th grade to the equivalent of about 1.6 million full-time students.

K-12 Schools

School Facilities Funding. The K-12 schools receive funding for construction and modernization (that is, renovation) of facilities from two main sources—state general obligation bonds and local general obligation bonds. General obligation bonds are backed by the state and school districts, meaning that they are obligated to pay the principal and interest costs on these bonds.

- ***State General Obligation Bonds.*** The state, through the School Facility Program (SFP), provides money for school districts to buy land and to construct and renovate K-12 school buildings. Districts receive funding for construction and renovation based on the number of pupils who meet the eligibility criteria of the program. The cost of school construction projects is shared between the state and local school districts. The state pays 50 percent of the cost of new construction projects and 60 percent of the cost for approved modernization projects. (Local matches are not necessary in "hardship" cases.) The state has funded the SFP by issuing general obligation bonds. General Fund revenues would be used to pay these costs. These revenues come primarily from state income and sales taxes. Over the past decade, voters have approved a total of $20.1 billion in state bonds for K-12 school construction. About $1.9 billion of these funds remain available for expenditure.
- ***Local General Obligation Bonds.*** School districts are authorized to sell general obligation bonds to finance school construction projects with the approval of 55 percent of the voters in the district. These bonds are paid off by taxes on real property located within the district. Over the last ten years, school districts have received voter approval to issue more than $37 billion of general obligation bonds.

Although school facilities have been funded primarily from state and local

ger al obligation bonds, school districts also r eive significant funds from:

- ***Developer Fees.*** State law authorizes school districts to impose developer fees on new construction. These fees are levied on new residential, commercial, and industrial developments. Statewide, school districts report having received an average of over $400 million a year in developer fees over the last decade.
- ***Special Local Bonds (Known as "Mello-Roos" Bonds).*** School districts may form special districts in order to sell bonds for school construction projects. (These special districts generally do not encompass the entire school district.) The bonds, which require two-thirds voter approval, are paid off by charges assessed to property owners in the special district. Statewide, school districts have received on average about $270 million a year in special local bond proceeds over the past ten years.

K-12 School Building Needs. Under the SFP, K-12 school districts must demonstrate the need for new or modernized facilities. Through September 2004, the districts have identified a need to construct new schools to house nearly 1 million pupils and modernize schools for an additional 1.1 million pupils. The state cost to address these needs is estimated to be roughly $16 billion.

Higher Education

California's system of public higher education includes 141 campuses in the three segments listed below, serving about 1.6 million students:

- The CCCs provide instruction to 1.1 million students at 108 campuses operated by 72 locally governed districts throughout the state. The community colleges grant associate degrees and also offer a variety of vocational skill courses.
- The CSU has 23 campuses, with an enrollment of about 331,000 students. The system grants bachelor and master degrees, and a small number of joint doctoral degrees with UC.
- The UC has nine general campuses, one health sciences campus, and various affiliated institutions, with a total enrollment of about 201,000 students. This system offers bachelor, master, and doctoral degrees, and is the primary state-supported agency for conducting research.

Over the past decade, the voters have approved $5.1 billion in general obligation bonds for capital improvements at public higher education campuses. Virtually all of these funds have been committed to specific projects. The state also has provided almost $1.6 billion in lease revenue bonds (authorized by the Legislature) for this same purpose.

In addition to these state bonds, the higher education segments have other sources of funding for capital projects.

FIGURE 1	
PROPOSITION 55 USES OF BOND FUNDS	
	Amount (in Millions)
K-12	
New construction projects	$5,260[a]

N ernization projects	2,250
Critically overcrowded schools	2,440
Joint use	50
Subtotal, K-12	($10,000)[b]
Higher Education	
Community Colleges	$920
California State University	690
University of California	690
Subtotal, Higher Education	($2,300)
TOTAL	$12,300

[a]Up to $300 million available for charter schools.
[b]Up to $20 million available for energy conservation projects.

- ***Local General Obligation Bonds.*** Community college districts are authorized to sell general obligation bonds to finance school construction projects with the approval of 55 percent of the voters in the district. These bonds are paid off by taxes on real property located within the district. Over the last decade, community college districts have received local voter approval to issue over $7 billion of bonds for construction and renovation of facilities.
- ***Gifts and Grants.*** The CSU and UC in recent years together have received on average over $100 million annually in gifts and grants for construction of facilities.
- ***UC Research Revenue.*** The UC finances the construction of new research facilities by selling bonds and pledging future research revenue for their repayment. Currently, UC uses about $130 million a year of research revenue to pay off these bonds.

Higher Education Building Plans. Each year the institutions of higher education prepare capital outlay plans in which they identify project priorities over the next few years. Higher education capital outlay projects in the most recent plans total $5.3 billion for the period 2003-04 through 2007-08.

PROPOSAL

This measure allows the state to issue $12.3 billion of general obligation bonds for construction and renovation of K-12 school facilities ($10 billion) and higher education facilities ($2.3 billion). Figure 1 shows how these bond funds would be allocated to K-12 and higher education.

Future Education Bond Act. If the voters do not approve this measure, state law requires the same bond issue to be placed on the November 2004 ballot.

K-12 School Facilities

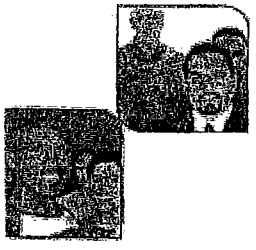


Figure 1 describes generally how the $10 billion for K-12 school projects would be allocated. However, the measure would permit changes in this allocation with the approval of the Legislature and Governor.

New Construction. A total of $5.26 billion would be available to buy land and construct *new* school buildings. A district would be required to pay for 50 percent of costs with local resources unless it qualifies for state hardship

fun[illegible]ng. The measure also provides that up to [illegible]00 million of these new co[illegible]uction funds is available for charter scho[illegible]acilities. (Charter schools are public schools that operate independently of many of the requirements of regular public schools.)

Modernization. The proposition makes $2.25 billion available for the reconstruction or modernization of existing school facilities. Districts would be required to pay 40 percent of project costs from local resources.

Critically Overcrowded Schools. This proposition directs a total of $2.44 billion to districts with schools which are considered critically overcrowded. These funds would go to schools that have a large number of pupils relative to the size of the school site.

Joint-Use Projects. The measure makes a total of $50 million available to fund joint-use projects. (An example of a joint-use project is a facility constructed for use by both a K-12 school district and a local library district.)

Higher Education Facilities

The measure includes $2.3 billion to construct new buildings and related infrastructure, alter existing buildings, and purchase equipment for use in these buildings for California's public higher education systems. As Figure 1 shows, the measure allocates $690 million each to UC and CSU and $920 million to CCCs. The Governor and the Legislature would select the specific projects to be funded by the bond monies.

FISCAL EFFECT

The cost of these bonds would depend on their interest rates and the time period over which they are repaid. If the $12.3 billion in bonds authorized by this proposition is sold at an interest rate of 5.25 percent (the current rate for this type of bond) and repaid over 30 years, the cost over the period would be about $24.7 billion to pay off both the principal ($12.3 billion) and interest ($12.4 billion). The average payment for principal and interest would be about $823 million per year.

Back to Top

EXHIBIT "C"

BUTT V. STATE OF CALIFORNIA (1992)

4 Cal.4th 668; 15 Cal.Rptr.3d 480; 842 P.2d 1240

[No. S020835. Dec. 31, 1992.]

THOMAS K. BUTT et al., Plaintiffs and Respondents, v.
THE STATE OF CALIFORNIA et al., Defendants and Appellants.

SUMMARY

Parents of school children enrolled in a unified school district filed a class action for injunctive relief against the state and the district's board of education, seeking to prevent the district from closing its schools six weeks before the official end of the school year due to a projected revenue shortfall. After granting plaintiffs' motion to amend the complaint to include the state Superintendent of Public Instruction and the state Controller as defendants, the trial court granted plaintiffs' motion for a preliminary injunction, ordering the state and the superintendent to ensure that the schools remained open until the end of the school year or to provide the students with a substantially equivalent educational opportunity. The court subsequently issued another order, pursuant to the superintendent's plan, authorizing the Controller to disburse an emergency loan to the district from unspent portions of appropriations for the Greater Avenues for Independence (GAIN) program and another unified school district, and authorizing the superintendent to relieve the present board, and to develop recovery and repayment plans. The state's appeal from the trial court's orders was transferred from the Court of Appeal to the Supreme Court. (Superior Court of Contra Costa County, No. C91-01645, Ellen Sickles James, Judge.)

The Supreme Court reversed the trial court's second order insofar as it approved funding of an emergency loan from appropriations for the GAIN program and the other school district; in all other respects, the court affirmed the orders, and directed the Court of Appeal to remand the matter to the trial court for further proceedings. The court held that the trial court, in deciding the propriety of a preliminary injunction, did not abuse its discretion in finding that there was a reasonable probability that plaintiffs would succeed on the merits of their case, since the early closure of the district's schools would have deprived the students of their fundamental right to basic equality in public education, and the state was required to intervene to prevent a deprivation of that right. The court also held that the trial court properly found that denial of the preliminary injunction would have caused students and their parents substantial and irreparable harm greater than that which defendants would suffer if the injunction were granted. The court held that

the trial court acted within its equitable powers in ordering the superintendent to displace the board, operate the district, and impose a plan for the district's permanent financial recovery, but that it was improper for the trial court to order the state to extend the loan by using unspent funds from appropriations for the GAIN program and the other school district, since those funds were not "reasonably available" for that purpose. (Opinion by Baxter, J., with Panelli, Arabian and George, JJ., concurring. Separate concurring and dissenting opinions by Lucas, C. J., Mosk and Kennard, JJ.)

HEADNOTES

Classified to California Digest of Official Reports

(1) **Appellate Review § 119—Dismissal—Grounds—Mootness—Exception for Matters of Public Interest—Issues Concerning Injunction Requiring Emergency State Loan to Fund School District.**—On the state's appeal from a preliminary injunction requiring it to extend an emergency loan to a school district so that it could keep its schools open until the end of the school year despite revenue shortfalls, and to implement a recovery plan for the district, some issues were moot due to the fact that a plan had already been implemented and the state did not seek rescission of the loan. Nevertheless, the Supreme Court had discretion to decide the issues, which included whether the state was responsible to ensure the students' fundamental right to basic educational equality and whether the trial court had authority to order a loan from funds the Legislature had appropriated for other purposes, since those issues involved potentially recurring questions of public importance. As to the appropriations issue, there was a substantial possibility that similar crises would produce similar emergency orders in the future, thus favoring review. Moreover, the state had fully litigated the issue, and any mootness stemmed from the Supreme Court's denial of the state's request for a stay pending appeal.

(2) **Injunctions § 21—Preliminary Injunctions—Appeal—Scope of Review.**—Appellate review of a trial court's decision as to whether to issue a preliminary injunction is limited to whether the decision was an abuse of discretion. In deciding whether to issue a preliminary injunction, the trial court must weigh two "interrelated" factors: (1) the likelihood that the moving party will ultimately prevail on the merits, and (2) the relative interim harm to the parties resulting from the issuance or nonissuance of the injunction. The trial court's determination must be guided by a "mix" of the two factors, and the greater the

plaintiff's showing on one, the less must be shown on the other to support an injunction. The scope of available preliminary relief is necessarily limited by the scope of the relief likely to be obtained at a trial on the merits, and the trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim. Thus, unless the potential merit of the claim is conceded, the appellate court must address that issue when reviewing an order granting a preliminary injunction.

(3a-3c) **Schools § 4—School Districts; Financing; Funds—Shortening School Year on Emergency Basis Due to Budget Shortfall—State's Obligation.**—In an action for injunctive relief by parents against the state, two state officials, and the board of education of a school district, seeking to prevent the district from ending the school year six weeks early due to a budget shortfall, the trial court, in granting plaintiffs a preliminary injunction, did not abuse its discretion in finding that there was a reasonable probability that plaintiffs would succeed on the merits of their case. Basic equality in public education for all students, regardless of the district in which they reside, is a fundamental right under the California Constitution, and denials of that right are subject to strict scrutiny. The state has the ultimate responsibility for assuring equal operation of the public school system, and is obliged to intervene when a local district's fiscal problems prevent its students from receiving basic educational equality. Moreover, there was no state policy of local autonomy and accountability at the district level that was compelling enough to justify the state's tolerance of the extreme and unprecedented educational deprivation that would have resulted from the early closure of the district's schools.

[See **Cal.Jur.3d,** Schools, §§ 291, 299.]

(4) **Schools § 1—Legislature's Nondelegable Responsibility Over Public School System.**—Public education is an obligation that the state assumed by adoption of the state Constitution. The public school system, although administered through local districts created by the Legislature, is one system applicable to all of the common schools. In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis. The Legislature's "plenary" power over public education is subject only to constitutional restrictions. Local districts are the state's agents for local operation of the common school system, and the state's ultimate responsibility for public education cannot be delegated to any other entity.

(5) **Constitutional Law § 87.2—Equal Protection—Classification—Judicial Review—Strict Standard of Review for Suspect Classifications or Classifications Touching on Fundamental Interests—Right to Education.**—Under the equal protection clauses of the federal and state Constitutions, heightened judicial scrutiny applies to state-maintained discrimination whenever the disfavored class is suspect or the disparate treatment has a real and appreciable impact on a fundamental right or interest. Education is such a fundamental interest for purposes of equal protection analysis under the California Constitution.

(6) **Schools § 4—School Districts; Financing; Funds—Shortening School Year on Emergency Basis Due to Budget Shortfall—Preliminary Injunction Against State—Balancing Harm to Parents and Students Against Harm to District.**—In an action for injunctive relief by parents against the state, two state officials, and the board of education of a school district to prevent closure of the district's schools six weeks early due to a budget shortfall, the trial court properly found that denial of the parents' motion for a preliminary injunction would have caused district students and their parents substantial and irreparable harm that was greater than that which defendants would suffer if the injunction were granted. Plaintiffs' declarations suggested that the district's inability to complete the school year arose from its ever-worsening fiscal condition and the deterioration of negotiations for emergency aid, and that the teachers' lesson plans did not provide for the contingency of early closure. They also detailed the difficulties of maintaining the educational progress of over 31,000 suddenly displaced students. While plaintiffs may not have demonstrated that "irreparable" harm to students was unavoidable by other means, the trial court's findings both that plaintiffs had a reasonable probability of success on the merits and that they would suffer more harm if an injunction were denied than the state would suffer if it were granted fully justified its decision to grant the preliminary injunction.

(7a, 7b) **Schools § 4—School Districts; Financing; Funds—District in Financial Distress Due to Mismanagement—Trial Court's Equitable Power to Grant Relief—Ordering Superintendent of Public Instruction to Assume Management.**—In an action for injunctive relief by parents against the state, the state Superintendent of Public Instruction, the state Controller, and the board of education of a school district, seeking to prevent the school district from ending the school year six weeks early due to a budget shortfall, the trial court did not exceed its powers in issuing an order, based on a plan submitted by the superintendent and the Controller, authorizing the superintendent to

displace the board, operate the district, and impose a plan for the district's permanent financial recovery. Although no statute gave the superintendent such authority, the takeover order was within the trial court's inherent equitable power to enforce the state's constitutional obligations in light of the unique situation. The state was justified in satisfying its duty by extending a loan with conditions to ensure appropriate use of the funds and minimize the risk of default, especially since the district's ability to administer the loan under its existing systems and managers was uniquely suspect.

(8) **Constitutional Law § 40—Distribution of Governmental Powers—Between Branches of Government—Judicial Power—To Order Discretionary Acts By Executive or Legislature.**—In general, courts have equitable authority to enforce their constitutional judgments. Principles of comity and separation of powers, however, place significant restraints on the authority of courts to order or ratify acts that are normally committed to the discretion of other branches or officials. In particular, the separation of powers doctrine (Cal. Const., art. III, § 3) obliges the judiciary to respect the separate constitutional roles of the Executive and the Legislature. Moreover, a judicial remedy must be tailored to the harm at issue. A court should always strive for the least disruptive remedy that is adequate to its legitimate task.

(9) **Constitutional Law § 40—Distribution of Governmental Powers—Between Branches of Government—Judicial Power—To Order Spending of Legislative Appropriations—Ordering Emergency Loan to School District From Funds Appropriated for Other Educational Purposes.**—In an action for injunctive relief by parents against the state, two state officials, and the board of education of a school district, seeking to prevent the school district from ending the school year six weeks early due to a budget shortfall, the trial court improperly ordered the state to extend the district an emergency loan of $19 million out of unspent funds appropriated for the Greater Avenues for Independence (GAIN) program and for an emergency loan to another school district. The appropriations did not make funds "reasonably available" for the purpose of financing the remainder of the district's school term. GAIN's purpose is to provide employment, adult education, and job training to recipients of public aid. The GAIN appropriation was expressly designated for that program alone, and was not intended to fund the needs of non-GAIN students. Similarly, the emergency loan to the other district was specifically appropriated for that district, with conditions addressed to the circumstances of that case. The funding of the remainder of the district's term was clearly

outside the particular purposes for which the appropriations were reserved.

[See 7 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, §§ 112, 115.]

COUNSEL

Daniel E. Lungren, Attorney General, Robert L. Mukai, Chief Assistant Attorney General, Charlton G. Holland, Assistant Attorney General, D. Robert Shuman, Richard J. Chivaro, Joseph R. Symkowick, Roger D. Wolfertz, Michael E. Hersher, Allan H. Keown and Stuart Biegel for Defendants and Appellants.

Frank R. Calton, Howard P. Abelson, Ronald A. Zumbrun and Anthony T. Caso as Amici Curiae on behalf of Defendants and Appellants.

Eva Paterson, Michael Harris, Morrison & Foerster, Darryl Rains, Arturo J. Gonzalez and Katherine E. Schuelke for Plaintiffs and Respondents.

Beverly Tucker, A. Eugene Huguenin, Jr., Robert Einar Lindquist, Constance de la Vega, Ann Fagan Ginger, Linda Fullerton, Alan L. Schlosser, Edward M. Chen, Matthew A. Coles, Margaret C. Crosby, Richard Briffault, John A. Powell, Helen Hershkoff, Adam S. Cohen, Winslow & Fassler, Martin Fassler, Bunch & Grimes and Michael C. Grimes as Amici Curiae on behalf of Plaintiffs and Respondents.

Robert J. Bezemek as Amicus Curiae.

OPINION

BAXTER. J.—In late April 1991, after a period of mounting deficits, the Richmond Unified School District (District) announced it lacked funds to complete the final six weeks of its 1990-1991 school term. The District proposed to close its doors on May 1, 1991. The Superior Court of Contra Costa County issued a preliminary injunction directing the State of California (State), its Controller, and its Superintendent of Public Instruction (SPI) to ensure that the District's students would receive a full school term or its equivalent. The court approved the SPI's plan for an emergency State loan, and for appointment by the SPI of an administrator to take temporary charge of the District's operation.

We declined to stay implementation of the plan pending the State's appeal. However, we transferred the appeal here in order to decide an important issue of first impression: Whether the State has a constitutional duty, aside from the equal allocation of educational funds, to prevent the budgetary problems of a particular school district from depriving its students of "basic" educational equality.

We affirm the trial court's determination that such a duty exists under the California Constitution. Further, the court did not err in concluding, on the basis of the plaintiffs' preliminary showing, that the particular circumstances of this case demanded immediate State intervention. However, the court exceeded its judicial powers by approving the diversion of emergency loan funds from appropriations clearly intended by the Legislature for other purposes.

FACTS AND PROCEDURAL HISTORY[1]

On April 17, 1991, Thomas K. Butt and other named District parents filed a class action for temporary and permanent injunctive relief against the State and the District's board of education (Board).[2] The complaint alleged as follows: The State is responsible for educating all California children, and the Board is the State's agent for carrying out this responsibility in the District. The scheduled final day of the District's 1990-1991 school term was June 14, 1991, but the District had announced that its 44 elementary, secondary, and adult schools would close on May 1, 1991. The resulting loss of six weeks of instruction would cause serious, irreparable harm to the District's 31,500 students and would deny them their "fundamental right to an effective public education" under the California Constitution. Moreover, as an unjustified discrimination against District students compared to those elsewhere in California, the closure would violate equal protection guarantees of the California and United States Constitutions. Therefore, defendants should be enjoined from closing the District's schools before the scheduled end of the scholastic term.

On April 22, 1991, plaintiffs noticed a motion for preliminary injunction. In an attached declaration, Frank R. Calton, a member of the Board, stated

[1]The State, as appellant, has elected to proceed by way of an appendix in lieu of the clerk's transcript, as permitted by rule 5.1 of the California Rules of Court. Some of the documents contained in the appendix, though they include handwritten filing dates, bear no official file stamps and have no proofs of service attached. However, rule 5.1 expressly allows the use of unofficial conformed copies (subd. (c)(1)) and provides that the filing of an appendix "constitutes a representation by counsel that the appendix consists of true and correct copies of the papers in the superior court file" (subd. (i)(1)). No party having urged otherwise, we adopt that assumption for purposes of this opinion.

[2]The named plaintiffs sued on behalf of themselves, their children, and other parents and students of the District.

that the District projected a revenue shortfall of $23 million for the 1990-1991 academic year and only had sufficient funds to pay its employees through April 1991. Calton declared the District would have to close at the end of April unless new funds were obtained or employees agreed to work for registered warrants in lieu of paychecks. He indicated that the District's efforts to obtain an emergency loan from the State had not yet succeeded, and the District was preparing to file for bankruptcy.

Plaintiffs' motion papers also included declarations by District teachers, academicians in the field of education, and members of the Contra Costa County board of education. These statements detailed the serious disruptive effect the proposed closure would have upon the educational process in the District and upon the quality of education afforded its students.

The motion was heard on April 29, 1991. The Attorney General represented the State in opposition. Counsel for the District represented that the Board's appearance was precluded by an automatic bankruptcy stay. The trial court granted plaintiffs' unopposed motion for amendment of the complaint to include the SPI and the Controller as defendants. Pending applications for intervention and amicus curiae status were not formally granted,[3] but as stipulated by the parties, the court heard argument from the applicants and agreed to consider their briefs.

At the conclusion of the hearing, the trial court ruled orally that under the California Constitution, the State itself is responsible for the "fundamental" educational rights of California students and must remedy a local district's inability to provide its students an education "basically equivalent" to that provided elsewhere in the State. Concluding that the threatened closure would deny the District's students a "constitutionally [equal] education," the court ordered the State and the SPI to act as "they deem appropriate" to ensure that District schools remained open until June 14, 1991, or to provide District students a "substantially equivalent educational opportunity" within the statutory school year ending June 30, 1991.

This oral decision was followed by two written orders filed May 2. One of these, drafted by plaintiffs' counsel, purported to formalize the April 29 ruling. It made findings that closure of District schools by May 1 would cause District students irreparable harm, that the balance of harm favored a preliminary injunction, that education is a "fundamental right" in California,

[3]Applications to appear as amici curiae were submitted by the Richmond Federation of Teachers (RFT) and jointly by the Meiklejohn Civil Liberties Institute, the National Lawyers Guild, and Multi-Cultural Education, Training, and Advocacy, Inc. (collectively Meiklejohn). Complaints in intervention and/or applications for leave to intervene were submitted by the Oakland Unified School District (OUSD), RFT, and United Teachers of Richmond (UTR).

that no "compelling interest" justified denying District students six weeks of instruction available to "every other child in the State," and that plaintiffs' ultimate success on the merits was reasonably probable. The State and its agents again were directed to act "as . . . appropriate" to ensure District students, within the school year ending June 30, 1991, an education "equivalent basically" to that provided elsewhere in California for a full school term. The Controller was added as a State official expressly bound by the court's commands.

On the same day, May 2, the SPI and the Controller submitted their plan for compliance with the preliminary injunction. With counsel for all interested parties present, the court took evidence indicating that uncommitted funds exceeding the estimated $19 million necessary to complete the District's school year were available from existing State appropriations to the Greater Avenues for Independence (GAIN) program and for emergency assistance to the OUSD. Counsel for the OUSD stipulated that his client had "no objection" to use of the $10 million OUSD appropriation for purposes of an emergency loan to the District.

Accordingly, the court executed an order, drafted by counsel for the SPI, approving in principle the submitted plan.[4] The order authorized the Controller to disburse an emergency loan to the District from unspent portions of the GAIN and OUSD appropriations. (See Stats. 1989, ch. 93, § 22.00; Stats. 1989, ch. 1438, § 1 et seq.) Meanwhile, the SPI, by virtue of the State's "ultimate responsibility" for equal education and his own statutory obligation to "superintend the schools of this state" (Ed. Code, § 33112, subd. (a)),[5] would have authority to "relieve the . . . [B]oard of its legal duties and powers, appoint a trustee, develop a recovery plan and, subject to the approval of the Controller, [develop] a repayment plan on the [D]istrict's behalf as necessary" to ensure completion of the school term, the District's financial recovery, and the protection of the loaned funds.[6]

The Attorney General timely noticed appeals from the April 29 and May 2 orders on behalf of the State. Defendants SPI and Controller did not

[4]Though the court's order recites that the SPI and the Controller "presented . . . , after notice to all parties, an agreement" to provide an emergency loan, neither the agreement itself, nor a description of its precise terms, has been made part of the record on appeal.

[5]All further statutory references are to the Education Code unless otherwise indicated.

[6]The preliminary injunction motion was litigated with understandable haste, and evidence of the causes of the District's apparent insolvency was not presented below. On appeal, the SPI invites us to take judicial notice of grand jury findings on this subject which were released after the preliminary injunction was granted. (See The Financial Affairs of the Richmond Unified School District, Rep. of 1990-1991 Contra Costa County Grand Jury (May 29, 1991) [hereafter Report].) Without objection, we may note the Report's contents. (Evid. Code, §§ 452, subds. (c), (d), 455, 459; see *People* v. *Gonzalez* (1990) 51 Cal.3d 1179, 1259, fn. 54 [275 Cal.Rptr. 729, 800 P.2d 1159].) Of course, we cannot accept its findings as evidence or its criticisms of the District and the Board as conclusively founded. We are

appeal. The State immediately requested transfer of the appeal from the Court of Appeal, First Appellate District, to this court (see Cal. Rules of Court, rule 20) and also asked that we stay enforcement of the trial court's orders pending appeal. (1)(See fn. 7.) The SPI and the Controller opposed a stay but supported transfer of the appeal to this court. We granted the transfer request but denied a stay.[7]

DISCUSSION

1. *Standard of review.*

(2) In deciding whether to issue a preliminary injunction, a court must weigh two "interrelated" factors: (1) the likelihood that the moving party

particularly loath to do so when the District and the Board were disabled below from defending against claims of mismanagement and, except for a special appearance at oral argument, have not participated in the appeal.

Nonetheless, we cannot ignore the grand jury's assessment that despite repeated warnings, an earnest but financially inexperienced Board permitted massive, accelerating deficit spending over a period of several years to expand staff, boost salaries and benefits, and support innovative programs installed by the District's former superintendent. (Report, pp. 3-5.) According to the Report, the resulting deficit for the years 1986-1990 was $29.5 million, with an $18.1 million deficit for 1990 alone. (*Id.*, at p. 4.) In 1990, the District had received a State emergency loan exceeding $9 million, in consequence of which a limited-powers trustee appointed by the SPI was overseeing District financial affairs during the 1990-1991 school term. (*Id.*, at p. 5.)

[7]Our denial of a stay allowed implementation of the plan approved by the trial court, and the District's school year was completed. Though the State vigorously contends the court lacked power to invade the GAIN and OUSD appropriations, it does not demand actual rescission of the court-approved loan. Moreover, we judicially notice without objection that in June 1992, the SPI approved a repayment and recovery plan adopted by the District, restored the Board's powers, and terminated the court-authorized appointment of the State administrator. (See Evid. Code, §§ 452, subds. (c), (h), 455, 459.) Although portions of the appeal may therefore be technically moot, we have discretion to decide the issues presented as potentially recurring questions of public importance. (E.g., *O'Hare* v. *Superior Court* (1987) 43 Cal.3d 86, 91, fn. 1 [233 Cal.Rptr. 332, 729 P.2d 766]; *DiGiorgio Fruit Corp.* v. *Dept. of Employment* (1961) 56 Cal.2d 54, 58 [13 Cal.Rptr. 663, 362 P.2d 487]; *People* v. *West Coast Shows, Inc.* (1970) 10 Cal.App.3d 462, 468 [89 Cal.Rptr. 290].)

The Chief Justice objects in particular that we neither must nor should address whether the sources of funding approved by the trial court were proper. However, he fails to indicate why this important and sensitive issue is any more moot, or any less worthy of consideration, than other portions of the trial court's order which have also been irretrievably implemented. Indeed, in these uncertain times, the substantial possibility arises that similar future crises will produce similar emergency orders for immediate diversion of State funds from expedient sources. Hence, contrary to the Chief Justice's suggestion, the issue is one capable of repetition but difficult to review, and this concern favors its prompt consideration under the "public interest" exception to the mootness doctrine. (*DiGiorgio Fruit Corp.*, *supra*, 56 Cal.2d at p. 58.) Moreover, the State has fully litigated the merits of the appropriations issue throughout, and any mootness in this or other aspects of the injunction stems from our denial of the State's request for a stay pending appeal. Under these circumstances, the State should not be penalized on appeal for conceding that State funds already expended by the District cannot practicably be recovered.

will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction. (*Common Cause* v. *Board of Supervisors* (1989) 49 Cal.3d 432, 441-442 [261 Cal.Rptr. 574, 777 P.2d 610].) Appellate review is limited to whether the trial court's decision was an abuse of discretion. (*Cohen* v. *Board of Supervisors* (1985) 40 Cal.3d 277, 286 [219 Cal.Rptr. 467, 707 P.2d 840].)

The trial court's determination must be guided by a "mix" of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction. (*King* v. *Meese* (1987) 43 Cal.3d 1217, 1227-1228 [240 Cal.Rptr. 829, 743 P.2d 889].) Of course, "[t]he scope of available preliminary relief is necessarily limited by the scope of the relief likely to be obtained at trial on the merits." (*Common Cause, supra,* 49 Cal.3d at p. 442.) A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim. (*Id.,* at pp. 442-443.) Unless potential merit is conceded, an appellate court must therefore address that issue when reviewing an order granting a preliminary injunction.

Here, the trial court found that plaintiffs' constitutional demand for State intervention had potential merit, and that the balance of interim harm justified the issuance of a preliminary injunction against the State. For the reasons that follow, we conclude that each of these determinations was within the court's discretion.[8]

2. *Merits of plaintiffs' claims.*

(3a) The trial court expressly found "[t]here is a reasonable probability that plaintiffs will succeed on the merits of their case." The court agreed with plaintiffs' claim that the equal protection guaranties of the California Constitution (art. I, § 7, subds. (a), (b); art. IV, § 16, subd. (a)) require State intervention to ensure that fiscal problems do not deprive a local district's

[8]The State insists that under the circumstances of this case, appellate review should not be limited to whether the trial court "abused its discretion" when weighing "interim" harm and "probable" merit. The State stresses that the unstayed injunction, though preliminary in form, was both final and unprecedented in fact. Accordingly, the State suggests, we must decide, as on appeal from a final judgment, whether plaintiffs were entitled to the relief they received.

We disagree. The abuse-of-discretion standard acknowledges that the propriety of preliminary relief turns upon difficult estimates and predictions from a record which is necessarily truncated and incomplete. Here, the urgency of the situation forced plaintiffs to produce, and the State to rebut, a hasty tentative showing of constitutional necessity. The evidence on which the trial court was forced to act may thus be significantly different from that which would be available after a trial on the merits. Neither the trial court nor this court could undertake a final adjudication of plaintiffs' lawsuit under such circumstances.

students of basic educational equality.[9] The court also accepted plaintiffs' preliminary showing that the effect of the District's crisis on its students' educational rights was serious enough to trigger the State's constitutional duty. The State, supported by amicus curiae Pacific Legal Foundation (Pacific),[10] assails these conclusions on multiple grounds.

At the outset, the State does not claim it lacks any and all constitutional role in local educational affairs. Instead, its reasoning proceeds as follows: The State fulfills its financial responsibility for educational equality by subjecting all local districts, rich and poor, to an equalized statewide revenue base.[11] Unless a district fails to provide the minimum six-month school term set forth in the "free school" clause (Cal. Const., art. IX, § 5),[12] the State has no duty to ensure prudent use of the equalized funds by local administrators. Even if local mismanagement causes one district's services to fall seriously below prevailing statewide standards, the resulting educational inequality is

[9]Article I, section 7, subdivision (a) provides in pertinent part that "[a] person may not be . . . denied equal protection of the laws. . . ." Article I, section 7, subdivision (b) provides in pertinent part that "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. . . ." Article IV, section 16, subdivision (a) provides that "[a]ll laws of a general nature have uniform operation."

[10]The positions adopted by the various parties and numerous amici curiae in this appeal are diverse. The Attorney General, representing the State as defendant and appellant, opposes all aspects of the trial court orders. Though they were joined as defendants below, the SPI and the Controller, deeming themselves "respondents" on appeal, support plaintiffs' view that the orders were proper in all respects. Amicus curiae Pacific supports the State's position. Amici curiae RFT and UTR approve State financial aid but object to displacement of the local governing board by a State administrator. Amici curiae Frank R. Calton and Howard P. Abelson urge that the Board acted correctly by deciding to close District schools and should not have been displaced. Calton and Abelson also suggest the injunction was improper because the Board had no opportunity to appear and defend against claims of mismanagement. Amici curiae Mario Diaz and Rebecca Hazlewood Bezemek (Diaz and Bezemek) take no position on State financial assistance but argue that the SPI's takeover of District government was improper. Amicus curiae briefs in support of plaintiffs have been filed by the American Civil Liberties Union Foundation, Human Rights Advocates, and Meiklejohn.

[11]The funding scheme for public education is complex, but no party disputes the summary description provided in the State's brief: "The Legislature has attempted to equalize school district funding . . . by the use of a 'base revenue limit' for each district. Each district is classified by size and type. ([Ed.] Code, [§] 42238.) Based upon this classification scheme, each district has a 'base revenue limit' per unit of average daily attendance. The base revenue limit for any district includes the amount of property tax revenues a district can raise, with other specific local revenues, coupled with an equalization payment by the State, thus bringing each district into a rough equivalency of revenues. (Compare [Cal. Code Regs., tit. 5, [§] 15371, *et seq.*[; Ed.] Code [§] 42238 et seq.) [¶] Because the student population is so diverse, the Legislature had to supplement the base revenue limit with specific augmentations targeted for categories of children with needs that require special attention. These supplements are designated as 'categorical' aid. . . ."

[12]Article IX, section 5 provides: "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established."

not grounded in district wealth, nor does it involve a "suspect classification" such as race. Thus, "strict scrutiny" of the disparity is not required, and the State's refusal to intervene must be upheld as rationally related to its policy of local control and accountability. Even if strict scrutiny is appropriate, the local-control policy is "compelling" enough to justify the State's inaction.

Under the unprecedented circumstances of this case, we cannot accept the State's contentions. We set forth our reasons in detail.

Since its admission to the Union, California has assumed specific responsibility for a statewide public education system open on equal terms to all. The Constitution of 1849 directed the Legislature to "provide for a system of common schools, by which a school shall be kept up and supported in each district . . . ." (Cal. Const. of 1849, art. IX, § 3.) That constitutional command, with the additional proviso that the school maintained by each district be "free," has persisted to the present day. (Cal. Const., art. IX, § 5.)

In furtherance of the State system of free public education, the Constitution also creates State and county educational offices, including a Superintendent of Public Instruction and a State Board of Education. (Cal. Const., art. IX, §§ 2-3.3, 7.) It authorizes the formation of local school districts (*id.*, §§ 6½, 14), requires that all public elementary and secondary schools be administered within the Public School System (*id.*, § 6), establishes a State School Fund (Fund) (*id.*, § 4), reserves a minimum portion of State revenues for allocation to the Fund (*id.*, art. XVI, §§ 8, 8.5), guarantees minimum allocations from the Fund for each public school (*id.*, art. IX, § 6), specifies minimum salaries for public school teachers (*ibid.*), authorizes the State Board of Education to approve public school textbooks (*id.*, § 7.5), and permits the Legislature to grant local districts such authority over their affairs as does not "conflict with the laws and purposes for which school districts are established" (*id.*, § 14).

(4) Accordingly, California courts have adhered to the following principles: Public education is an obligation which the State assumed by the adoption of the Constitution. (*San Francisco Unified School Dist.* v. *Johnson* (1971) 3 Cal.3d 937, 951-952 [92 Cal.Rptr. 309, 479 P.2d 669]; *Piper* v. *Big Pine School Dist.* (1924) 193 Cal. 664, 669 [226 P. 926].) The system of public schools, although administered through local districts created by the Legislature, is "*one* system . . . applicable to all the common schools . . . ." (*Kennedy* v. *Miller* (1893) 97 Cal. 429, 432 [32 P. 558], italics in original.) ". . . In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis. . . ." (*Jackson* v.

Pasadena City School Dist. (1963) 59 Cal.2d 876, 880 [31 Cal.Rptr. 606, 382 P.2d 878].) "[M]anagement and control of the public schools [is] a matter of state[, not local,] care and supervision. . . ." (*Kennedy* v. *Miller, supra*, 97 Cal. at p. 431; see also *Hall* v. *City of Taft* (1956) 47 Cal.2d 177, 181 [302 P.2d 574]; *California Teachers Assn.* v. *Huff* (1992) 5 Cal.App.4th 1513, 1523-1524 [7 Cal.Rptr.2d 699].) The Legislature's "plenary" power over public education is subject only to constitutional restrictions. (*Hall* v. *City of Taft, supra*, at pp. 180-181 [302 P.2d 574]; *Tinsley* v. *Palo Alto Unified School Dist.* (1979) 91 Cal.App.3d 871, 903-904 [154 Cal.Rptr. 591].) Local districts are the State's agents for local operation of the common school system (*Hall* v. *City of Taft, supra*, at p. 181; *San Francisco Unified School Dist.* v. *Johnson, supra*, 3 Cal.3d at p. 952; *California Teachers Assn., supra*), and the State's ultimate responsibility for public education cannot be delegated to any other entity (*Hall* v. *City of Taft, supra*; *Piper* v. *Big Pine School Dist., supra*, 193 Cal. at p. 669).

(3b) It is true that the Legislature has assigned much of the governance of the public schools to the local districts (e.g., §§ 14000, 35160 et seq., 35160.1), which operate under officials who are locally elected and appointed (§§ 35020, 35100 et seq.). The districts are separate political entities for some purposes. (E.g., *Johnson* v. *San Diego Unified School Dist.* (1990) 217 Cal.App.3d 692, 698-700 [266 Cal.Rptr. 187] [general theory of respondeat superior does not make State liable for torts of local district or its employees]; *Gonzales* v. *State of California* (1972) 29 Cal.App.3d 585, 590-592 [105 Cal.Rptr. 804] [same]; *First Interstate Bank* v. *State of California* (1987) 197 Cal.App.3d 627, 633-634 [243 Cal.Rptr. 8] [State not vicariously liable for district's breach of contract]; *Board of Education* v. *Calderon* (1973) 35 Cal.App.3d 490, 496 [110 Cal.Rptr. 916] [local district is not the "state" or the "People," so as to be civilly bound in dismissal proceedings by teacher's acquittal of criminal sex offense under principles of res judicata].)

Yet the existence of this local-district system has not prevented recognition that the State itself has broad responsibility to ensure basic educational equality under the California Constitution. Because access to a public education is a uniquely fundamental personal interest in California, our courts have consistently found that the State charter accords broader rights against State-maintained educational discrimination than does federal law. Despite contrary federal authority, California constitutional principles require State assistance to correct basic "interdistrict" disparities in the system of common schools, even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents.

In *Serrano* v. *Priest* (1971) 5 Cal.3d 584 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187] (*Serrano I*), this court struck down the existing State

public school financing scheme, which caused the amount of basic revenues per pupil to vary substantially among the respective districts depending on their taxable property values. *Serrano I* concluded at length that such a scheme violated both state and federal equal protection guaranties because it discriminated against a fundamental interest—education—on the basis of a suspect classification—district wealth—and could not be justified by a compelling state interest under the strict scrutiny test thus applicable. (Pp. 596-619.) As the court concluded, "where fundamental rights *or* suspect classifications are at stake, a state's general freedom to discriminate on a geographical basis will be significantly curtailed by the equal protection clause. [Citation.]" (P. 612, italics added.)

Among other things, *Serrano I* rejected a claim that the wealth-based financing scheme was immune from challenge because the interdistrict revenue disparities it produced were not de jure, but merely de facto. Our opinion detailed the purposeful state legislative action which had produced the geographically based wealth classifications. It also made clear, however, that under California principles developed in cases involving school racial segregation, the absence of purposeful conduct by the State would not prevent a finding that the State system for funding public education had produced unconstitutional results. (*Serrano I, supra*, 5 Cal.3d at pp. 603-604, citing *Jackson* v. *Pasadena City School Dist., supra*, 59 Cal.2d 876, 881.)

Serrano I also discussed two groups of federal cases suggesting that place of residence was an impermissible basis for State discrimination in the quality of education. *Serrano I* cited with approval *Hall* v. *St. Helena Parish School Board* (E.D.La. 1961) 197 F.Supp. 649. This federal decision struck down a Louisiana statute permitting local parishes to close their schools rather than integrate them. As *Serrano I* noted, *Hall* v. *St. Helena Parish* found an equal protection violation not only because of the statute's racial consequences, but also " 'because its application in one parish, while the state provides public schools elsewhere, would unfairly discriminate against the residents of that parish, irrespective of race. . . . [A]bsent a reasonable basis for so classifying, a state cannot close the public schools in one area while, at the same time, it maintains schools elsewhere with public funds.' " (*Serrano I, supra*, 5 Cal.3d at p. 612, quoting *Hall* v. *St. Helena Parish, supra*, 197 F. Supp. at pp. 651, 656.)

Serrano I further noted a "second group of cases, dealing with apportionment [of votes], [in which] the high court has held that accidents of geography and arbitrary boundary lines of local government can afford no ground for discrimination among a state's citizens. [Citation.] . . . If a voter's address may not determine the weight to which his ballot is entitled,

surely it should not determine the quality of his child's education. [Fn.]" (*Serrano I, supra*, 5 Cal.3d at p. 613.)

Finally, *Serrano I* rejected the State's claim that plaintiffs' wealth-discrimination theory would apply equally, and with disastrous effect, to all public services dependent in part on local property taxes. "[W]e are satisfied," the majority concluded, that whatever the status of other public services, "its uniqueness among public activities clearly demonstrates that *education* must respond to the command of the equal protection clause." (*Serrano I, supra*, 5 Cal.3d at p. 614, italics in original.)

In *San Antonio School District* v. *Rodriguez* (1973) 411 U.S. 1 [36 L.Ed.2d 16, 93 S.Ct. 1278], decided after *Serrano I*, the United States Supreme Court declined to subject Texas's similar local-property-tax based school financing scheme to heightened scrutiny under the Fourteenth Amendment. The *Rodriguez* majority concluded that a school finance scheme dependent on district tax values does not discriminate against the poor as a distinct class; in any event, the majority observed, wealth alone had never been deemed a suspect classification for federal purposes. Moreover, the majority reasoned, education is not a fundamental interest protected by the federal Constitution. Therefore finding the strict scrutiny standard of review inapplicable, the majority upheld Texas's system as rationally related to that state's policy of local control of schools. (411 U.S. at pp. 18-55.)

Nonetheless, in *Serrano* v. *Priest* (1976) 18 Cal.3d 728 [135 Cal.Rptr. 345, 557 P.2d 929] (*Serrano II*), this court reaffirmed the reasoning and result of *Serrano I* as required by the separate equal protection guaranties of the California Constitution. (*Serrano II, supra*, 18 Cal.3d at pp. 760-768.) Among other things, *Serrano II* reiterated that for California purposes, education remains a fundamental interest "which [lies] at the core of our free and representative form of government [fn.] . . . ." (*Id.*, at pp. 767-768.)

Hence, *Serrano II* declared, "[i]n applying our state constitutional provisions guaranteeing equal protection of the laws we shall continue to apply strict and searching judicial scrutiny" to claims of discriminatory educational classifications. (*Serrano II, supra*, at p. 767.) More recent cases confirm that education is a fundamental interest under the California equal protection guaranties (e.g., *Steffes* v. *California Interscholastic Federation* (1986) 176 Cal.App.3d 739, 746 [222 Cal.Rptr. 355]) and that the unique importance of public education in California's constitutional scheme requires careful scrutiny of state interference with basic educational rights (see, e.g., *Hartzell* v. *Connell* (1984) 35 Cal.3d 899, 906-909 [201 Cal.Rptr. 601, 679 P.2d 35] [scope of free school guarantee]).

In *Tinsley* v. *Palo Alto Unified School Dist.*, *supra*, 91 Cal.App.3d 871, parents sought mandate requiring several neighboring San Mateo and Santa Clara County school districts, the State, and certain State school officials, to submit a plan for the redress of interdistrict racial segregation in the affected locality. The petitioners declined to allege any specific acts committed by State or local parties as the cause of the interdistrict imbalance.

The State respondents answered the petition, but the districts successfully demurred, and the petition was dismissed as to them. The Court of Appeal reversed, holding that the California Constitution, unlike its federal counterpart as construed in *Milliken* v. *Bradley* (1974) 418 U.S. 717 [41 L.Ed.2d 1069, 94 S.Ct. 3112], contemplates interdistrict relief to remedy mere de facto racial imbalance which extends across district lines. (*Tinsley*, *supra*, 91 Cal.App.3d at pp. 899-907.) Several aspects of the *Tinsley* decision emphasize the State's ultimate responsibility for maintaining a nondiscriminatory common school system.

At the outset, the districts asserted that an appeal was premature under the "one final judgment" rule, because as mere agencies of the State, which had not demurred, they had no separate legal interests which an appeal from their dismissal could finally resolve. The Court of Appeal observed that if the districts' claim of mere agency was correct, any relief ordered against the State would necessarily affect them, and the judgment dismissing them from the action should therefore be reversed. In any event, the court concluded, the premise of identical interests did not bear scrutiny, because while "[t]he local districts, as agents, may have limited powers in interdistrict affairs, . . . the state . . . has plenary powers in all school district affairs. . . ." (*Tinsley*, *supra*, 91 Cal.App.3d at pp. 880-881.)

Turning to the merits, *Tinsley* dismissed the majority reasoning in *Milliken* insofar as based on the federal rule, long rejected in California (see *Crawford* v. *Board of Education* (1976) 17 Cal.3d 280 [130 Cal.Rptr. 724, 551 P.2d 28]; *Jackson* v. *Pasadena City School Dist.*, *supra*, 59 Cal.2d 876), that only de jure racial segregation is a constitutional violation. (*Tinsley*, *supra*, 91 Cal.App.3d at p. 903.) *Tinsley* also distinguished the *Milliken* majority's concern that it "would disrupt and alter" Michigan's entrenched system of local control of schools to impose an interdistrict remedy for Detroit city school segregation without proof that the state or affected suburban districts had engaged in intentional segregative conduct. The *Tinsley* court noted, among other things, that in California, the State shares responsibility with "the local entities it has created" to provide "equal educational opportunity

to the youth of the state" and "has a duty to intervene to prevent unconstitutional discrimination" in its schools. (*Id.*, at pp. 903-904.)[13]

It therefore appears well settled that the California Constitution makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students of particular districts. The State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity.

The State claims it need only ensure the six-month minimum term guaranteed by the free school clause (Cal. Const., art. IX, § 5). This contention, however, misconstrues the basis of the trial court's decision. Whatever the requirements of the free school guaranty, the equal protection clause precludes the State from maintaining its common school system in a manner that denies the students of one district an education basically equivalent to that provided elsewhere throughout the State.

The State argues that even if the District's fiscal problems threatened its students' basic educational equality, any State duty to redress the discrimination must be judged under the most lenient standard of equal protection review. The State reasons as follows: Plaintiffs do not claim discrimination on the suspect basis of race. Nor is wealth-based discrimination at issue; as all parties concede, the District received the full benefit of the equalized funding system mandated by our *Serrano* decisions. At most, plaintiffs assert that a misuse of equalized funds by the District's officials caused a geographical disparity in service. Because residence and geography are not suspect classifications, the State's failure to prevent educational discrimination on those grounds is not subject to strict scrutiny. Rather, State inaction must be accepted as rationally related to the legitimate State policy of local control of schools.

(5) However, both federal and California decisions make clear that heightened scrutiny applies to State-maintained discrimination whenever the

[13]In November 1979, the voters adopted a Senate amendment to the California Constitution's equal protection clause, article I, section 7, subdivision (a). The amendment declares that nothing in the California Constitution imposes upon the State, or any local district or official, any obligations beyond those imposed by the Fourteenth Amendment of the United States Constitution "with respect to the use of pupil school assignment or pupil transportation." The amendment further forbids California courts from imposing any school-assignment or pupil-transportation obligation except when a violation of the Fourteenth Amendment has occurred, and unless a federal court could impose such a remedy for the violation. Whatever effect this amendment may have on *Tinsley*'s result, it does not affect consistent interpretations of the California equal protection guaranty where, as here, assignment or transportation of students is not at issue.

disfavored class is suspect *or* the disparate treatment has a real and appreciable impact on a fundamental right or interest. (*Plyler* v. *Doe* (1982) 457 U.S. 202, 216-217 [72 L.Ed.2d 786, 102 S.Ct. 2382]; *Shapiro* v. *Thompson* (1969) 394 U.S. 618, 634 [22 L.Ed.2d 600, 614-615, 89 S.Ct. 1322]; *Darces* v. *Woods* (1984) 35 Cal.3d 871, 885, 888 [201 Cal.Rptr. 807, 679 P.2d 458]; *Fair Political Practices Com.* v. *Superior Court* (1979) 25 Cal.3d 33, 47 [157 Cal.Rptr. 855, 599 P.2d 46]; *Serrano II, supra*, 18 Cal.3d 728, 761, 767-768; *Weber* v. *City Council* (1973) 9 Cal.3d 950, 959 [109 Cal.Rptr. 553, 513 P.2d 601]; *Serrano I, supra*, 5 Cal.3d 584, 597; *Westbrook* v. *Mihaly* (1970) 2 Cal.3d 765, 784-785 [87 Cal.Rptr. 839, 471 P.2d 487].) As we have seen, education is such a fundamental interest for purposes of equal protection analysis under the California Constitution.

(3c) The State suggests there was no showing that the impact of the threatened closure on District students' fundamental right to basic educational equality was real and appreciable. Of course, the Constitution does not prohibit all disparities in educational quality or service. Despite extensive State regulation and standardization (see discussion, *post*), the experience offered by our vast and diverse public school system undoubtedly differs to a considerable degree among districts, schools, and individual students. These distinctions arise from inevitable variances in local programs, philosophies, and conditions. "[A] requirement that [the State] provide [strictly] 'equal' educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. . . ." (*Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley* (1982) 458 U.S. 176, 198 [73 L.Ed.2d 690, 707, 102 S.Ct. 3034].) Moreover, principles of equal protection have never required the State to remedy all ills or eliminate all variances in service.

Accordingly, the California Constitution does not guarantee uniformity of term length for its own sake. While the current statutory system for allocating State educational funds strongly encourages a term of at least 175 days (see fn. 14, *post*, at p. 687), that system is not constitutionally based and is subject to change. In an uncertain future, local districts, faced with mounting fiscal pressures, may be forced to seek creative ways to gain maximum educational benefit from limited resources. In such circumstances, a planned reduction of overall term length might be compensated by other means, such as extended daily hours, more intensive lesson plans, summer sessions, volunteer programs, and the like. An individual district's efforts in this regard are entitled to considerable deference.

Even unplanned truncation of the intended school term will not necessarily constitute a denial of "basic" educational equality. A finding of constitutional disparity depends on the individual facts. Unless the actual quality

of the district's program, viewed as a whole, falls fundamentally below prevailing statewide standards, no constitutional violation occurs.

Here, however, plaintiffs' preliminary showing suggested that closure of the District's schools on May 1, 1991, would cause an extreme and unprecedented disparity in educational service and progress. District students faced the sudden loss of the final six weeks, or almost one-fifth, of the standard school term originally intended by the District and provided everywhere else in California.[14] The record indicates that the decision to close early was a desperate, unplanned response to the District's impending insolvency and the impasse in negotiations for further emergency State aid.[15] Several District teachers declared that they were operating on standard-term lesson schedules made at the beginning of the school year. These declarants outlined in detail how the proposed early closure would prevent them from completing instruction and grading essential for academic promotion, high school graduation, and college entrance.[16] Faced with evidence of such extensive educational disruption, the trial court did not abuse its discretion

[14]The trial court record contains no evidence of the prevailing term length in California, but the parties assumed below that a minimum term of 175 days prevails, and no dispute has arisen on the issue here. The statutes provide that an established local district may not receive any part of its annual apportionment from the State School Fund if it failed to remain in session at least 175 days during the most recent fiscal year, unless specified circumstances excusing the failure are established to the satisfaction of the SPI. (§§ 41420, subd. (a), 41422.) In an appendix to his brief, the SPI provides copies of local district certifications, submitted to the SPI as a condition of funding under section 41420, which indicate that virtually every established school district in California operated for at least 175 days during the 1990-1991 school year. The SPI asks us to take judicial notice of this information. Having received no objection, we do so. (Evid. Code, §§ 452, subds. (c), (h), 455, 459.)

[15]The declaration of Board member Calton, dated April 12, 1991, detailed the District's growing financial woes and stated the following: ". . . The District has only enough money to pay its employees through April 1991 [even under the most favorable accounting assumptions]. . . . Unless (a) additional funds are received, or (b) employees are willing to work for registered warrants, not redeemable checks, the District will have no alternative but to close all of its public schools at the end of April 1991. [¶] . . . The District has applied to the State of California for a loan, but that request has not been approved. It is my understanding that [collective bargaining concessions demanded by the State] have not been made, although negotiations are continuing. The District has retained bankruptcy counsel, . . . and is preparing to file for bankruptcy prior to April 30, 1991, if necessary."

[16]For example, John Enos, a high school government/economics teacher, stated that early termination of his required senior government class would eliminate intended lessons covering the State's executive and judicial branches, and county and local government. Geoffrey Cantrell, a high school mathematics teacher, stated that if the District closed early, Algebra I students would miss essential instruction in quadratic equations; Algebra II students would miss essential instruction in trigonometry; and geometry students would miss lessons in coordinate systems, logical proof, and trigonometric ratios. Craig Brammer, another high school mathematics teacher who also teaches a preparatory course for the Scholastic Aptitude Test (SAT), opined that loss of six weeks' instruction would severely impair his students' chances on the mathematics portion of the SAT. Betty Jean Crenshaw, a teacher of first-year languages, declared that early closure would prevent students from learning vocabulary and

by concluding that the proposed closure would have a real and appreciable impact on the affected students' fundamental California right to basic educational equality.

The State asserts that its financial obligation to equal education is limited to the equalized system of interdistrict funding required by our *Serrano* decisions. Once revenues are fairly apportioned at the beginning of each school year, the State insists, it cannot be constitutionally liable for how local officials manage the funds.

Nothing in the *Serrano* cases themselves, or in other California decisions, supports the State's argument. On the contrary, the cases suggest that the State's responsibility for basic equality in its system of common schools extends beyond the detached role of fair funder or fair legislator. In extreme circumstances at least, the State "has a duty to intervene to prevent unconstitutional discrimination" at the local level. (*Tinsley*, *supra*, 91 Cal.App.3d at p. 904.)

The State's most vigorous contention is that its nonintervention should have been upheld even under the strict scrutiny standard of equal protection analysis. Allowing the District's students to absorb the consequences of District mismanagement, the State urges, was necessary to preserve the State's compelling educational policy of local autonomy and accountability. However, the State fails to demonstrate a policy of local control so compelling as to justify State tolerance of the extreme local educational deprivation at issue here.

In the first place, the local-district system of school administration, though recognized by the Constitution and deeply rooted in tradition, is not a constitutional mandate, but a legislative choice. (See Cal. Const., art. IX, §§ 6½, 14.) The Constitution has always vested "plenary" power over education not in the districts, but in the State, through its Legislature, which may create, dissolve, combine, modify, and regulate local districts at pleasure. (See *Tinsley*, *supra*, 91 Cal.App.3d at p. 904.) The legislative decision

grammar necessary for advancement to second-year courses. Amy Shinsako, a first grade teacher, stated that early closure would prevent instruction in phonics, reading comprehension, creative writing, handwriting skills, two-digit addition and subtraction, and addition with three addends, all necessary for advancement to the second grade. Several declarants noted that failure to complete the term would prevent the scheduling of final examinations and other term-end projects crucial to the assignment of final grades. Other declarants detailed the difficulties District students would face if forced to transfer to other districts to complete the year's studies. They also noted that unless graduating seniors completed required courses and received final grades, the District might not be able to award high school diplomas, any diplomas awarded would be "stigmatized," and the ability of departing seniors to qualify for college admission might be seriously compromised.

to emphasize local administration does not end the State's constitutional responsibility for basic equality in the operation of its common school system. Nor does disagreement with the fiscal practices of a local district outweigh the rights of its blameless students to basic educational equality.

Moreover, though the Constitution and statutes encourage maximum local program and spending authority consistent with State law (Cal. Const., art. IX, § 14; Ed. Code, §§ 14000, 35160, 35160.1), the degree of supervision voluntarily retained by the State over the common school system is high indeed. The volume and scope of State regulation indicate the pervasive role the State itself has chosen to assume in order to ensure a fair, high quality public education for all California students.

School finance aside, the statutes address at length such matters as county and district organization, elections, and governance (§§ 4000-5450, 35000-35780); educational programs, instructional materials, and proficiency testing (§§ 51000-62008); sex discrimination and affirmative action (§§ 40-41, 200-263, 44100-44105); admission standards (§§ 48000-48053); compulsory attendance (§§ 48200-48416); school facilities (§§ 39000-40048); rights and responsibilities of students and parents (§§ 48900-49079); holidays (§§ 37220-37223); school health, safety, and nutrition (§§ 32000-32254, 49300-49570); teacher credentialing and certification (§§ 44200-44481); rights and duties of public school employees (§§ 44000-44104, 44800-45460; see also Gov. Code §§ 3540-3549.3 [organizational and bargaining rights]); and the pension system for public school teachers (§§ 22000-24924). The statutory scheme has spawned further voluminous regulations administered by the State's Department of Education and the SPI. (Cal. Code Regs., tit. 5, §§ 1-23005.) This long-established level of State involvement in the public education system undermines any claim that local control is a paramount and compelling State policy for all purposes.

Nor is there any indication that the State has had a compelling policy of absolute budgetary freedom and responsibility for local districts. On the contrary, during the years in which the District's deficit developed, districts were required to adopt budgets meeting State standards, and to submit them for oversight and approval by county and State authorities. (§§ 33127, former §§ 42120-42129.) Failure to adopt a conforming budget precluded State or county funding of the district (former § 42128), and a district was required to operate under its most recent approved budget (former § 42127.4).

The State argues that by saddling the District with long-term debt to cover short-term operations, the trial court's orders undermine the District's future

financial health and compromise its ability to provide basic educational equivalency in years to come. The State also urges that other districts will feel free to overspend if encouraged to believe in the availability of State relief.

These are indeed troubling concerns, but we cannot accept the implication that the State deems them compelling. In fact, the State itself has endorsed a policy of emergency conditional loan assistance to districts in financial difficulty.

Under statutes in effect since 1977, distressed districts may, through the SPI, seek specific legislative apportionments for emergency loans. (§§ 41310, 41310.5, 41320 et seq.) As a condition of such aid, a district must prepare a financial recovery plan and obtain approval of the plan from the county superintendent and the SPI. (§ 41320.) The district must also accept a temporary SPI-appointed trustee with veto power over financially significant actions of the local governing board. (§ 41320.1.)

The District itself had received a $9,525,000 conditional State loan under this program in spring 1990 (Stats. 1990, ch. 171, § 3), and its operations were already being monitored by a State trustee at the time closure of District schools was threatened in April 1991. The 1989 Legislature had also appropriated $10 million for a similar emergency loan-with-trustee to the OUSD. (Stats. 1989, ch. 1438, §§ 1-11.) Under these circumstances, the State cannot claim it follows a compelling policy of local control by declining to intervene when financial adversity threatens a district's operations.

Shortly before this lawsuit began, the District faced the prospect of further legislative intervention in its crisis. Assembly Bill No. 128, 1991-1992 Regular Session (A.B. 128), as introduced in December 1990 and thereafter amended, would have appropriated an additional $29 million for emergency loans to the District. Acceptance of the proposed loan would have subjected the District to unprecedented restrictions on self-government. These included a temporary takeover of all District affairs by an SPI-appointed administrator pending approval and implementation of a plan for financial recovery and loan repayment. The administrator would have had broad power, among others, to unilaterally determine wages and benefits for all District employees who, as of April 29, 1991, were not covered by ratified collective bargaining agreements meeting the requirements of an approved recovery plan. (A.B. 128, Sen. Amend. of Jan. 18, 1991, §§ 2, 5.)

A.B. 128 failed passage, but that fact does not suggest a compelling policy against emergency State financial assistance to a local district. On the

contrary, the State has forged into the realm of emergency assistance and control, using the "specific appropriation" requirement (§ 41320) to decide on a case-by-case basis whether, and on what terms, it will intervene.

The State claims that emergency assistance to mismanaged districts contravenes the compelling principle of equalized funding established in our *Serrano* decisions. As we have seen, however, nothing in the *Serrano* cases, which addressed wealth-based disparities in district revenues, prohibits emergency State assistance to a particular district which is experiencing financial difficulties despite its receipt of equalized funding.[17]

Finally, nothing in our analysis is intended to immunize local school officials from accountability for mismanagement, or to suggest that they may indulge in fiscal irresponsibility without penalty. The State is constitutionally free to legislate against any recurrence of the Richmond crisis. It may further tighten budgetary oversight, impose prudent, nondiscriminatory conditions on emergency State aid, and authorize intervention by State education officials to stabilize the management of local districts whose imprudent policies have threatened their fiscal integrity. To the extent such conditions compromise local autonomy and mortgage a district's future, they are not calculated to persuade local officials or their constituents that mismanagement and profligacy will be rewarded.

Indeed, in response to this case, the Legislature and the Governor have already agreed to tighter county and State control of local district budgets and spending.[18] Under certain circumstances, this new legislation *requires* the SPI's complete takeover of an insolvent district as a precondition of an

[17]The *Serrano* decisions themselves, as well as the subsequent adoption of Proposition 13, have exacerbated the need for occasional emergency State intervention by restricting one aspect of local control—the power of local districts to tax themselves out of financial crises. Our *Serrano* opinions condemned the former dependence of school finance on local ad valorem property taxes, because, as a practical matter, however willing a local district might be to increase taxes for education, "districts with small [real property] tax bases simply cannot levy taxes at a rate sufficient to produce the revenue that more affluent districts reap with minimal tax efforts. . . ." (*Serrano I, supra*, 5 Cal.3d 584, 598.) In obedience to *Serrano* principles, the current system of public school finance largely eliminates the ability of local districts, rich or poor, to increase local ad valorem property taxes to fund current operations at a level exceeding their State-equalized revenue per average daily attendance. (§ 42238 et seq.) Moreover, Proposition 13 places a general ceiling on the ad valorem property taxes which may be levied on behalf of local governments and school districts. (Cal. Const., art. XIII A, § 1.)

[18]Legislation adopted in 1991 provides, among other things, that if a local district's proposed budget fails to win final county and State approval, the county superintendent of schools shall adopt a governing budget for the district which permits the district to meet current and "multiyear" commitments. The county superintendent may rescind any district action or payment which is inconsistent with the county superintendent's budget, except those

emergency State appropriation.[19] Thus, the State has already made vast inroads on the principle that local control is paramount to State intervention in an insolvent district's affairs. The State's plenary power over education includes ample means to discourage future mismanagement in the day-to-day operations of local districts.

In sum, the California Constitution guarantees "basic" equality in public education, regardless of district residence. Because education is a fundamental interest in California, denials of basic educational equality on the basis of district residence are subject to strict scrutiny. The State is the entity with ultimate responsibility for equal operation of the common school system. Accordingly, the State is obliged to intervene when a local district's fiscal problems would otherwise deny its students basic educational equality, unless the State can demonstrate a compelling reason for failing to do so.

The preliminary facts before the trial court support the inference that the District's impending failure to complete the final six weeks of its scheduled school term would cause educational disruption sufficient to deprive District students of basic educational equality. The State has identified no compelling interest which negated its duty to intervene. We therefore find no abuse of discretion in the trial court's conclusion that plaintiffs' constitutional claims had potential merit.[20]

3. *Interim harm.*

The trial court also expressly concluded that plaintiffs, District students and their parents, would suffer "substantial and irreparable harm" if a preliminary injunction were denied. This harm, the court further found,

in performance of a previously effective collective bargaining agreement. (§ 42127.3, subd. (b)(1), as amended by Stats. 1991, ch. 1213, § 18.) The county superintendent must also monitor all local budgets continuously to ensure that each district can meet its financial obligations for the current and ensuing fiscal years. A county superintendent's determination that a district will be unable to meet its obligations triggers a process which may culminate in forced revisions to the district's budget and rescission of actions, other than collective bargaining obligations, which are inconsistent with the revisions. (§ 42127.6, added by Stats. 1991, ch. 1213, § 20.)

[19]New sections 41325 through 41327 provide that when a local district accepts an emergency appropriation more than twice the size of its State-recommended reserve, the SPI must take control of the district for at least two fiscal years, assume all duties and powers of the local governing board, fire district officials who took no action to avert insolvency, impose a recovery plan including a ten-year repayment schedule, and remain in control until satisfied that local compliance with recovery requirements is probable.

[20]Our conclusion that the trial court's finding of probable merit is supported by the equal protection clauses of the California Constitution makes it unnecessary to address claims that a State duty of intervention may also have arisen under the "free school" clause or the Fourteenth Amendment.

would be "greater . . . than defendants will suffer if the injunction is granted."

These determinations were based upon the uncontradicted declarations of District teachers, local and regional public school officials, and academic specialists in the field of public education. Besides detailing the severe and immediate academic disruption which would arise from the pending closure (see discussion, *ante*, fn. 16, at p. 687), these declarations set forth at length the "ripple" effect on District parents and students. For example, the declarations recounted, working parents, including the high percentage of needy families in the District, would be faced with expensive child care for the lost school hours; difficult efforts would be required to obtain other placement of the students for the remainder of the year; and special-need students would lose carefully nurtured progress.

The State submitted no evidence that it would suffer comparable or greater harm by offering emergency loan assistance necessary to ensure completion of the District's academic program for 1990-1991. Instead, the State simply argued that court-ordered State aid would damage the State's public school policies of local control and accountability.

(6) The State nonetheless claims plaintiffs' "interim harm" showing was inadequate as a matter of law. In the State's view, plaintiffs' declarations failed to establish that the early closure was unforeseeable, or to explain persuasively why any adverse effects on student progress could not be ameliorated.

We find the trial court's interim-harm findings amply supported. As previously noted, plaintiffs' preliminary showing suggested that the District's inability to complete its school year arose from its ever-worsening fiscal condition and from the deterioration of its negotiations for emergency aid. The declarations of District teachers uniformly indicated that their lesson plans did not provide for the contingency of early closure. Other declarations detailed the difficulties of alternate arrangements to maintain the educational progress of over 31,000 suddenly displaced District students, who included high school seniors poised for graduation. The court could reasonably infer that orderly planning to minimize the resulting educational disruption had not taken place and was not realistically possible.

In any event, the court was not obliged to deny a preliminary injunction simply because plaintiffs failed to demonstrate that "irreparable" harm to students was unavoidable by other means. The preliminary record properly convinced the court *both* that plaintiffs had a reasonable probability of

success on the merits, *and* that they would suffer more harm in the meantime if an injunction were denied than the State would suffer if it were granted. This "mix" of the "interrelated" relevant factors fully justified the court's decision to grant the injunction. (See *Common Cause* v. *Board of Supervisors*, *supra*, 49 Cal.3d at pp. 441-442; *King* v. *Meese*, *supra*, 43 Cal.3d at p. 1227.) No error appears.

4. *Scope of remedial order.*

In orders dated April 29, 1991, and May 2, 1991, the trial court directed the State, the SPI, and the Controller to ensure "by whatever means they deem appropriate" that District students would receive their educational rights; both orders made clear that "[h]ow these defendants accomplish this is up to the discretion of defendants. . . ." When no other State official proposed a solution, the SPI and the Controller, on May 2, 1991, offered a conditional loan plan for approval by the court.

After a hearing on that day, the court found that $19 million in aid funds proposed by the SPI and the Controller were presently available, and the court authorized the Controller to apportion such funds as an emergency loan to the District. The court further determined that, given the State's obligation to provide an equal education, the SPI's statutory authority to "[s]uperintend the schools of this state" (§ 33112, subd. (a)), and the "unique" emergency circumstances, "the [SPI] . . . has authority to relieve the [Board] of its legal duties and powers, appoint a trustee, develop a recovery plan and, subject to the approval of the Controller, [develop] a repayment plan on the [D]istrict's behalf as necessary to ensure the operation of the schools through June 14, 1991, the financial recovery of the [D]istrict, and the protection of State funds loaned to the [D]istrict."

(7a) The State and several amici curiae contend that even if the trial court could require State intervention to prevent violation of the District students' constitutional rights, there was no legal or equitable basis for the court's order authorizing the SPI to displace the Board, operate the District through his own administrator, and impose a plan for the District's permanent financial recovery. Under the circumstances presented by this case, however, we conclude that this portion of the court's order did not exceed its powers.

We agree that the statutes themselves provided no direct authority for the approach taken by the trial court. In general, though they act as regulated State agents, local governing boards are vested by statute with immediate jurisdiction over day-to-day district affairs. (§§ 14000, 35000 et seq.) The

SPI has important statutory responsibilities for allocating school funds (§§ 33118, 14000 et seq.), monitoring local budgets (§§ 42120 et seq., 41450), and administering the conditions of emergency loans *appropriated by the Legislature* (§§ 41310, 41320 et seq.; see also § 41325 et seq.), but no statute grants him emergency powers to operate a local district under other circumstances.[21]

The court relied in part on section 33112, subdivision (a), which provides that the SPI shall "[s]uperintend the schools of this state." But no case has interpreted this statute to vest the SPI with nonexpress powers, and an older decision construed similar language narrowly against a county superintendent. (*McKenzie* v. *Board of Education* (1905) 1 Cal.App. 406, 409 [82 P. 392].) Indeed, counsel for the SPI conceded in the trial court that the SPI had no statutory authority to take over the District's government.

The trial court also believed its takeover order was within its inherent equitable power to enforce the State's constitutional obligations in light of the "unique emergency financial conditions" presented by the case. In the court's view, ratification of all loan conditions proposed by the SPI was necessary to ensure the District's continued operation through June 14, 1991, promote its permanent financial recovery, and protect the loan itself. We agree.

(8) In general, courts have equitable authority to enforce their constitutional judgments. (E.g., *Crawford* v. *Board of Education*, *supra*, 17 Cal.3d 280, 308.) Of course, principles of comity and separation of powers place significant restraints on courts' authority to order or ratify acts normally committed to the discretion of other branches or officials. (*Common Cause* v. *Board of Supervisors*, *supra*, 49 Cal.3d 432, 445-446; *Mandel* v. *Myers* (1981) 29 Cal.3d 531, 540 [174 Cal.Rptr. 841, 629 P.2d 935]; *Serrano II*, *supra*, 18 Cal.3d 728, 751; *Crawford* v. *Board of Education*, *supra*, 17 Cal.3d at pp. 305-306; cf. *Missouri* v. *Jenkins* (1990) 495 U.S. 33, 50-58 [109 L.Ed.2d 31, 53-59, 110 S.Ct. 1651].) In particular, the separation of powers doctrine (Cal. Const., art. III, § 3) obliges the judiciary to respect the separate constitutional roles of the Executive and the Legislature.

Moreover, a judicial remedy must be tailored to the harm at issue. (E.g., *Sheet Metal Workers* v. *EEOC* (1986) 478 U.S. 421, 476 [92 L.Ed.2d 344, 388, 106 S.Ct. 3019]; *Dayton Board of Education* v. *Brinkman* (1977) 433

[21] A.B. 128 would have granted the SPI powers of this magnitude over the District, but the bill failed passage. (See discussion, *ante*, at p. 690.) 1991 statutory amendments call for the SPI's takeover of districts that accept large emergency insolvency *appropriations* (§ 41325 et seq.; see discussion, *ante*, fn. 18 at p. 691), but even after 1991, the SPI has no such statutory authority *independent* of a specific insolvency appropriation by the Legislature.

U.S. 406, 420 [53 L.Ed.2d 851, 863-864, 97 S.Ct. 2766].) A court should always strive for the least disruptive remedy adequate to its legitimate task.

(7b) The trial court's remedial order in this case fell within proper boundaries. Having correctly held the State constitutionally responsible for the students' rights, the court could not deny the State and its officials effective means of fulfilling its obligation. Under the circumstances, the court was warranted in authorizing temporary transfer to the SPI of the Board's statutory powers over District affairs.

The emergency the court confronted on May 2, 1991, demanded a prompt State-assisted solution to prevent immediate closure of the District's schools. The State was justified in satisfying its constitutional duty of aid by extending a loan that would impose the ultimate consequences of the District's self-created predicament upon the District, rather than upon the State, its taxpayers, and the students of other districts. The State was also entitled to conditions on the loan that would ensure its appropriate use for the intended constitutional purpose, and would minimize the risk of the District's default in repayment.

The District's ability to administer the new loan under its existing systems and managers was uniquely suspect. As a matter of public record, the District's worsening financial situation had recently led the Legislature to provide a loan in excess of $9 million. A limited-powers State trustee appointed to monitor the District's fiscal affairs in connection with that loan had not been able to stem a growing District deficit estimated by one declarant, a member of the Board, to exceed $23 million for the 1990-1991 school year alone. In response to these difficulties, the Board had caused the District to seek bankruptcy protection against its existing creditors.

As counsel for the SPI explained on April 29, 1991, the District's unprecedented financial collapse indicated systemic management problems. Hence, counsel reported, the SPI considered it foolhardy to extend further substantial State credit to the District unless its management was placed in competent hands, its administrative practices were reformed and restructured from the outside, and a long-term plan for its financial recovery was imposed.[22] On behalf of the State, the Attorney General contested the legality of vesting such extraordinary powers in the SPI, but no party disputed the logic of the SPI's position.

[22]The following colloquy occurred between the court and counsel for the SPI: "[¶] MR. HERSHER [SPI's counsel]: . . . [The SPI] does not want to make . . . 20 to 30 million dollars in state funds available to a district that has already demonstrated substantial financial irresponsibility. It's pouring state money into a hole and it's never going to come back out. [¶] THE COURT: Would he want to do that if the State was given the responsibility for running the district as you suggested? [¶] MR. HERSHER: I believe so. I think what Bill Honig sees is that

Nor can we. Given the emergency circumstances, and under the extreme and aggravated conditions disclosed by the evidence, the court below could properly conclude that orderly completion of the District's 1990-1991 school term, and the sound financing essential to achieve that end, required temporary displacement of the sitting Board and the operation of the District by the SPI's designee for the purpose of stabilizing its financial affairs.[23] We conclude that the order approving temporary takeover of the District by the SPI was within the court's inherent equitable power to remedy the constitutional crisis.[24]

5. *Source of loan funds.*

In order to obtain the necessary $19 million in emergency loan funds, the trial court authorized the Controller to disburse (1) $9 million of unspent funds from a special contingency appropriation to the Department of Education for the GAIN program, and (2) the unused $10 million appropriated as an emergency loan to the OUSD. (9) The State and amicus curiae Pacific argue that because the Legislature had not earmarked either of these sums

the District has to be reorganized. The financial management of the District needs to be completely restructured, and there needs to be a long-term recovery plan . . . . [I]t has always been [the SPI's] position that somebody needs to . . . take over the District, come up with a long-term plan in which all the creditors of the District suffer equally or equitably."

[23]Amici curiae Diaz and Bezemek ask us to receive additional evidence and make findings about the SPI's record as administrator of the District after May 2, 1991. Among other things, Diaz and Bezemek allege that the SPI's administrator has withdrawn the District's bankruptcy petition, dismantled essential programs, failed to reappoint a citizens' advisory committee, restructured the District's administration, dismissed faculty and counselors, obstructed reorganization of the District's existing debt, imposed an unconscionable interest rate on the court-approved loan, and diverted educational funds to debt repayment. Diaz and Bezemek claim this evidence supports their contention that the SPI's governance of the District presents an inherent conflict between his role as protector of State-loaned funds and his duty to restore the District to financial and educational health.

Appellate courts have limited powers to take evidence and find facts in nonjury civil cases. (Cal. Const., art. VI, § 11; Code Civ. Proc., § 909; Cal. Rules of Court, rule 23(b).) However, the matters Diaz and Bezemek seek to present are beyond the scope of this lawsuit and unnecessary to our analysis. Moreover, Diaz and Bezemek concede the proffered evidence is disputed; appellate courts will not resolve such factual conflicts. (E.g., *In re Marriage of Davis* (1983) 141 Cal.App.3d 71, 75-76 [190 Cal.Rptr. 104]; see *McCracken* v. *Teets* (1953) 41 Cal.2d 648, 653 [262 P.2d 561].) We therefore deny the motion.

[24]The State argues that even if extraordinary judicial interference in the District's affairs was necessary to guarantee the constitutional rights of District students, the court erred by granting the SPI extralegal "discretion" to act rather than assuming control over the District itself, with the SPI as the court's appointed agent. The State cites no authority for its proposition that the court's remedial options were so narrowly confined. The remedial order of May 2, 1991, makes clear that the authority therein accorded the SPI flows from a direct and critical exercise of the court's equitable power and jurisdiction over the constitutional dispute. The order laudably minimizes direct judicial involvement in matters best left to officials with specific responsibilities and expertise in education, but its effect is no different than if it had expressly made the SPI a court functionary. We find no error.

for purposes "reasonably related" to resolving the District's financial crisis, the court improperly invaded the nonjudicial power of appropriation.

We agree. In a valid exercise of its constitutional powers, the Legislature had directed each of these sums to specific agencies and narrow purposes which did not include the District and its financial emergency. Hence, the Legislature had not made these funds reasonably available for disbursement to the District. By diverting the funds from their earmarked destinations and purposes, the court invaded the Legislature's constitutional authority.

Article III, section 3 of the Califonia Constitution provides that "[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Article XVI, section 7 provides that "[m]oney may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant." Article IV, sections 10 and 12 set forth the respective powers of the Legislature and Governor over the enactment of appropriations. It has long been clear that these separation-of-powers principles limit judicial authority over appropriations. (*Myers* v. *English* (1858) 9 Cal. 341, 349; see *Westinghouse Electric Co.* v. *Chambers* (1915) 169 Cal. 131, 135 [145 P. 1025]; *California State Employees' Assn.* v. *Flournoy* (1973) 32 Cal.App.3d 219, 234 [108 Cal.Rptr. 251]; see also *Payne* v. *Superior Court* (1976) 17 Cal.3d 908, 920, fn. 6 [132 Cal.Rptr. 405, 553 P.2d 565].)

In certain narrow circumstances, California courts have concluded that judicial orders for the disbursement of appropriated funds do not invade valid legislative functions. *Mandel* v. *Myers*, *supra*, 29 Cal.3d 531, is the only decision by this court which found judicial power to "commandeer" appropriated funds. The facts and analysis of that case demonstrate the strict limits on the judicial authority it recognized.

The plaintiff in *Mandel*, a Department of Health Services (DHS) worker, had prevailed in litigation challenging DHS's practice of allowing paid employee leave on Good Friday. The judgment against the State included an award of attorney fees. However, the Legislature removed appropriations for payment from successive claims and budget bills, including the 1978-1979 Budget Act (Act). The Act included the usual appropriation to DHS for "general operating expenses and equipment," which expressly included expenses for "services" and "all other proper purposes." Such "catchall" budget categories for State agencies had traditionally been used to pay agency legal expenses. However, the Act expressly precluded use of any appropriation therein "to achieve any purpose which has been denied by any formal action of the Legislature."

We upheld the trial court's order that the Controller pay the fee award from the general operating budget of DHS. We noted first that the "catchall" appropriation was "reasonably" or "generally" available for payment of legal expenses incurred by DHS, because the broad terms of the appropriation, as well as its historical uses, indicated such a legislative intent. In effect, we concluded that the Legislature had voluntarily made an appropriation for payments of this general kind. (*Mandel* v. *Myers*, *supra*, 29 Cal.3d at pp. 539-545.)

We further explained that, once having made an appropriation generally available, the Legislature may not impose specific restrictions which are unconstitutionally discriminatory, or which constitute an impermissible legislative attempt to readjudicate the merits of a final court judgment. Hence, we reasoned, the Legislature's attempt to avoid payment of the *Mandel* award in particular must be struck down. The DHS "catchall" appropriation thus remained "available" under its general terms for payment of the judgment. (*Mandel* v. *Myers*, *supra*, 29 Cal.3d at pp. 545-551.)

Subsequent Court of Appeal decisions adhered to these principles of *Mandel*. In *Serrano* v. *Priest* (1982) 131 Cal.App.3d 188 [182 Cal.Rptr. 387], attorneys who had won the school-finance class action sought judicial help after the State rebuffed their informal efforts to collect a court-ordered fee award. After *Mandel* was decided, the State conceded that the trial court had properly ordered payment from a "catchall" appropriation to the Department of Education, the SPI, and the State Board of Education for "operating expenses and equipment." (Pp. 197-198.) In *Committee to Defend Reproductive Rights* v. *Cory* (1982) 132 Cal.App.3d 852 [183 Cal.Rptr. 475], the court concluded, after disregarding an unconstitutional budget act provision against use of Medi-Cal funds for abortions (see *Committee to Defend Reproductive Rights* v. *Myers* (1981) 29 Cal.3d 252 [172 Cal.Rptr. 866, 625 P.2d 779, 20 A.L.R.4th 1118]), that abortion funding could be ordered from monies appropriated for other Medi-Cal pregnancy services. (132 Cal.App.3d at pp. 857-858.)

Plaintiffs and the SPI suggest that two more recent Court of Appeal decisions, *Long Beach Unified Sch. Dist.* v. *State of California* (1990) 225 Cal.App.3d 155 [275 Cal.Rptr. 449] and *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521 [234 Cal.Rptr. 795], have expanded *Mandel*'s concept of "reasonable [or] general availability." The trial court in the instant case apparently relied on these decisions to conclude that it could divert the GAIN and OUSD appropriations to the District because they were "generally related" to education.

Long Beach and *Carmel Valley* do make occasional use of the term "generally related" to describe *Mandel*'s principle of reasonable or general

"availability." (See *Long Beach*, *supra*, 225 Cal.App.3d at p. 181; *Carmel Valley*, *supra*, 190 Cal.App.3d at p. 541.) But nothing in those cases supports the trial court's apparent view that funds appropriated for one specific educational purpose may be judicially diverted to another. So far as the face of the opinions discloses, the stated intent of the target appropriation in each case, or its historical uses, indicated that the court's application of the funds was plausibly within purposes the Legislature might have contemplated.[25] No court has suggested that *Mandel* principles permit court-ordered diversion of an appropriation away from a clear, narrow, and valid purpose specified by the Legislature. We affirm that the words "generally related," as used in *Long Beach* and *Carmel Valley*, do not countenance such judicial incursions into the legislative power over appropriations.[26]

The instant trial court misapplied *Mandel* when it authorized the diversion of appropriated funds from the specific purposes and programs for which the Legislature had validly earmarked them. Nine million dollars was taken from an appropriation in the 1989-1990 Budget Act for the GAIN program. (Stats. 1989, ch. 93, § 22.00.) GAIN's purpose is to provide employment, adult

[25]In *Carmel Valley*, the Court of Appeal struck down budgetary language which had been inserted to foreclose the constitutionally required reimbursement of local agencies for expenses incurred in upgrading firefighter protective clothing as mandated by the State. (See Cal. Const., art. XIII B, § 6.) After disregarding these unconstitutional restrictions, the Court of Appeal quite logically determined that funds appropriated to the Department of Industrial Relations for Program 40, the Prevention of Industrial Injuries and Deaths of California Workers, were available for this expense. (*Carmel Valley*, *supra*, 190 Cal.App.3d at p. 541.) In *Long Beach*, a local school district sought reimbursement for the State-mandated expenses of developing desegregation programs. After the Legislature deleted an appropriation for this purpose from the 1985-1986 budget bill, the district obtained a trial court order for reimbursement from specified line-item accounts related to education, and from the general operating budget of the Department of Education, which had mandated the programs. The Court of Appeal affirmed on grounds that the record substantially supported the trial court's order. As the Court of Appeal explained, these and similar accounts had historically been used to support programs such as the one for which reimbursement was sought, and were logical sources of funding for this specific purpose. (*Long Beach*, *supra*, 225 Cal.App.3d at pp. 181-182; see also p. 185.)

[26]We are aware that in *Missouri* v. *Jenkins*, *supra*, 495 U.S. 33, the United States Supreme Court upheld the power of federal courts to order local tax levies to enforce judicial remedies for unconstitutional school segregation. However, even if the federal Constitution permits federal courts to impose far-reaching remedies for State government violations of federal constitutional rights, it does not follow that California courts are exempt from the constraints imposed by the California Constitution upon their power to invade the functions of a coequal branch of State government.

Indeed, the California Constitution's separation of powers clause precludes any branch from usurping or improperly interfering with the essential operations of either of the other two branches. (See Cal. Const., art. IV, § 1 [legislative power]; Cal. Const., art. V, § 1 [executive power]; Cal. Const., art. VI, § 1 [judicial power].) Nothing in this opinion should be interpreted as sanctioning or immunizing such unconstitutional interference, or as addressing the question of the appropriate remedies that may be invoked in the event one branch improperly impinges on the essential operations of a coequal branch.

education, and job training to recipients of public assistance. (Welf. & Inst. Code, § 11320 et seq.) Local school districts can receive GAIN funds for adult education and training classes (*id.*, §§ 11320.8, 11322, 11323), and the Legislature intended that the 1989-1990 GAIN appropriation might include such funding subject to strict conditions (see Stats. 1989, ch. 93, § 22.00, subd. (b)). However, this appropriation was expressly designated for that program alone and was not intended to fund the needs of non-GAIN students. Nothing in the trial court's order restricted use of the GAIN-derived funds to uses contemplated by the appropriation.

Similar considerations govern the remaining $10 million of the emergency loan, which was derived from the 1989 Legislature's special appropriation for the OUSD. This appropriation, by its express terms, was "for the purpose of an emergency loan *to* [*that*] [*d*]*istrict* in compliance with Article 2 (commencing with Section 41320) of Chapter 3 of Part 24 of the Education Code." (Stats. 1989, ch. 1438, § 1, italics added.)

Section 41310 expresses the intent that emergency loans to distressed districts under section 41320 et seq. not occur "unless funds have been *specifically* appropriated *therefor* by the Legislature." (Italics added.) The statutory scheme imposes detailed conditions on emergency loans granted under its auspices (§§ 41320.1-41323), and the Legislature further refined the conditions on the OUSD appropriation to address the particular circumstances of that case (Stats. 1989, ch. 1438, §§ 2-9).

When it makes an appropriation to a specific district, under specific conditions addressed to the problems of that district, the Legislature clearly intends and contemplates that the appropriation will only be used for that purpose, and under those conditions. Hence, the appropriation is not reasonably available for court-ordered diversion to another district under different conditions.

The trial court, understandably anxious to resolve the crisis, concluded that it could fund its order from any monies previously appropriated "for a purpose that is reasonably related to educational purposes." The court found that the GAIN and OUSD appropriations were "reasonably related to the State's obligation to keep the Richmond schools open through June 14, 1991 . . . ."

As we have seen, however, the test of reasonable availability under *Mandel* does not extend to uses clearly outside the particular purpose for which an appropriation was reserved. The GAIN and OUSD appropriations were earmarked for purposes entirely distinct from the subject matter of this

lawsuit.[27] They were not reasonably available for court diversion to finance the remainder of the District's school term.

In her concurring and dissenting opinion, Justice Kennard claims that by flatly disclaiming judicial power to divert appropriations from the purposes specified by the Legislature, we adopt a "formalistic" and outmoded view of the separation of powers. Citing language from two United States Supreme Court decisions (*Mistretta* v. *United States* (1989) 488 U.S. 361 [102 L.Ed.2d 714, 109 S.Ct. 647]; *Nixon* v. *Administrator of General Services* (1977) 433 U.S. 425 [53 L.Ed.2d 867, 97 S.Ct. 2777]), she proposes that interbranch conflicts of this kind be resolved under a "pragmatic" and "flexible" case-by-case balancing test, in which the derogation of one branch's powers by another may be warranted to promote overriding objectives within the "constitutional authority" of the latter. Because both the OUSD and GAIN appropriations were "generally related" to elementary and secondary education, she reasons, diversion of these funds to the District was not a "great" or "extreme" intrusion upon the appropriations power, and the court's action was justified by its constitutional responsibility to District students.

We cannot accept these contentions. Our adherence to *Mandel* can hardly be deemed rigid or formalistic; our decision in that case strained to find a practical, sensitive, and principled balance between legislative and judicial power over appropriations. In effect, Justice Kennard urges abandonment of *Mandel*'s careful analysis in favor of a rule giving the judiciary unchecked power to override the valid budgetary acts of coequal branches.

However, nothing in the California or federal cases on which Justice Kennard relies even hints that a court may *nullify* a *specific and valid exercise* by the Legislature and the Executive of fundamental budgetary powers explicitly entrusted to those branches, simply for the purpose of

[27]No party or amicus curiae suggests that the purposes specified by the Legislature for these two appropriations were "improper or invalid . . . restriction[s]" on their use which may be disregarded by the courts. (*Mandel* v. *Myers*, *supra*, 29 Cal.3d at p. 542.) This is not a case where the Legislature, in defiance of the Constitution or the judicial branch, had prohibited use of appropriations for particular purposes to which they would otherwise logically extend.

We recognize that, at the May 2 hearing, counsel for the OUSD indicated his client had "no objection" to diversion of its loan appropriation for the court's purposes. The OUSD's position may not have been entirely altruistic; on April 29, counsel had committed the OUSD to accepting an influx of displaced District students but expressed concern about the disruption such a solution would cause. Even if the OUSD believed that diversion of its appropriation was in its own best interests, however, the OUSD could not unilaterally alter the terms and conditions the Legislature had imposed on the appropriation. Moreover, the OUSD's waiver was conditional; counsel made clear that the OUSD reserved its right to demand refunding of the OUSD appropriation "if and when [the OUSD] chooses to exercise its rights to request a loan from the state of [$]10 million at any time up until June 30, 1993."

satisfying a judgment or order that is *unrelated* to the appropriation. (Compare, e.g., *Mistretta* v. *United States*, *supra*, 488 U.S. 361, 380-384 [102 L.Ed.2d 714, 735-738] [Congress's creation of United States Sentencing Commission, a judicial-branch agency charged with establishing mandatory federal sentencing guidelines, did not usurp authority of individual judicial officers or grant forbidden legislative power to judicial branch]; *Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. 425, 441-446 [53 L.Ed.2d 867, 889-893] [legislation vesting Administrator of General Services with limited control over presidential papers of resigned chief executive did not undermine authority of executive branch]; *Wilson* v. *Eu* (1991) 54 Cal.3d 471, 473 [286 Cal.Rptr. 280, 816 P.2d 1306] [Legislature's failure to reapportion justifies judicial adoption of reapportionment plan]; *Davis* v. *Municipal Court* (1988) 46 Cal.3d 64, 72-87 [249 Cal.Rptr. 300, 757 P.2d 11] [District attorney's statutory power to disapprove local misdemeanor-diversion program was not improper delegation of legislative authority; prosecutor's absolute discretion to prevent diversion by charging "wobbler" as felony did not constitute forbidden judicial power]; *Younger* v. *Superior Court* (1978) 21 Cal.3d 102, 115-118 [145 Cal.Rptr. 674, 577 P.2d 1014] [statute requiring Department of Justice to destroy individual's marijuana arrest and conviction records upon application after sentence is complete did not create impermissible conflict with executive clemency powers].)

The balance proposed by Justice Kennard in this case would elevate the judiciary above its coequal brethren, upset the delicate system of checks and balances, and stand the separation of powers clause on its head. Applying *Mandel*'s well-settled principles, we remain satisfied that the trial court acted in excess of its authority when it funded the District's loan with appropriations specifically earmarked by the Legislature for other purposes.[28]

CONCLUSION AND DISPOSITION

The District's financial inability to complete the final six weeks of its 1990-1991 school term threatened to deprive District students of their

[28]Although the instant record is silent on the point, Justice Kennard worries that there *may* have been no unearmarked educational appropriations available to enforce this trial court's order. She suggests further that such funds *may* also not be available under current laws and budgetary constraints to permit judicial enforcement of students' constitutional rights in similar future cases. These concerns have no practical effect in the instant lawsuit, because the State does not seek rescission of the District's loan, and the educational rights of the District's students are secure. In any event, we cannot overlook the fact that the urgency of the District's crisis denied the Legislature any opportunity to respond to the trial court's injunctive order. Once alerted by the trial court's constitutional ruling, however, the Legislature and the Governor have taken significant steps to prevent or remedy recurrences of the District's crisis. We may not assume they will fail or refuse to respond as necessary to our final determination of the State's constitutional responsibilities.

California constitutional right to basic educational equality with other public school students in this State. As the court further concluded, discrimination of this nature against education, a fundamental interest, could only be justified as necessary to serve a compelling interest. The State itself, as the entity with plenary constitutional responsibility for operation of the common school system, had a duty to protect District students against loss of their right to basic educational equality. Local control of public schools was not a compelling interest which would justify the State's failure to intervene.

The trial court thus properly ordered the State and its officials to protect the students' rights. The court also acted within its remedial powers by authorizing the SPI to assume control of the District's affairs, relieve the Board of its duties, and supervise the District's financial recovery. However, the court invaded the exclusive legislative power of appropriation by approving the diversion of appropriations for GAIN and the OUSD to an emergency loan for the District.

Accordingly, we reverse the trial court's remedial order of May 2, 1991, insofar as it approves funding of an emergency loan to the District from appropriations for the Oakland Unified School District and the Greater Avenues for Independence program. In all other respects, the court's orders of April 29 and May 2, 1991, are affirmed. The Court of Appeal is directed to remand the cause to the trial court for such further proceedings as may be appropriate under the views expressed in this opinion.

Panelli, J., Arabian, J., and George, J., concurred.

LUCAS, C. J., Concurring and Dissenting.—I concur with the majority's conclusions regarding the constitutional obligations of the State of California (State) to assure educational equality. I would not, however, address the propriety of the sources approved by the trial court to provide an emergency loan.

In my view, we need not consider questions regarding the use of the Oakland Unified School District (OUSD) emergency appropriation or the unused appropriation for the Greater Avenues for Independence (GAIN) program because the issues are moot and their resolution will have no impact on the status quo in this case. As the majority notes, at the May 2, 1991, proceeding, the State continued to object to the trial court's order arising out of the April 29, 1991, hearing. That order required the State, Superintendent of Public Instruction (SPI) and Controller, at their discretion and "by whatever means they deem appropriate," to ensure Richmond students were not deprived of six weeks of education provided to other students within California. In addition to renewing its basic position on the merits of the

constitutional arguments, the State also objected to use of the specific funds proposed by the SPI and Controller. It offered no alternative sources of funding and appealed from both orders.

Before us, however, the State does not demand rescission of the court-approved loan or any change in the status of that funding. The funding was granted as a loan and a loan repayment agreement has been worked out by the parties. The State, acknowledging those facts, expressly asserts "We do not argue that the Controller must be compelled immediately to recover the money." In other words, it seeks no relief from the trial court's order granting payment from the challenged sources and compelling repayment of the funds under a prescribed repayment schedule.

Accordingly, as the SPI observes, the matter is moot. The State's response, found in its reply brief, is only that "the trial court in the next case will still be guided by, unless this court disapproves the test, the 'generally related' test set forth in *Carmel Valley [Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 540-541 (234 Cal.Rptr. 795)] and *Long Beach [Unified Sch. Dist.* v. *State of California* (1990) 225 Cal.App.3d 155, 181-182 (275 Cal.Rptr. 449)]." It does not assert that this issue is capable of evading review because of timing or that a present controversy over the use of these particular funds still exists. Instead, it seeks guidance only for the future. I would decline to render what would essentially be an advisory opinion here. (See *People* ex rel. *Lynch* v. *Superior Court* (1970) 1 Cal.3d 910, 912 [83 Cal.Rptr. 670, 464 P.2d 126] ["The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court"].)

MOSK, J., Concurring and Dissenting.—I am in general agreement with the views expressed in Justice Kennard's concurring and dissenting opinion.

However, I cannot embrace the ill-advised concession that the trial court's order "did pose a potential for disruption of a function of the legislative branch" although the degree of potential disruption "is not great" and the purported infringement on the legislative function is "not substantial." (Kennard, J., *post,* conc. and dis. opn. at pp. 710, 711.)

The theory of potential interference with legislative functions to any extent is inconsistent with the ultimate conclusion that the funds used for the emergency loan were "reasonably related" to the educational purposes of the legislation, and, indeed, "the trial court's order furthered, rather than defeated, that valid legislative purpose." As persuasively observed in footnote 2, the "funds were appropriated for purposes reasonably and closely related

to the purpose for which the trial court ordered them to be used." (Kennard, J., *post*, conc. and dis. opn. at p. 711.)

Under the foregoing circumstances—with which I agree—there cannot be some conceptual interference, even though "not great," with the functions of the legislative branch.

With that caveat, I join the concurring and dissenting opinion.

KENNARD, J., Concurring and Dissenting.—I agree with the majority that the threatened closure of the schools of the Richmond Unified School District (District) was such an extreme departure from prevailing educational standards as to infringe on the students' state constitutional rights to basic educational equality, requiring the State of California (State) to intervene to protect those rights.

I do not agree, however, that the trial court violated the separation of powers doctrine by ordering that emergency loan funds be made available from an unused special appropriation to the Department of Education and an unused emergency appropriation to the Oakland Unified School District (OUSD). The majority has, in effect, declared that although the students' right to education is fundamental, no means may exist by which our judicial system can enforce that right. In my view, the trial court's order was an appropriate and pragmatic resolution of a difficult case under extreme pressure. Because the Legislature had already appropriated the funds in question for educational purposes reasonably related to the District's needs, I discern no constitutional violation, and would affirm the trial court's orders in their entirety.

I

On April 17, 1991, the District, facing a $23 million budgetary shortfall, announced its schools would close on May 1, 1991, rather than as scheduled on June 14, 1991. Parents of students in the District's schools then filed a class action against the State and the District's board of education, alleging the closure would deprive children of their fundamental right to education and would violate equal protection guarantees. The trial court granted plaintiffs' motion for a preliminary injunction, finding that "education is a fundamental right in California [and] unless injunctive relief is granted children in the District will be denied six weeks of instruction that will be provided to every other child in the State." The trial court ordered the State, the Superintendent of Public Instruction (Superintendent), and the State Controller "to ensure that the students in the District are not deprived of six

weeks of public education while others within the state are not so deprived." The trial court added that "how these defendants accomplish this is up to the discretion of the defendants."

Thereafter, the Superintendent and the Controller proposed a plan to keep the schools open. They proposed that $19 million in unspent funds from two educational programs—from the Greater Avenues for Independence (GAIN) program and from an appropriation to the OUSD—be loaned to the District. After an evidentiary hearing, the trial court ordered the State Controller to disburse an emergency loan to the District from these funds. This court denied the State's motion to stay the order pending appeal, but transferred the case here.

II

The majority holds that the trial court's remedial order violated the doctrine of separation of powers. Essentially, the majority reasons that by ordering that the unused funds be loaned to the District, the trial court impermissibly engaged in the appropriation of funds, an area of exclusive legislative concern.

The majority's conclusion originates from a fundamental misunderstanding of the separation of powers doctrine. Implicit in the majority's discussion is the assumption that under our tripartite scheme of government, particular powers can be definitively categorized as belonging to one of the three branches, and that these powers can never be exercised by a branch other than the designated branch. Thus, under the majority's approach, appropriation is exclusively a legislative function, and unless the Legislature has either appropriated funds for a specific purpose, or made a "catchall" appropriation under which a specific use of funds may fall, funds are simply not available for any purpose, no matter what rights are at stake.

This formalistic interpretation of the separation of powers concept is, however, contrary to modern understanding. The opinions of the United States Supreme Court, although not binding on this court in interpreting the separation of powers principles of the California Constitution, supply a persuasive body of case authority. Just as our state Constitution provides for the separation of the powers of government into three branches (Cal. Const., art. III, § 3), so does the federal Constitution segregate the branches of government (U.S. Const., art. I, § 1, art. II, § 1, & art. III, § 1).

The United States Supreme Court has "squarely rejected the argument that the Constitution contemplates a complete division of authority between the

three branches." (*Nixon* v. *Administrator of General Services* (1977) 433 U.S. 425, 443 [53 L.Ed.2d 867, 891, 97 S.Ct. 2777].) Rather than reading the federal Constitution as " 'requiring three airtight departments of government,' " the high court has adopted a "pragmatic, flexible approach." (*Id.* at pp. 443, 442 [53 L.Ed.2d at pp. 891, 890-891.) This approach, the court has explained, is supported by historical understanding. James Madison, one of the principal architects of the United States Constitution, wrote that the concept of separation of powers " 'd[oes] not mean that these departments ought to have no *partial agency* in, or no *control* over the acts of each other,' " but instead that " 'where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.' " (J. Madison, The Federalist No. 47, pp. 325-326 (J. Cooke ed. 1961) (original italics), quoted in *Mistretta* v. *United States* (1989) 488 U.S. 361, 380-381 [102 L.Ed.2d 714, 735-736, 109 S.Ct. 647].) Thus, the basic purpose of the separation of powers is to guard against the concentration of power in the hands of one branch, but it is important to distinguish "partial agency" from those aggrandizements of power that pose genuine threats to the constitutional scheme.

The pragmatic and flexible approach favored by the nation's highest court is also appropriate because, in a society growing ever more complex, the practical requirements of efficient government action by each of the three branches must be considered. " 'While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.' " (*Mistretta* v. *United States*, *supra*, 488 U.S. at p. 381 [102 L.Ed.2d at p. 736], quoting *Youngstown Sheet & Tube Co.* v. *Sawyer* (1952) 343 U.S. 579, 635 [96 L.Ed. 1153, 1199, 72 S.Ct. 863, 26 A.L.R.2d 1378] (conc. opn. of Jackson, J.).) In contemporary society, concerns about the workability of government are especially weighty.

Thus, the high court has not evolved a rigid classification of governmental powers as belonging exclusively to one branch or another. Instead, the court has stated that "the proper inquiry focuses on the extent to which [the act complained of] prevents [one of the three branches] from accomplishing its constitutionally assigned functions." (*Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. at p. 443 [53 L.Ed.2d at p. 891]; *Mistretta* v. *United States*, *supra*, 488 U.S. at p. 383 [102 L.Ed.2d at pp. 737-738].) If the "potential for disruption is present," the court must then "determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority" of the branch whose action is challenged. (*Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. at p. 443 [53

L.Ed.2d at p. 891]; *Mistretta* v. *United States, supra,* 488 U.S. at p. 383, fn. 13 [102 L.Ed.2d at p. 737].)

This court has expressed a similar understanding. We have recognized that the purpose of the doctrine of separation of powers "is to prevent one branch of government from exercising the *complete* power constitutionally vested in another [citation]; it is not intended to prohibit one branch from taking action properly within its sphere that has the *incidental* effect of duplicating a function or procedure delegated to another branch. [Citation.]" (*Younger* v. *Superior Court* (1978) 21 Cal.3d 102, 117 [145 Cal.Rptr. 674, 577 P.2d 1014] [original italics].)

More recently, this court reiterated that the separation of powers doctrine " 'has not been interpreted as requiring the rigid classification of all the incidental activities of government, with the result that once a technique or method of procedure is associated with a particular branch of the government, it can never be used thereafter by another.' . . . 'From the beginning, each branch has exercised all three kinds of powers.' " (*Davis* v. *Municipal Court* (1988) 46 Cal.3d 64, 76 [249 Cal.Rptr. 300, 757 P.2d 11] [citations and italics omitted].)

III

A line of cases from California courts has established the principle that a court does not violate the separation of powers doctrine when it orders appropriate expenditures from already existing funds, if such funds are reasonably available for the expenditures in question. (*Mandel* v. *Myers* (1981) 29 Cal.3d 531, 540 [174 Cal.Rptr. 841, 629 P.2d 935]; *Long Beach Unified Sch. Dist.* v. *State of California* (1990) 225 Cal.App.3d 155, 180-181 [275 Cal.Rptr. 449]; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 538-539 [234 Cal.Rptr. 795]; *Committee to Defend Reproductive Rights* v. *Cory* (1982) 132 Cal.App.3d 852, 856 [183 Cal.Rptr. 475].) The precise question in this case is whether funds can be considered "reasonably available" when they are not made part of a "catchall" appropriation under which the specific use of the funds may fall. The majority concludes that unless the funds are part of a "catchall" appropriation, they are not reasonably available.[1]

I would announce no such categorical rule. In my view, the proper inquiry is that set forth by the United States Supreme Court in *Nixon* v. *Administrator of General Services, supra,* 433 U.S. 425 and *Mistretta* v. *United States,*

[1]The majority purports to reaffirm the rule of these cases, but in fact undermines it. The "catchall" appropriation exception to the majority's rule could easily be eliminated if the Legislature took the time to label more specifically the purpose of each appropriation in a particular area. If the Legislature did so, there would be no possible remedy for the failure to fund any program, no matter how essential.

supra, 488 U.S. 361: To what extent does the challenged act of one branch interfere with another branch's performance of its constitutionally assigned functions? If there is some potential disruption, the court must then determine whether the challenged act is "justified by an overriding need to promote objectives within the constitutional authority" of the branch whose action is challenged. (*Nixon* v. *Administrator of General Services*, *supra*, at p. 443 [53 L.Ed.2d at p. 891]; *Mistretta* v. *United States*, *supra*, at p. 383, fn. 13 [102 L.Ed.2d at p. 737].)

Applying the principles followed by the high court in *Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. 425 and *Mistretta* v. *United States*, *supra*, 488 U.S. 361, and by this court in cases such as *Younger* v. *Superior Court*, *supra*, 21 Cal.3d 102 and *Davis* v. *Municipal Court*, *supra*, 46 Cal.3d 64, I conclude that the trial court's order authorizing the Controller to disburse funds from the GAIN and OUSD accounts as an emergency loan to the District to assure the District's schools remained open did pose a potential for disruption of a function of the legislative branch.

The degree of potential disruption, however, is not great. As the trial court concluded, the funds that were the source of the emergency loan were appropriated for purposes reasonably related to the educational purposes served by the District.

The OUSD loan funds were appropriated by the Legislature for the precise purpose for which they were employed here—to alleviate a fiscal crisis in a local school district and prevent disruption of an ongoing educational program. (See Stats. 1989, ch. 1438, § 1.) Moreover, the trial court had before it an application for leave to intervene from the OUSD itself, in which the OUSD stated that the threatened closure of the nearby District "would place substantial and difficult burdens on OUSD as displaced Richmond students seek admission to Oakland Schools," that would be "extremely costly and disruptive" to the operation of the Oakland schools. The emergency loan fund for the OUSD was intended by the Legislature to avoid disruption of the educational program at the Oakland schools, and the trial court's order furthered, rather than defeated, that valid legislative purpose.

The GAIN program was enacted to address the problem of teenage parenting, basic educational deficiencies, and long-term welfare dependency. Specifically, GAIN was intended to "[p]rovide the education and training services needed by teenage parents to help them earn a high school diploma or its equivalent," and to "[l]ink teenagers to other needed health and social services." (Welf. & Inst. Code, § 11330, subd. (c).) The purpose of the particular appropriation to the Department of Education at issue in this case

was solely to meet educational needs, and not to provide health and social services. (Stats. 1989, ch. 93, § 22.00.) This goal is served by keeping the District's schools open. The trial court had before it uncontradicted evidence that a large number of the students in the District came from low-income families, many of whom were welfare-dependent. The court could rationally conclude that the otherwise unused GAIN funds were reasonably available to meet the basic educational needs of the District's students, a significant portion of whom were in the welfare-dependent population the GAIN program was targeted to assist. Under the circumstances, the funds were ordered to be used for a purpose reasonably congruent with the statutory purpose.[2]

Thus, because the trial court authorized the OUSD and GAIN funds to be used for a purpose that was reasonably related to the purposes for which the funds were appropriated, any infringement on the legislative function is not substantial. By contrast, we are not faced with a situation in which a trial court has ordered that funds appropriated for one purpose be used for some entirely unrelated purpose; nor are we confronted with a trial court order that funds actually in use for one program be diverted to another. It is vital that

[2]The majority asserts that this opinion "urges abandonment" of the rule of *Mandel* v. *Myers*, *supra*, 29 Cal.3d 531 (*Mandel*). This is incorrect.

In *Mandel*, *supra*, 29 Cal.3d 531, this court held that the separation of powers doctrine does not prevent the courts from ordering appropriate expenditures from already existing funds when such funds are "reasonably available for the expenditures in question . . . ." (*Id.* at p. 542.) There, the court found that certain "catchall" funds were reasonably available for the expenditures in question, the payment of attorney fees in a case enforcing constitutional rights. But nothing in *Mandel* indicated that the only funds that might ever be reasonably available in any case were "catchall" funds. And, as later cases made clear, *Mandel*'s test of "reasonable availability" encompasses unused funds that have been appropriated for purposes closely related to the purposes for which they are sought to be expended. (*Long Beach Unified Sch. Dist.* v. *State of California*, *supra*, 225 Cal.App.3d at p. 181; *Carmel Valley Fire Protection Dist.* v. *State of California*, *supra*, 190 Cal.App.3d at p. 541.)

In this case, as my analysis has demonstrated, the OUSD and GAIN funds were appropriated for purposes reasonably and closely related to the purpose for which the trial court ordered them to be used. Thus, *Mandel* and its progeny were not violated. The analysis in this opinion is entirely consistent with both the *Mandel* line of cases, and the cases from the United States Supreme Court and this court that more fully and generally articulate the doctrine of separation of powers. *Mandel* and its progeny represent an area of specific application of general separation of powers principles; properly understood, there is no disjunction between the *Mandel* line of cases and cases such as *Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. 425, and *Mistretta* v. *United States*, *supra*, 488 U.S. 361, that set forth a principled and coherent view of the separation of powers doctrine.

Thus, the majority's accusation that the approach to separation of powers questions set forth in this opinion, which is the same approach employed by our nation's highest court, would "stand the separation of powers clause on its head," is meritless.

trial courts take care to minimize any impingement on legislative prerogatives. But the trial court in this case did use the least intrusive means available to it to ensure the students' rights.[3]

As discussed earlier, if there is some cognizable interference with the functions of another branch, the reviewing court must then determine whether the act is "justified by an overriding need to promote objectives within the constitutional authority" of the branch whose action is challenged. (*Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. at p. 443 [53 L.Ed.2d at p. 891]; *Mistretta* v. *United States*, *supra*, 488 U.S. at p. 383, fn. 13 [102 L.Ed.2d at p. 737].) In my view, here the trial court's order was so justified.

The objective that the trial court sought to achieve by its orders in this case—to assure the protection of the fundamental rights of the District's students—was unquestionably within its constitutional authority. As this court has made clear on previous occasions, and as the majority reaffirms today, education is a fundamental right under the California Constitution. (*Serrano* v. *Priest* (1971) 5 Cal.3d 584, 608-609 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187]; *Serrano* v. *Priest* (1976) 18 Cal.3d 728, 766 [135 Cal.Rptr. 345, 557 P.2d 929].)

Moreover, the court, in acting to protect the students' rights to education, had no practical alternative to the remedial order it issued. It was the court's

[3]At the hearing on the preliminary injunction, an official of the Department of Education testified without contradiction that there were two sources from which department funds were available that could be employed to assist the District—the OUSD fund and the GAIN fund. No other funds were identified as available.

The funds appropriated to the Department of Education for the general support of elementary and secondary schools are not placed in a "catchall" fund subject to the discretion of Department of Education officials. Instead, under the Education Code, virtually all sums transferred from the state's general fund to the Department of Education for the general support of elementary and secondary education are transferred subject to a strict formula under which each local district is entitled to an amount computed on the basis of average daily student attendance. (Ed. Code, § 14000 et seq., § 46000 et seq.) No state official appears to have any discretion to vary the legislatively mandated allocation of funds.

My research reveals that the only funds that might have been considered reasonably available to aid the District under the majority's criteria at the time of the trial court's decision in this case were certain emergency funds under control of the Director of Finance. (Stats. 1990, ch. 467, § 2.00.) But there is nothing in the record to show that these funds had not been used for some other emergency purpose. Even assuming that none of these funds had been committed to some other use, however, the funds would have been grossly inadequate to meet the District's needs in any event. The total amount of funds available to the Director of Finance to meet all the emergency needs of the State under the then-current budget was $7 million. (*Ibid.*) As we have seen, the District faced a $23 million budget shortfall.

duty to act. As the United States Supreme Court has held, "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." (*Reynolds* v. *Sims* (1964) 377 U.S. 533, 566 [12 L.Ed.2d 506, 530, 84 S.Ct. 1362].)

When the other branches of government have failed to act, the courts have not flinched from their duty to fashion appropriate remedies when necessary to guarantee constitutional rights to the people of this state. Thus, in *Wilson* v. *Eu* (1991) 54 Cal.3d 471, 473 [286 Cal.Rptr. 280, 816 P.2d 1306], we held that, although reapportionment is primarily a matter for the legislative branch, when that branch has failed to act and electoral rights will be irretrievably lost if no action is taken, "we must proceed forthwith to draft such [reapportionment] plans." And in *Crawford* v. *Board of Education* (1976) 17 Cal.3d 280, 307 [130 Cal.Rptr. 724, 551 P.2d 28], we held that when a recalcitrant school board failed to act to cure the harmful consequences of school segregation, the trial court could exercise "broad equitable powers" to frame a remedy that would assure the students' basic rights. (Accord, e.g., *Swann* v. *Board of Education* (1971) 402 U.S. 1, 15 [28 L.Ed.2d 554, 566, 91 S.Ct. 1267]; see *Assembly* v. *Deukmejian* (1982) 30 Cal.3d 638, 659 [180 Cal.Rptr. 297, 639 P.2d 939]; *Midway Orchards* v. *County of Butte* (1990) 220 Cal.App.3d 765, 779 [269 Cal.Rptr. 796].)

No sound reason exists to hold that although some fundamental rights demand judicial protection when they are endangered because the other branches of government have failed to act, other rights, equally fundamental, do not. Yet that is the consequence of the majority's holding in this case that the trial court erred in ordering that an emergency loan be made to the District.

The practical consequences of the majority's holding should not be overlooked. In an era of fiscal constraint and uncertainty for local governments, including school districts, we cannot assume that the District's problems will prove to be unique. If another school district experiences financial difficulties and the other branches of government fail to act, parents may indeed bring a lawsuit to protect their children's right to education. Under today's decision, the trial court will declare that the children have a constitutional right to basic educational equality, and that the State bears responsibility for assuring this right is not denied. The court may then announce that no means

exist by which it can enforce that right. And the doors to the schoolhouse will close.

I would affirm the orders of the trial court in their entirety.

EXHIBIT E

SixTen and Associates
Mandate Reimbursement Services

KEITH B. PETERSEN, MPA, JD, President
E-Mail: Kbpsixten@aol.com

San Diego
5252 Balboa Avenue, Suite 900
San Diego, CA 92117
Telephone: (858) 514-8605
Fax: (858) 514-8645

Sacramento
3841 North Freeway Blvd., Suite 170
Sacramento, CA 95834
Telephone: (916) 565-6104
Fax: (916) 564-6103

October 5, 2007

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: No. CSM. 02-TC -35
Public Contracts (K-14)

Dear Ms. Higashi:

Please find enclosed a supplement to the test claim filing, specifically, a history of the Title 5, CCR, sections included in the test claim.

Sincerely,

Keith B. Petersen

Keith B. Petersen
SixTen and Associates
3841 North Freeway Blvd, Suite 170
Sacramento, CA 95834
Voice: (916) 565-6104
Fax: (916) 564-6103
kbpsixten@aol.com

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Supplement to the:	No. CSM. 02-TC -35
Test Claim Filed June 24, 2003 by:	Public Contracts (K-14)
Clovis Unified School District	History Index for Title 5, California Code of Regulations
and	Section 59500
Santa Monica Community College District	Section 59504 Section 59505 Section 59506 Section 59509

REQUEST FOR SUPPLEMENTAL INFORMATION

This supplement to the test claim provides an index and copy of each change to the Title 5, CCR, sections included in the test claim. The Registers cited are attached as Exhibit A. Amended language is underlined (new language) or stricken out (deleted language).

HISTORY OF TITLE 5, CCR, SECTIONS INCLUDED IN THE TEST CLAIM

Register 80-40 Added §§ 59500 - 59503. The subject matter is not related to this mandate.

Register 88-16 Repealed §§ 59500 - 59503. The subject matter is not related to

this mandate.

Register 94-06 Added §§ 59500, 59504 - 59506, 59509.

Register 98-18 Amended:

§ 59500: Editorial correction removing duplicative sections and amending HISTORY 1.

Subsequent Registers: There may be changes to the regulations after the date the test claim was filed, which are not included.

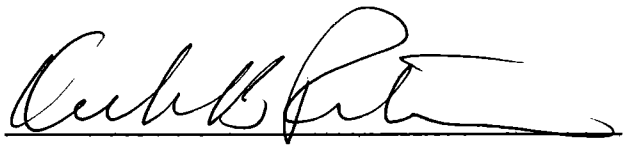
/

/

CERTIFICATION

By my signature below, I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this document is true and complete to the best of my own knowledge or information or belief, and that the attached regulations are true and correct copies of documents from archives of a recognized law library.

EXECUTED this 3 day of October 2007, at Sacramento, California



FOR THE TEST CLAIMANT

Keith Petersen, President

SixTen and Associates

ATTACHMENT

Exhibit A Title 5, CCR Registers

CHAPTER 1. STANDARDS FOR THE DETERMINATION OF PROPORTIONAL LEVEL OF SERVICE FOR ADULT NONCREDIT PROGRAMS FOR SUBSTANTIALLY HANDICAPPED PERSONS

59500. Purpose.

These standards are established pursuant to Section 84730 of the Education Code, which requires the Chancellor to adopt standards for the determination of proportional level of service for adult noncredit programs for substantially handicapped persons.

NOTE: Authority cited: Section 84730, Education Code. Reference: Section 84730, Education Code.

HISTORY:

1. New Chapter 1 (Sections 59500–59503) filed 10-3-80; effective thirtieth day thereafter (Register 80, No. 40).

59501. Substantially Handicapped Persons.

"Substantially handicapped persons" are those who have handicaps which are likely to continue indefinitely or for a prolonged period and whose handicap results in substantial functional limitations in one or more of the following activities: self-care, receptive or expression language, learning, mobility, self-direction, capacity for independent living, or economic self-sufficiency.

NOTE: Authority cited: Section 84730, Education Code. Reference: Section 84730, Education Code.

59502. Proportional Level of Service.

Adult noncredit programs offered during the regular academic year and summer for substantially handicapped persons shall be maintained at the following levels:

(a) Each district shall make available to such program at least an amount of revenue which is equal to: the 1979–80 required funding level for such programs divided by the 1979–80 total funding level for the district, as computed by the Chancellor, times the current year's total funding level for the district.

(b) Each district shall maintain at least 85 percent of 1977–78 average daily attendance level for adult noncredit programs for substantially handicapped persons; provided that this percentage may be reduced by the Chancellor if:

(1) A program is changed, with prior approval of the Chancellor, to better meet student needs and program objectives; or

(2) A program is altered, with prior approval of the Chancellor, to comply with legal requirements.

(c) The requirements of subsections (a) and (b) may be waived for a district by the Chancellor if it is found that the local demand for a program is less than the required proportional level of service. The Chancellor shall develop a form for such waivers, which form shall require certification by the district as to lack of demand.

NOTE: Authority cited: Section 84730, Education Code. Reference: Section 84730, Education Code.

59503. Withholding.

No community college district providing adult noncredit programs for substantially handicapped persons shall receive any apportionment from the State School Fund unless the district maintains a proportional level of service in such programs or is granted a waiver, as specified in Section 59502.

NOTE: Authority cited: Section 84730, Education Code. Reference: Section 84730, Education Code.

DIVISION 11. REGULATIONS OF THE CHANCELLOR

CHAPTER 1. STANDARDS FOR THE DETERMINATION OF PROPORTIONAL LEVEL OF SERVICE FOR ADULT NONCREDIT PROGRAMS FOR SUBSTANTIALLY HANDICAPPED PERSONS

59500. Purpose.

NOTE: Authority cited: Section 84730, Education Code. Reference: Section 84730, Education Code.

HISTORY:

1. New Chapter 1 (Sections 59500–59503) filed 10-3-80; effective thirtieth day thereafter (Register 80, No. 40).
2. Repealer filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

59501. Substantially Handicapped Persons.

NOTE: Authority cited: Section 84730, Education Code. Reference: Section 84730, Education Code.

HISTORY:

1. Repealer filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

59502. Proportional Level of Service.

NOTE: Authority cited: Section 84730, Education Code. Reference: Section 84730, Education Code.

HISTORY:

1. Repealer filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

59503. Withholding.

NOTE: Authority cited: Section 84730, Education Code. Reference: Section 84730, Education Code.

HISTORY:

1. Repealer filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

Register 94-06

§ 59500
§ 59504
§ 59505
§ 59506
§ 59509

NOTE: Authority cited: Sections 66700 and 70901, Education Code. Reference: Section 70901, Education Code.

HISTORY

1. Renumbering and amendment of former section 53530 to section 59422 filed 5–15–93; operative 6–4–93 (Register 93, No. 25).

§ 59424. Territory of District Becoming Part of Two or More Districts; Disposition of Records.

If all the territory of any reorganized district becomes part of two or more districts, and the inclusion in the two or more districts of the several portions of territory comprising the whole of the original district is effective for all purposes on the same date, the records of the original district shall be disposed of as follows:

(a) All records of the original district which are required by law to be kept on file shall be deposited with the governing board of the district which, after the reorganization has become effective for all purposes, has located within its boundaries the former office of the superintendent of the original district.

(b) Records of employees shall be transferred to the district thereafter employing the personnel or thereafter maintaining the last place of employment.

(c) Records of students shall be transferred to the district which, after the date on which the reorganization becomes effective for all purposes, maintains the college in which a student was last enrolled.

NOTE: Authority cited: Sections 66700 and 70901, Education Code. Reference: Section 70901, Education Code.

HISTORY

1. Renumbering and amendment of former section 53540 to section 59424 filed 5–15–93; operative 6–4–93 (Register 93, No. 25).

Subchapter 9. Minority, Women, and Disabled Veteran Business Enterprise Participation Goals for the California Community Colleges

§ 59500. Scope of Subchapter.

(a) The California Community Colleges shall provide opportunities for minority, women, and disabled veteran business enterprise participation in the award of district contracts consistent with this Subchapter. The statewide goal for such participation is not less than 15 percent minority business enterprise participation, not less than 5 percent women business enterprise participation, and not less than 3 percent disabled veteran business enterprise participation of the dollar amount expended by all districts each year for construction, professional services, materials, supplies, equipment, alteration, repair, or improvement. However, each district shall have flexibility to determine whether or not to seek participation by minority, women, and disabled veteran business enterprises for any given contract.

(b) Nothing in this Subchapter authorizes any district to discriminate in awarding contracts on the basis of ethnic group identification, ancestry, religion, age, sex, race, color, or physical or mental disability.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New subchapter 9 and section filed 12–29–93; operative 1–28–94. Submitted to OAL for printing only (Register 94, No. 6).

§ 59502. Definitions.

The definitions set forth in Subsections (d), (e), and (f) of Section 10115.1 of the Public Contract Code, as they may be amended from time to time, apply to this Subchapter and are incorporated herein as though fully set forth in addition, for purposes of this Subchapter:

(a) "Certification" means a process to identify minority, women, and disabled veteran business enterprises.

(b) "Contract" includes any agreement or joint development agreement to provide labor, services, material, supplies, or equipment in the performance of a contract, franchise, concession, or lease granted, let, or awarded for and on behalf of the district. The term "contract" does not include payments to utility companies or purchases, leases or services secured through other public agencies and corporations, the Department of General Services, or the federal government pursuant to Public Contract Code sections 20652 and 20653 and Education Code Section 81653;

(c) "Contractor" means any person or persons, regardless of ethnic group identification, ancestry, religion, sex, race, or color, or any firm, partnership, corporation, or combination thereof, whether or not a minority, women, and disabled veteran business enterprise, who enters into a contract with a district.

(d) "District" means any community college district, board of trustees or officer, employee, or agent of such a district or board empowered to enter into contracts on behalf of the district.

(e) "MBE/WBE/DVBE" means a minority business enterprise, a women business enterprise, and/or a disabled veteran business enterprise. Although a business enterprise may qualify under multiple categories, the entry shall be designated in one specific category for the purposes of these regulations.

(f) "Goal" means a numerically expressed objective for systemwide MBE/WBE/DVBE participation that districts are expected to contribute to achieving. Goals are not quotas, set–asides, or rigid proportions.

(g) "Disabled veteran business enterprise" means a business enterprise certified as a disabled veteran business enterprise by the Office of Small and Minority Business, pursuant to Military and Veterans Code Section 999, or a business enterprise that certifies that it has met such standards.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New section filed 12–29–93; operative 1–28–94. Submitted to OAL for printing only (Register 94, No. 6).

§ 59504. Efforts by Districts.

Each district shall undertake appropriate efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises in district contracts. Appropriate efforts may include vendor and service contractor orientation programs related to participating in district contracts or in understanding and complying with the provisions of this Subchapter, developing a listing of minority, women, and disabled veteran business enterprises potentially available as contractors or suppliers, or such other activities they may assist interested parties in being considered for participation in district contracts. Districts shall also undertake efforts to contribute to achievement of the systemwide goals established in Section 59500 by seeking minority, women, and disabled veteran business enterprises as contractors for such contracts as the district may deem appropriate pursuant to Section 59505.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New section filed 12–29–93; operative 1–28–94. Submitted to OAL for printing only (Register 94, No. 6).

§ 59505. Application of Participation Goals.

(a) If a district elects to apply MBE/WBE/DVBE goals to any contract which is to be awarded to the lowest responsible bidder, bidding notices shall include a statement that at the time of bid opening, bidders shall be considered responsive only if they document to the satisfaction of the district that they meet or have made a good faith effort to meet minority, women, and disabled veteran business enterprise participation goals.

(b) A responsive bidder documents a good faith effort to meet the participation goals if, in connection with the submission of a bid, the bidder provides evidence satisfactory to the district that efforts were made to seek out and consider minority, women, and disabled veteran business

enterprises as potential subcontractors, materials and/or equipment suppliers, or both subcontractors and/or suppliers.

(c) The district may also elect to seek minority, women, and disabled veteran business enterprises to serve as contractors for any other contracts not covered by subsection (a).

(d) The district shall assess the status of each of its contractors and, if the contractor is a certified or self-certified minority, women, and disabled veteran business enterprise subcontractors and/or suppliers to the satisfaction of the district, the district may include the actual dollar amount attributable to minority, women, and disabled veteran business enterprise participation in reporting its participation activity pursuant to Section 59509.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, part 1, Public Contract Code.

HISTORY

1. New section filed 12-29-93; operative 1-28-94. Submitted to OAL for printing only (Register 94, No. 6).

§ 59506. Certification.

(a) Each district shall establish a process to collect and retain certification information provided by a business enterprise claiming minority, women, and disabled veteran business enterprise status.

(b) The process described in subsection (a) shall include notification to responsive bidders subject to Section 59505(a) of the requirements for qualification as a responsive bidder.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New section filed 12-29-93; operative 1-28-94. Submitted to OAL for printing only (Register 94, No. 6).

§ 59508. Enforcement of Contracts and Severability Provision.

(a) Notwithstanding any other provision of this Subchapter, the participation goals established herein shall not affect the validity or enforceability of any contract or any bonds, notes or other obligations issued by the district to provide for the payment of any contract subject to this Subchapter.

(b) If any provision of this Subchapter or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the Subchapter which can be given effect without the invalid provision or application, and to this end, the provisions of this Subchapter are severable.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New section filed 12-29-93; operative 1-28-94. Submitted to OAL for printing only (Register 94, No. 6).

§ 59509 Monitoring of Participation Goals.

Each district shall monitor its participation as specified in this Subchapter. Beginning October 15, 1994, and by each October 15 thereafter, each district shall report to the Chancellor the level of participation by minority, women, and disabled veteran business enterprises pursuant to this Subchapter for the previously completed fiscal year. Even if a district elects not to apply minority, women, and disabled veteran business enterprise goals to one or more particular contract(s), all such contracts shall be reported to the Chancellor and shall be taken into account in determining whether the community college system as a whole has achieved the goals set forth in Section 59500.

The Chancellor shall prescribe forms to be used by the districts in making their yearly reports.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New section filed 12-29-93; operative 1-28-94. Submitted to OAL for printing only (Register 94, No. 6).

Chapter 11. Regulations of the Chancellor

Subchapter 1. Standards for the Determination of Proportional Level of Service for Adult Noncredit Programs for Substantially Handicapped Persons

§ 59500. Purpose.

NOTE: Authority cited: Section 84730, Education Code. Reference: Section 84730, Education Code.

HISTORY

1. New Chapter 1 (Sections 59500-59503) filed 10-3-80; effective thirtieth day thereafter (Register 80, No. 40).
2. Repealer filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

§ 59501. Substantially Handicapped Persons.

NOTE: Authority cited: Section 84730, Education Code. Reference: Section 84730, Education Code.

HISTORY

1. Repealer filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

§ 59502. Proportional Level of Service.

NOTE: Authority cited: Section 84730, Education Code. Reference: Section 84730, Education Code.

HISTORY

1. Repealer filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

§ 59503. Withholding.

NOTE: Authority cited: Section 84730, Education Code. Reference: Section 84730, Education Code.

HISTORY

1. Repealer filed 3-29-88; operative 4-28-88 (Register 88, No. 16).

* * *

Subchapter 8. District Reorganization

§ 59420. Newly Formed District.

A community college district is a newly formed district up to the close of the fiscal year in which its formation became effective for all purposes.

NOTE: Authority cited: Sections 66700 and 70901, Education Code. Reference: Section 70901, Education Code.

HISTORY

1. New subchapter 8 and section filed 5-15-93; operative 6-4-93 (Register 93, No. 25).

§ 59422. Use of Bond Proceeds.

When the territory of a district is reorganized, any funds derived from the sale of the bonds issued by the former district shall be used for the acquisition, construction, or improvement of college property only in the territory which comprised the former district or to discharge the bonded indebtedness of the former district, except that if the bonded indebtedness is assumed by the new district, the funds may be used in any area of the new district for the purposes for which the bonds were originally voted.

NOTE: Authority cited: Sections 66700 and 70901, Education Code. Reference: Section 70901, Education Code.

HISTORY

1. Renumbering and amendment of former section 53530 to section 59422 filed 5-15-93; operative 6-4-93 (Register 93, No. 25).

§ 59424. Territory of District Becoming Part of Two or More Districts; Disposition of Records.

If all the territory of any reorganized district becomes part of two or more districts, and the inclusion in the two or more districts of the several portions of territory comprising the whole of the original district is effective for all purposes on the same date, the records of the original district shall be disposed of as follows:

(a) All records of the original district which are required by law to be kept on file shall be deposited with the governing board of the district which, after the reorganization has become effective for all purposes, has located within its boundaries the former office of the superintendent of the original district.

(b) Records of employees shall be transferred to the district thereafter employing the personnel or thereafter maintaining the last place of employment.

(c) Records of students shall be transferred to the district which, after the date on which the reorganization becomes effective for all purposes, maintains the college in which a student was last enrolled.

NOTE: Authority cited: Sections 66700 and 70901, Education Code. Reference: Section 70901, Education Code.

HISTORY

1. Renumbering and amendment of former section 53540 to section 59424 filed 5-15-93; operative 6-4-93 (Register 93, No. 25).

Subchapter 9. Minority, Women, and Disabled Veteran Business Enterprise Participation Goals for the California Community Colleges

§ 59500. Scope of Subchapter.

(a) The California Community Colleges shall provide opportunities for minority, women, and disabled veteran business enterprise participation in the award of district contracts consistent with this Subchapter. The statewide goal for such participation is not less than 15 percent minority business enterprise participation, not less than 5 percent women business enterprise participation, and not less than 3 percent disabled veteran business enterprise participation of the dollar amount expended by all districts each year for construction, professional services, materials, supplies, equipment, alternation, repair, or improvement. However, each district shall have flexibility to determine whether or not to seek participation by minority, women, and disabled veteran business enterprises for any given contract.

(b) Nothing in this Subchapter authorizes any district to discriminate in awarding contracts on the basis of ethnic group identification, ancestry, religion, age, sex, race, color, or physical or mental disability.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New subchapter 9 and section filed 12-29-93; operative 1-28-94. Submitted to OAL for printing only (Register 94, No. 6). For prior history of former chapter 11 (sections 59500-59503), see Register 88, No. 16.
2. Editorial correction removing duplicative sections and amending HISTORY 1 (Register 98, No. 18).

§ 59502. Definitions.

The definitions set forth in Subsections (d), (e), and (f) of Section 10115.1 of the Public Contract Code, as they may be amended from time to time, apply to this Subchapter and are incorporated herein as though fully set forth in addition, for purposes of this Subchapter:

(a) "Certification" means a process to identify minority, women, and disabled veteran business enterprises.

(b) "Contract" includes any agreement or joint development agreement to provide labor, services, material, supplies, or equipment in the performance of a contract, franchise, concession, or lease granted, let, or awarded for and on behalf of the district. The term "contract" does not include payments to utility companies or purchases, leases or services secured through other public agencies and corporations, the Department of General Services, or the federal government pursuant to Public Contract Code sections 20652 and 20653 and Education Code Section 81653;

(c) "Contractor" means any person or persons, regardless of ethnic group identification, ancestry, religion, sex, race, or color, or any firm, partnership, corporation, or combination thereof, whether or not a minority, women, and disabled veteran business enterprise, who enters into a contract with a district.

(d) "District" means any community college district, board of trustees or officer, employee, or agent of such a district or board empowered to enter into contracts on behalf of the district.

(e) "MBE/WBE/DVBE" means a minority business enterprise, a women business enterprise, and/or a disabled veteran business enterprise. Although a business enterprise may qualify under multiple categories, the entry shall be designated in one specific category for the purposes of these regulations.

(f) "Goal" means a numerically expressed objective for systemwide MBE/WBE/DVBE participation that districts are expected to contribute to achieving. Goals are not quotas, set-asides, or rigid proportions.

(g) "Disabled veteran business enterprise" means a business enterprise certified as a disabled veteran business enterprise by the Office of Small and Minority Business, pursuant to Military and Veterans Code Section 999, or a business enterprise that certifies that it has met such standards.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New section filed 12-29-93; operative 1-28-94. Submitted to OAL for printing only (Register 94, No. 6).

§ 59504. Efforts by Districts.

Each district shall undertake appropriate efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises in district contracts. Appropriate efforts may include vendor and service contractor orientation programs related to participating in district contracts or in understanding and complying with the provisions of this Subchapter, developing a listing of minority, women, and disabled veteran business enterprises potentially available as contractors or suppliers, or such other activities they may assist interested parties in being considered for participation in district contracts. Districts shall also undertake efforts to contribute to achievement of the systemwide goals established in Section 59500 by seeking minority, women, and disabled

veteran business enterprises as contractors for such contracts as the district may deem appropriate pursuant to Section 59505.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New section filed 12-29-93; operative 1-28-94. Submitted to OAL for printing only (Register 94, No. 6).

§ 59505. Application of Participation Goals.

(a) If a district elects to apply MBE/WBE/DVBE goals to any contract which is to be awarded to the lowest responsible bidder, bidding notices shall include a statement that at the time of bid opening, bidders shall be considered responsive only if they document to the satisfaction of the district that they meet or have made a good faith effort to meet minority, women, and disabled veteran business enterprise participation goals.

(b) A responsive bidder documents a good faith effort to meet the participation goals if, in connection with the submission of a bid, the bidder provides evidence satisfactory to the district that efforts were made to seek out and consider minority, women, and disabled veteran business enterprises as potential subcontractors, materials and/or equipment suppliers, or both subcontractors and/or suppliers.

(c) The district may also elect to seek minority, women, and disabled veteran business enterprises to serve as contractors for any other contracts not covered by subsection (a).

(d) The district shall assess the status of each of its contractors and, if the contractor is a certified or self-certified minority, women, and disabled veteran business enterprise subcontractors and/or suppliers to the satisfaction of the district, the district may include the actual dollar amount attributable to minority, women, and disabled veteran business enterprise participation in reporting its participation activity pursuant to Section 59509.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, part 1, Public Contract Code.

HISTORY

1. New section filed 12-29-93; operative 1-28-94. Submitted to OAL for printing only (Register 94, No. 6).

§ 59506. Certification.

(a) Each district shall establish a process to collect and retain certification information provided by a business enterprise claiming minority, women, and disabled veteran business enterprise status.

(b) The process described in subsection (a) shall include notification to responsive bidders subject to Section 59505(a) of the requirements for qualification as a responsive bidder.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New section filed 12-29-93; operative 1-28-94. Submitted to OAL for printing only (Register 94, No. 6).

§ 59508. Enforcement of Contracts and Severability Provision.

(a) Notwithstanding any other provision of this Subchapter, the participation goals established herein shall not affect the validity or enforceability of any contract or any bonds, notes or other obligations issued by the district to provide for the payment of any contract subject to this Subchapter.

(b) If any provision of this Subchapter or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the Subchapter which can be given effect without the invalid provision or application, and to this end, the provisions of this Subchapter are severable.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New section filed 12-29-93; operative 1-28-94. Submitted to OAL for printing only (Register 94, No. 6).

§ 59509. Monitoring of Participation Goals.

Each district shall monitor its participation as specified in this Subchapter. Beginning October 15, 1994, and by each October 15 thereafter, each district shall report to the Chancellor the level of participation by minority, women, and disabled veteran business enterprises pursuant to this Subchapter for the previously completed fiscal year. Even if a district elects not to apply minority, women, and disabled veteran business enterprise goals to one or more particular contract(s), all such contracts shall be reported to the Chancellor and shall be taken into account in determining whether the community college system as a whole has achieved the goals set forth in Section 59500.

The Chancellor shall prescribe forms to be used by the districts in making their yearly reports.

NOTE: Authority cited: Sections 66700, 70901 and 71028, Education Code. Reference: Section 71028, Education Code; Article 1.5, Chapter 1, Part 1, Public Contract Code.

HISTORY

1. New section filed 12-29-93; operative 1-28-94. Submitted to OAL for printing only (Register 94, No. 6).

* * *

Hearing Date: May 25, 2012
J:\MANDATES\2002\tc\02-tc-35 (Pub Con)\TC\dsa.docx

ITEM __

TEST CLAIM
DRAFT STAFF ANALYSIS

Public Contract Code Sections 2000, 2001, 3300, 6610, 7104, 7107, 7109, 9203, 10299, 12109, 20100, 20101, 20102, 20103.5, 20103.6, 20103.8, 20104, 20104.2, 20104.4, 20104.6, 20104.50, 20107, 20110, 20111, 20111.5, 20116, 20650, 20651, 20651.5, 20657, 20659, and 22300

Business and Professions Code Section 7028.15

Statutes 1976, Chapter 921; Statutes 1977, Chapter 36; Statutes 1977, Chapter 631; Statutes 1980, Chapter 1255; Statutes 1981, Chapter 194; Statutes 1981, Chapter 470; Statutes 1982; Chapter 251; Statutes 1982, Chapter 465; Statutes 1982, Chapter 513; Statutes 1983, Chapter 256; Statutes 1984, Chapter 173; Statutes 1984, Chapter 728; Statutes 1984, Chapter 758; Statutes 1985, Chapter 1073; Statutes 1986, Chapter 886; Statutes 1986, Chapter 1060; Statutes 1987, Chapter 102; Statutes 1988, Chapter 538; Statutes 1988, Chapter 1408; Statutes 1989, Chapter 330; Statutes 1989, Chapter 863; Statutes 1989, Chapter 1163; Statutes 1990, Chapter 321; Statutes 1990, Chapter 694; Statutes 1990, Chapter 808; Statutes 1990, Chapter 1414; Statutes 1991, Chapter 785; Statutes 1991, Chapter 933; Statutes 1992, Chapter 294; Statutes 1992, Chapter 799; Statutes 1992, Chapter 1042; Statutes 1993, Chapter 1032; Statutes 1993, Chapter 1195; Statutes 1994, Chapter 726; Statutes 1995, Chapter 504; Statutes 1995, Chapter 897; Statutes 1997, Chapter 390; Statutes 1997, Chapter 722; Statutes 1998, Chapter 657; Statutes 1998, Chapter 857; Statutes 1999, Chapter 972; Statutes 2000, Chapter 126; Statutes 2000, Chapter 127; Statutes 2000, Chapter 159; Statutes 2000, Chapter 292; Statutes 2000, Chapter 776; and Statutes 2002, Chapter 455

California Code of Regulations, Title 5, Sections 59500, 59504, 59505, 59506, and 59509

Register 94, number 6

Public Contracts (K-14)
02-TC-35

Clovis Unified School District and
Santa Monica Community College District, Claimants

EXECUTIVE SUMMARY

Overview

This test claim addresses public contract requirements imposed on K-12 school districts (including county offices of education) and community college districts when they contract for goods, services, and public works projects.

These requirements address a wide range of issues regarding public contracting that include the following: (1) public contracting provisions specifically applicable to K-12 school districts and community college districts; (2) the requirement to specify the classification of a contractor's license in the bid proposal; (3) the requirement to notify bidders of a mandatory pre-bid

conferences; (4) required contract clauses for public works involving digging trenches or other excavations; (5) requirements associated with retention proceeds; (6) contract provisions regarding antigraffiti technology, abatement, and deterrence; (7) the requirement to retain money from progress payments; (8) use of the Department of General Services (DGS) for the acquisition of information technology goods and services; (9) the general provisions of the Local Agency Construction Act; (10) required contract provisions regarding performance retentions and substitute security; (11) the requirement to verify a bidder's license status; (12) the requirement to return the security of unsuccessful bidders for contracts subject to the State School Building Aid Law of 1949; and (13) activities taken by districts in regard to promoting minority, women, and disabled business enterprise participation in public contracts.

Because the activities alleged to be required by the test claim statutes and regulations are dependent on whether K-12 school districts and community college districts are required to acquire goods or services, undertake public projects, and contract for those goods, services, or public projects, this analysis will address: (1) what goods and services and public projects K-12 school districts and community college districts are required to acquire or undertake; (2) whether the districts are required to contract for those required goods, services, and public projects; (3) whether the test claim statutes impose state-mandated new programs or higher levels of service; and (4) whether the test claim statutes and regulations impose costs mandated by the state within the meaning of Government Code section 17514 and 17556.

Procedural History

The *Public Contracts (K-14)* test claim (02-TC-35) was filed during the 2002-2003 fiscal year. As a result, the reimbursement period for any reimbursable state-mandated new program or higher level of service found in this test claim begins on July 1, 2001.

On March 24, 2004, the California Community Colleges, Chancellor's Office (Chancellor's Office) filed comments in response to the test claim. On April 16, 2004, the Department of Finance (Finance) also filed comments in response to the test claim. On May 7, 2004, the claimants filed a response to the Chancellor's Office and Finance's comments.

Positions of the Parties

Claimants' Position

The claimants contend that the test claim statutes and regulations impose mandated costs reimbursable by the state for school districts, county offices of education, and community college districts to engage in state-mandated new programs or higher levels of service, including:

1. Using standardized questionnaires and financial statements.
2. Maintaining those questionnaires and financial statements confidential and not subject to public inspection.
3. Rating bidders on the basis of those questionnaires and financial statements.
4. Prequalifying bidders.
5. Following required dispute resolution procedures (including meet and confer requirements, attending mediations, and mandatory judicial arbitrations).

6. Detailing specific reasons for changes to plans and specifications.
7. Verifying contractor licensing status.
8. Specifying bid procedures for additive and deductive contract items.
9. Paying interest on certain claims.
10. Receiving and returning bidder's security.
11. Requiring bidders to participate with minority and women business enterprises contracts.
12. Require competitive bidding for certain purchases, services and repairs and complying with the requirements of Minority, Women, and Disabled Veteran Business Enterprise Participation Goals for Community Colleges.

The claimants also make two general arguments regarding: (1) activities alleged to be discretionary by the Chancellor's Office and Finance; and (2) the need to construct schools and apply for state funds for that purpose. Specifically, the claimants assert that legal compulsion is not required for a finding that an activity is mandated by the state, and that school districts are required to construct school buildings.

Chancellor's Office

The Chancellor's Office suggests that some of the test claim statutes may impose mandated costs on community college districts. However, the Chancellor's Office argues that a "number of the provisions that are presented as part of this [test claim] do not represent reimbursable mandates." The Chancellor's Office identifies two primary recurring themes governing the provisions:

1. Numerous provisions are optional. Community college districts are not required to engage in the conduct, but may choose to do so. An optional choice negates the finding of a state mandate.
2. Several Public Contract Code sections supporting this test claim existed prior to January 1, 1975, as Education Code sections. To the extent that any mandates predated January 1, 1975 they are not eligible for reimbursement.

Department of Finance

Finance asserts that the activities and requirements cited in this test claim do not constitute a reimbursable state mandate. Finance's assertion is based on the following reasons:

1. Projects for new construction proposed by school districts and community college districts are discretionary and therefore not reimbursable.
2. The costs incurred by complying with the Local Agency Public Construction Act (which includes some of the test claim statutes) are allowable costs for the use of the modernization and new construction grants provided by the State Allocation Board (school districts) and capital outlay appropriations in the State Budget Act (community college districts). Therefore, funding received from the state would offset any necessary costs of the Local Agency Public Construction Act for modernization and new construction projects should the Commission find that any activities are a reimbursable mandate.

In addition, participation in the state's new construction and modernization programs, as well as the use of capital outlay funds by community college districts, is a voluntary and discretionary action resulting from a request initiated by the school or community college district.

3. School districts and community college districts receive funding from the state for deferred maintenance projects. Therefore, any projects funded through the State School Deferred Maintenance Program or the Community Colleges Facility Deferred Maintenance and Special Repair Program would have covered the state's share of any necessary costs of the Local Agency Public Construction Act.
4. School districts have the authority to charge development fees to finance construction projects, and as a result, any additional costs to school districts are not reimbursable because the affected districts have the authority to cover those costs through developer fees.

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission cannot apply article XIII B, section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.

Claims

The following chart provides a brief summary of the claims and issues raised by the claimants, and staff's recommendation.

Claim	Description	Staff Recommendation
Public Contract Code sections 20111, 20111.5, 20116, 20651, 20651.5, 20657, and 20659	These sections address requirements associated with letting a contract to the lowest bidder, establishing a pre-qualification process, retaining records, and changes to contracts.	*Denied*: Many of the activities are not new, and the remaining activities are triggered by various discretionary decisions of a district, including establishing a pre-qualification process, or make changes to a contract, and thus, not mandated by the state.

Public Contract Code section 3300	This section requires districts to specify the classification of the contractor's license that a contractor must possess at the time a contract is awarded in the plans and bid notices.	*Approved*: Only for required repair and maintenance contracts, as discussed in the analysis below.
Public Contract Code section 6610	This section addresses the inclusion of specific information regarding mandatory prebid site visits when inviting formal bids.	*Denied*: The requirement is triggered by a district's discretionary decision to have a mandatory prebid site visit, and thus, is not mandated by the state.
Public Contract Code section 7104	This section addresses the requirement to include a differing site conditions clause in public works contracts, which involve digging trenches or other excavations that extend deeper than four feet below the surface.	*Approved*: Only for required repair and maintenance contracts, as discussed in the analysis below.
Public Contract Code section 7107	This section addresses the disbursement of retention proceeds, withholding retention proceeds in the event of a dispute, and the consequences of improperly withholding retention proceeds.	*Denied*: The requirements imposed by section 7107 are not unique to public agencies, and therefore, do not constitute programs within the meaning of articles XIII B.
Public Contract Code section 7109	This section addresses the authority to engage in specific graffiti abatement or deterrence activities.	*Denied*: The plain language of the code section does not impose any state-mandated activities on K-12 school districts or community college districts.
Public Contract Code section 9203	This section requires the retention of money from progress payments made to a contractor.	*Denied*: This is a pre-1975 requirement and, as a result, does not impose a new program or higher level of service under article XIII B.
Public Contract Code sections 10299 and 12109	These sections address the authority of the director of DGS to make DGS' information technology acquisition services available to K-12 school districts and community college districts.	*Denied*: The plain language of these code sections does not impose any state-mandated activities on K-12 school districts or community college districts.

Public Contract Code sections 20100, 20102, 20103.6, 20103.8, 20104, 20104.2, 20104.4, 20104.6, and 20104.50	These sections address: (1) the performance of work by day's labor after plans and specifications have been prepared for formal or informal bid; (2) the disclosure of indemnity provisions in contracts for architectural services; (3) the addition and deduction of items from a contract; (4) the resolution process of construction claims; and (5) the prompt payment of progress payments.	*Partially Approved*: Some of the requirements are triggered by a district's discretionary decision, and as a result, are not mandated by the state. However, only for required repair and maintenance contracts, discussed in the analysis below, the code sections impose state-mandated new programs or higher levels of service associated with the resolution of construction claims and the prompt payment of progress payments.
Public Contract Code section 22300	This section requires the inclusion of provisions permitting the substitution of securities for any money retained by districts in any invitation for bid and in any contract documents.	*Approved*: Only for required repair and maintenance contracts, as discussed in the analysis below.
Business & Professions Code section 7028.15 and Public Contract Code section 20103.5	These sections require districts to verify that a contractor awarded a contract is properly licensed.	*Approved*: Only for required repair and maintenance contracts, as discussed in the analysis below.
Public Contract Code section 20107	This section addresses requirements on bidders to a K-12 school district project subject to the State School Building Aid Law of 1949.	*Denied*: Participation in the State School Building Aid Law of 1949 is discretionary, and as a result, the section does not impose any state-mandated activities.
Public Contract Code sections 2000 and 2001, and California Code of Regulations, title 5, sections 59500, 59504, 59505, 59506, 59509	These sections address the actions that K-12 school districts and community college districts are authorized to take in order to aid the participation in K-12 school district and community college district contracts by minority business enterprises (MBE), women business enterprises (WBE), and disabled veteran business enterprises (DVBE).	*Partially Approved*: Any requirements imposed by Public Contract Code sections 2000 and 2001 are triggered by a district's discretionary decision and therefore are not mandated by the state. Only for the repair and maintenance contracting requirements discussed in the analysis below, the title 5 regulations impose state-mandated new programs or higher levels of service to undertake efforts to provide participation in community college contracts and to report MBE, WBE, and DVBE participation to the Chancellor's Office.

Staff Analysis

Staff findings:

A. School districts and community college districts are required by the state to repair and maintain school property, but all other decisions regarding the purchase of goods and services and the undertaking of public works projects are discretionary decisions made by the K-12 school district or community college district.

B. School districts and community college districts are required by state law to contract for repair or maintenance services or repair and maintenance public works projects subject to specific limitations based on the cost of the repair and maintenance and the hours needed to complete the repair and maintenance.

C. When K-12 school districts and community college districts are required to contract for repairs or maintenance some of the test claim statutes and regulations impose state-mandated new programs or higher levels of service subject to article XIII B, section 6, of the California Constitution.

D. However, staff finds that many of the claimed activities are not required by the plain language of the statute, are not new, or are triggered by a discretionary decision of the K-12 school district or community college districts and so do not impose a state-mandated new program or higher level of service subject to article XIII B, section 6, of the California Constitution.

Costs Mandated by the State

The claimants have met the minimum burden of showing costs mandated by the state necessary to file a test claim pursuant to Government Code sections 17514 and 17564.

Finance argues that funds provided by the State School Deferred Maintenance Program (DMP) and the Community Colleges Facilities Deferred Maintenance and Special Repair Program (DMSRP) can be used to pay the cost of the activities in this claim. However, Finance has not provided any legal authority for this assertion. Based on the plain language of the code sections pled, the use of the funds under these programs is limited to the cost of the actual maintenance and repair work. However, the state-mandated new programs or higher levels of service found in this test claim consist of activities associated with the *contracting* for repair and maintenance services and public projects, *not* the actual repair and maintenance services and public projects. Thus, staff finds that DMP and DMRP funds cannot be used to offset the costs of the state-mandated new programs or higher levels of service found in this test claim and that Government Code section 17556(e) does not apply here to deny the test claim.

Conclusion

For the reasons discussed above, the Commission finds that the following activities constitute a reimbursable state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, but only when those activities are triggered by repair or maintenance to school facilities and

property, pursuant to Education Code sections 17002, 17565, 17593, and 81601, when the repair and maintenance must be let to contract under the following circumstances:

1. For *K-12 school districts*, when repairs and maintenance do not constitute a public project as defined by Public Contract Code section 22002(c), and the repairs and maintenance are not an emergency as set forth in Public Contract Code section 20113; and
    a. for repairs, and maintenance as defined by Public Contract Code section 20115, that exceed $50,000; unless
        1. the district has an average daily attendance of less than 35,000, and the total number of hours on the job does not exceed 350 hours; or
        2. the district has an average daily attendance of 35,000 or greater, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.
2. For *K-12 school districts*, when repairs and maintenance constitute a public project as defined by Public Contract Code section 22002(c), and the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for repair and maintenance public projects that exceed $15,000; unless
        1. the district has an average daily attendance of less than 35,000, and the total number of hours on the job does not exceed 350 hours; or
        2. the district has an average daily attendance of 35,000 or greater, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.
3. For *community college districts*, when repairs and maintenance do not constitute a public project as defined by Public Contract Code section 22002(c), and the repairs and maintenance are not an emergency as set forth in Public Contract Code section 20654; and
    a. for repairs, and maintenance as defined by Public Contract Code section 20656, that exceed $50,000; unless
        1. the district has full-time equivalent students of fewer than 15,000, and the total number of hours on the job does not exceed 350 hours; or
        2. the district has full-time equivalent students of 15,000 or more, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.
4. For *community college districts*, when repairs and maintenance constitute a public project as defined by Public Contract Code section 22002(c), and the project is not an emergency as set forth in Public Contract Code section 20654; and
    a. for repair and maintenance public projects that exceed $15,000; unless
        1. the district has full-time equivalent students of fewer than 15,000, and the total number of hours on the job does not exceed 350 hours; or

2. the district has full-time equivalent students of 15,000 or more, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.

5. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and

   a. for contracts entered into between July 1, 2001 and January 1, 2007, the project cost will exceed $25,000;

   b. for contracts entered into between January 1, 2007 and January 1, 2012, the project cost will exceed $30,000; or

   c. for contracts entered into after January 1, 2012, the project cost will exceed $45,000.

Only the following activities for the foregoing projects are reimbursable:

For K-12 School Districts and Community College Districts

1. Specify the classification of the contractor's license which a contractor shall possess at the time a contract for repair or maintenance is awarded in any plans prepared for a repair or maintenance public project and in any notice inviting bids required pursuant to the Public Contract Code. (Pub. Contract Code, § 3300(a) (Stats. 1985, ch. 1073).)

2. Include in any public works contract for repair and maintenance, which involves digging trenches or other excavations that extend deeper than four feet below the surface, a clause that provides the following:

   (a) That the contractor shall promptly, and before the following conditions are disturbed, notify the local public entity, in writing, of any:

   (1) Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.

   (2) Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids.

   (3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

   (b) That the local public entity shall promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work shall issue a change order under the procedures described in the contract.

   (c) That, in the event that a dispute arises between the local public entity and the contractor whether the conditions materially differ, or involve hazardous

waste, or cause a decrease or increase in the contractor's cost of, or time required for, performance of any part of the work, the contractor shall not be excused from any scheduled completion date provided for by the contract, but shall proceed with all work to be performed under the contract. The contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties.

(Pub. Contract Code, § 7104 (Stats. 1989, ch. 330).)

3. Set forth in the plans or specifications for any public work for repair and maintenance which may give rise to a claim of $375,000 or less which arise between a contractor and a K-12 school district or community college district, excluding those districts that elect to resolve claims pursuant to Article 7.1 (commencing with section 10240) of Chapter 1 of Part 2 of the Public Contract Code. (Pub. Contract Code, § 20104(c) (Stats. 1994, ch. 726).)

   "Claim" is defined by Public Contract Code section 20104(b)(2) (Stats. 1994, chapter 726).

4. For claims of less than $50,000 resulting from a public works contract for repair or maintenance, respond in writing to any written claim within 45 days of receipt of the claim. (Pub. Contract Code, § 20104.2(b)(1) (Stats. 1994, ch. 726).)

   "Claim" is defined by Public Contract Code section 20104(b)(2) (Stats. 1994, chapter 726).

5. For claims of more than $50,000 and less than or equal to $375,000 resulting from a public works contract for repair or maintenance, respond in writing to any written claim within 60 days of receipt of the claim. (Pub. Contract Code, § 20104.2(c)(1) (Stats. 1994, ch. 726).)

   "Claim" is defined by Public Contract Code section 20104(b)(2) (Stats. 1994, chapter 726).

6. Upon demand by a contractor disputing a K-12 school district's or community college district's response to a claim, schedule a meet and confer conference within 30 days for settlement of the dispute. (Pub. Contract Code, § 20104.2(d) (Stats. 1994, ch. 726).)

   "Claim" is defined by Public Contract Code section 20104(b)(2) (Stats. 1994, chapter 726).

7. Review each payment request from a contractor for repair and maintenance as soon as practicable after the receipt of the request to determine if the payment request is a proper payment request. "As soon as practicable" is limited by the seven day period in the activity mandated by Public Contract Code section 20104.50(c)(2). (Pub. Contract Code, § 20104.50(c)(1) (Stats. 1992, ch. 799).)

8. Return to the contractor for repair and maintenance any payment request determined not to be a proper payment request suitable for payment as soon as practicable, but no later than seven days after receipt of the request.

A returned request shall be accompanied by a document setting forth in writing the reasons why the payment request is not proper. (Pub. Contract Code, § 20104.50(c)(2) (Stats. 1992, ch. 799).)

9. Require Article 1.7, Chapter 1, Part 3, Division 2 of the Public Contract Code (Pub. Contract Code, § 20104.50) or a summary thereof, to be set forth in the terms of any repair and maintenance contract. (Pub. Contract Code, § 20104.50(f) (Stats. 1992, ch. 799).)
10. In any invitation for bid and in any repair and maintenance contract documents, include provisions to permit the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract. This excludes invitations for bid and contract documents for projects where there will be financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. Sec. 1921 et seq.), and where federal regulations or policies, or both, do not allow the substitution of securities. (Pub. Contract Code, § 22300(a) (Stats. 1988, ch. 1408).)
11. Before awarding repair and maintenance contract to a contractor for a project that *is not* governed by Public Contract Code section 20103.5 (which addresses projects that involve federal funds), verify with the Contractors' State Licensing Board that the contractor was properly licensed when the contractor submitted the bid. (Bus. & Prof. Code, § 7028.15(e) (Stats. 1990, ch. 321).)
12. Before making the first payment for work or material to a contractor under any repair and maintenance contract for a project where federal funds are involved, verify with the Contractors' State Licensing Board that the contract was properly licensed at the time that the contract was awarded to the contractor. (Pub. Contract Code, § 20103.5 (Stats. 1990, ch. 1414).)

<u>For Community College Districts Only</u>

1. Undertake appropriate efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises in district contracts for repair and maintenance. Appropriate efforts may include: (1) vendor and service contractor orientation programs related to participating in district contracts or in understanding and complying with the provisions of California Code of Regulations, title 5, section 59500 et seq.; (2) developing a listing of minority, women, and disabled veteran business enterprises potentially available as contractors or suppliers; or (3) such other activities that may assist interested parties in being considered for participation in district contracts.

   Appropriate activity does not include the application of the systemwide goals established in California Code of Regulations, title 5, section 59500 to district contracts. (Cal. Code Regs., tit. 5, § 59504 (Register 94, No. 6).)
2. Assess the status of each of its contractors regarding whether a contractor is a certified or self-certified minority, women, and disabled veteran business enterprise subcontractor and/or supplier. (Cal. Code Regs., tit. 5, §§ 59505(d) and 59509 (Register 94, No. 6), beginning July 1, 2001 through April 13, 2006.)
3. Establish a process to collect and retain certification information by a business enterprise claiming minority, women, and disabled veteran business enterprise status. (Cal. Code

Regs., tit. 5, §§ 59506(a) and 59509 (Register 94, No. 6), beginning July 1, 2001 through April 13, 2006.)

4. Each October 15, report to the Chancellor the level of participation by minority, women, and disabled veteran business enterprises in community college district contracts for repair and maintenance for the previously completed fiscal year. (Cal. Code Regs., tit. 5, § 59509 (Register 94, No. 6), beginning July 1, 2001 through March 31, 2005.)

Any other test claim statutes and allegations not specifically approved above, do not impose a reimbursable state mandated program subject to article XIII B, section 6 of the California Constitution.

Staff Recommendation

Staff recommends that the Commission adopt this analysis to partially approve this test claim.

STAFF ANALYSIS

Claimants

Clovis Unified School District and Santa Monica Community College District

Chronology

06/24/2003	Claimants file test claim 02-TC-35
03/24/2004	California Community Colleges Chancellor's Office files comments on 02-TC-35
04/16/2004	Department of Finance files comments on 02-TC-35
05/07/2004	Claimants file response to the Department of Finance's comments and the California Community Colleges Chancellor's Office's comments

I. Background

This test claim addresses public contract requirements imposed on K-12 school districts (including county offices of education) and community college districts when they contract for goods, services, and public works projects.

In 1981, the Legislature consolidated the law relating to public contracts by enacting the Public Contract Code and repealing the public contracting provisions found in the various areas of the California Code, including the Education Code and Government Code.[1] As a result, the Public Contract Code sets forth public contracting requirements that apply generally to all public agencies and requirements that apply specifically to K-12 school districts and community college districts, some of which are derived from prior California Code sections. The test claim statutes pled by the claimants include some of the requirements specific to K-12 school district and community college district contracts, and the requirements that apply generally to public agency contracts.

These requirements address a wide range of issues regarding public contracting that include the following: (1) public contracting provisions specifically applicable to K-12 school districts and community college districts; (2) the requirement to specify the classification of a contractor's license in the bid proposal; (3) the requirement to notify bidders of mandatory pre-bid conferences; (4) required contract clauses for public works involving digging trenches or other excavations; (5) requirements associated with retention proceeds; (6) contract provisions regarding antigraffiti technology, abatement, and deterrence; (7) the requirement to retain money from progress payments; (8) use of the Department of General Services (DGS) for the acquisition of information technology goods and services; (9) the general provisions of the Local Agency Construction Act; (10) required contract provisions regarding performance retentions and substitute security; (11) the requirement to verify a bidder's license status; (12) the requirement to return the security of unsuccessful bidders for contracts subject to the State School Building Aid Law of 1949; and (13) activities to promote minority, women, and disabled business enterprise participation in public contracts.

Because the activities alleged to be required by the test claim statutes and regulations are dependent on whether K-12 school districts and community college districts are required to acquire goods or services, undertake public projects, and contract for those goods, services, or

[1] Statutes 1981, chapter 306.

public projects, this analysis will address: (1) what goods and services and public projects K-12 school districts and community college districts are required to acquire or undertake; (2) whether the districts are required to contract for those required goods, services, and public projects; (3) whether the test claim statutes impose state-mandated new programs or higher levels of service; and (4) whether the test claim statutes and regulations impose costs mandated by the state within the meaning of Government Code section 17514 and 17556.

II. Positions of the Parties

A. Claimants' Position

The claimants contend that the test claim statutes and regulations impose mandated costs reimbursable by the state for school districts, county offices of education, and community college districts to engage in state-mandated new programs or higher levels of service, including:

1. Using standardized questionnaires and financial statements.
2. Maintaining those questionnaires and financial statements confidential and not subject to public inspection.
3. Rating bidders on the basis of those questionnaires and financial statements.
4. Prequalifying bidders.
5. Following required dispute resolution procedures (including meet and confer requirements, attending mediations, and mandatory judicial arbitrations).
6. Detailing specific reasons for changes to plans and specifications.
7. Verifying contractor licensing status.
8. Specifying bid procedures for additive and deductive contract items.
9. Paying interest on certain claims.
10. Receiving and returning bidder's security.
11. Requiring bidders to participate with minority and women business enterprises contracts.
12. Require competitive bidding for certain purchases, services and repairs and complying with the requirements of Minority, Women, and Disabled Veteran Business Enterprise Participation Goals for Community Colleges.

On May 7, 2004, the claimants filed a response to the Chancellor's Office and Finance's comments on the test claim. The claimants make two general arguments regarding: (1) activities alleged to be discretionary by the Chancellor's Office and Finance; and (2) the need to construct schools and apply for state funds for that purpose. Specifically, the claimants assert that legal compulsion is not required for a finding that an activity is mandated by the state, and that school districts are required to construct school buildings.

B. California Community Colleges Chancellor's Office (Chancellor's Office)

In comments dated March 24, 2004, the Chancellor's Office addresses each activity alleged to create a reimbursable state-mandate by the claimants, and suggests that some of the test claim statutes may impose mandated costs on community college districts. However, the Chancellor's Office argues that a "number of the provisions that are presented as part of this [test claim] do

not represent reimbursable mandates." The Chancellor's Office identifies two primary recurring themes governing the provisions:

1. Numerous provisions are optional. Community college districts are not required to engage in the conduct, but may choose to do so. An optional choice negates the finding of a state mandate.
2. Several Public Contract Code sections supporting this test claim existed prior to January 1, 1975, as Education Code sections. To the extent that any mandates predated January 1, 1975 they are not eligible for reimbursement.

C. Department of Finance (Finance)

In comments dated April 16, 2004, Finance asserts that the activities and requirements cited in this test claim do not constitute a reimbursable state mandate. Finance's assertion is based on the following reasons:

1. Projects for new construction proposed by school districts and community college districts are discretionary and therefore not reimbursable.
2. The costs incurred by complying with the Local Agency Public Construction Act (which includes some of the test claim statutes) are allowable costs for the use of the modernization and new construction grants provided by the State Allocation Board (school districts) and capital outlay appropriations in the State Budget Act (community college districts). Therefore, funding received from the state would offset any necessary costs of the Local Agency Public Construction Act for modernization and new construction projects should the Commission find that any activities are a reimbursable mandate.

   In addition, participation in the state's new construction and modernization programs, as well as the use of capital outlay funds by community college districts, is a voluntary and discretionary action resulting from a request initiated by the school or community college district.
3. School districts and community college districts receive funding from the state for deferred maintenance projects. Therefore, any projects funded through the State School Deferred Maintenance Program or the Community Colleges Facility Deferred Maintenance and Special Repair Program would have covered the state's share of any necessary costs of the Local Agency Public Construction Act.
4. School districts have the authority to charge development fees to finance construction projects, and as a result, any additional costs to school districts are not reimbursable because the affected districts have the authority to cover those costs through developer fees.

III. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever 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 such local government for the costs of such programs or increased level of service.

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[2] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[3]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[4]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[5]
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 it increases the level of service provided to the public.[6]
4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity. [7]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[8] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[9] In making its decisions, the Commission must strictly construe article XIII B,

---

[2] *County of San Diego v. State of California* (1997)15 Cal.4th 68, 81.

[3] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[4] *San Diego Unified School Dist. v. Commission on State Mandates, supra*, 33 Cal.4th at p. 874.

[5] *San Diego Unified School Dist., supra,* 33 Cal.4th at pgs. 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[6] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[7] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[8] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

[9] *County of San Diego, supra,* 15 Cal.4th 68, 109.

section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[10]

Issue 1: Do the Test Claim Statutes and Regulations Impose a State-Mandated New Program or Higher Level of Service on K-12 School Districts and Community College Districts within the Meaning of Article XIII B, Section 6?

The claimants seek reimbursement for the costs incurred by K-12 school districts, county offices of education, and community college districts as a result of activities required when a district engages in contracting for public works projects or public projects, and when contracting for the purchase of goods or services.

"Public works contract" is defined as an agreement for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind.[11] "Public project" is defined as the construction, reconstruction, erection, alteration, renovation, improvement, demolition, repair work, and painting or repainting involving any public owned, leased, or operated facility.[12] "Public project" excludes maintenance work which includes such activities as: (1) routine, recurring, and usual work for the preservation or protection of any public owned or publicly operated facility for its intended purposes; (2) minor painting, and (3) landscape maintenance.

For the purchase of goods and services, Public Contract Code sections 20111 and 20651, which apply specifically to K-12 school districts and community college districts, provide that K-12 school districts and community college districts are required to contract for goods and services when expending more than $50,000 for any of the following: (1) the purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district; (2) services, not including construction services; and (3) repairs, including maintenance.[13]

K-12 school districts, county offices of education, and community college districts maintain broad authority to carry on any activity not prohibited by or in conflict with the law or the purpose for which they were established.[14] As a result, the projects and goods and services that

---

[10] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[11] Public Contract Code section 1101. Civil Code sections 3100 and 3106 define "public work" as any work of improvement contracted for by a public entity including:

> [C]onstruction, alteration, addition to, or repair, in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, or road, the seeding, sodding, or planting of any lot or tract of land for landscaping purposes, the filling, leveling, or grading of any lot or tract of land, the demolition of buildings, and the removal of buildings.

[12] Public Contract Code section 22002(c).

[13] Public Contract Code sections 20111(a) and (c), and 20651(a) and (c).

[14] Education Code sections 35160, 35160.2, and 70902(a)(1), authorize K-12 school districts and community college districts to initiate and carry on any program, activity, or may 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 purpose for which the districts are established. Education Code

K-12 school districts and community college districts are authorized to contract for is very broad. This is further indicated by Public Contract Code sections 20110 and 20650, which establish the scope of applicability for the provisions of the Public Contract Code that are specifically directed at K-12 school districts (Pub. Contract Code, §§ 20110-20118.4) and community college districts (Pub. Contract Code, §§ 20650-20662). Sections 20110 and 20650 provide that the Public Contract Code sections apply to a broad range of issues for which K-12 school districts and community college districts have the authority to contract for, including interscholastic athletics, property acquisition, and supplementary services.

Because the provisions of the test claim statutes and regulations are only applicable to K-12 school districts, county offices of education, and community college districts that enter into contracts for public works projects, or for the purchase or acquisition of goods and services, the analysis must first address whether the *state* requires K-12 school districts, county offices of education, or community college districts to engage in any public works projects or to purchase goods or services, or whether they are required by the state to contract out for those projects, goods, or services. Only when the state requires school districts to engage in these triggering activities are the downstream requirements considered mandated by the state and eligible for reimbursement.[15]

A. School Districts and Community College Districts are Required by the State to Repair and Maintain School Property, but all Other Decisions Regarding the Purchase of Goods and Services and the Undertaking of Public Works Projects are Discretionary Decisions Made by the K-12 School District or Community College District

Education Code section 17593 requires K-12 school districts to keep school buildings and property in repair as follows:

> The clerk of each district except a district governed by a city or city and county board of education shall, under the direction of the governing board, keep the schoolhouses in repair during the time school is taught therein, and exercise a general care and supervision over the school premises and property during the vacations of the school.

Education Code section 17565 further requires the governing board of any school district to "repair" school property as follows: "The governing board of any school district shall furnish, repair, insure against fire, and in its discretion rent the school property of its districts."

Although, in specific instances the Legislature has expressly included county offices of education within the definition of "school districts," the Legislature has chosen not to do so when imposing the above requirements on K-12 school districts. Thus unlike K-12 school districts, county offices of education do not face the same statutory requirements

---

section 35160.2 provides that "For the purposes of Section 35160, 'school district' shall include county superintendents of schools and county boards of education." Thus, the Legislature specifically extends the broad authority of school districts to county offices of education.

[15] *San Diego Unified School Dist., supra*, 33 Cal.4th at p. 880; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 751.

to keep schoolhouses in repair. As a result, staff finds that county offices of education are not legally required to repair school facilities.

Community college districts are also required to repair school property. Education Code section 81601 states:

> The governing board of a community college district shall furnish, repair, insure against fire, and in its discretion rent the school property of its districts. …

The term "repair" is defined as "to restore to sound condition after damage or injury" and "to renew or refresh."[16] Thus, staff finds that "repair" includes "maintenance" for purposes of these provisions.

Thus, both K-12 school districts and community college districts, but not county offices of education, are required by statute to repair the school property of their districts. Since "property" includes "any external thing over which the rights of possession, use, and enjoyment are exercised,"[17] the requirement to repair includes real property as well as facilities owned by the district.

In addition, because of the use of "repair" in the Education Code sections is broadly defined, staff finds that the repair and maintenance required by the Education Code sections include both repair and maintenance activities that are defined as "public projects" by Public Contract Code section 22002(c), and repair and maintenance that are excluded from "public projects" by Public Contract Code sections 22002(d), 20111(a)(3), and 20651(a)(3).

Other than the repair and maintenance of K-12 school district and community college district school buildings and property, however, K-12 school districts, county offices of education, and community college districts are granted broad authority to engage in a multitude of activities, including the acquisition of goods and services.[18] The state has not specifically required the purchase of equipment, materials, or supplies, or the acquisition of non-construction services, or to contract for such goods and services, *excluding repairs and maintenance*. Thus, except for repair and maintenance, K-12 school districts and community college districts are not legally compelled by the state to engage in these other triggering activities.

The claimants argue, however, that goods and services acquired for general school construction, including new construction, is not voluntary.[19] In support of this contention, the claimants cite to *Butt v. State of California*[20] for the proposition that the state has a responsibility to "provide for a system of common schools, by which a school shall be kept up and supported in each district" and that those schools are required to be "free."[21]

---

[16] Webster's II, New Collegiate Dictionary, 1999, page 939, column 2.

[17] Black's Law Dictionary, Seventh Edition, 1999, page 1232, column 2.

[18] Education Code sections 35160, 35160.2, and 70902(a)(1).

[19] Exhibit D, comments filed by the claimants in response to comments filed by the Chancellor's Office and Department of Finance, dated May 7, 2004, p. 6.

[20] *Butt v. State of California* (1992) 4 Cal.4th 688.

[21] Exhibit D, comments filed by the claimants in response to comments filed by the Chancellor's Office and Department of Finance, dated May 7, 2004, p. 11.

It is true, as the claimants state, that courts have consistently held public education to be a matter of statewide rather than a local or municipal concern, and that the Legislature's power over the public school system is plenary.[22] These conclusions are true for every Education Code statute that comes before the Commission on the question of reimbursement under article XIII B, section 6 of the California Constitution. It is also true that the state is the beneficial owner of all school properties and that local school districts hold title as trustee for the state.[23]

Nevertheless, article IX, section 14 of the California Constitution allows the Legislature to authorize the governing boards of all school districts, including community college districts, to initiate and carry on any program or activity, or to act in any manner that is not in conflict with state law. In this respect, it continues to be the legislative policy of the state to strengthen and encourage local responsibility for control of public education through local school districts.[24] The governing boards of K-12 school districts and community college districts may hold and convey property for the use and benefit of the school district.[25] Governing boards of K-12 school districts have also been given broad authority by the Legislature to decide when to build and maintain a schoolhouse and, "when desirable, may establish additional schools in the district."[26] Governing boards of community college districts are required to manage and control all school property within their districts, and have the power to acquire and improve property for school purposes.[27] Thus, under state law, the decision to construct a school facility lies with the governing boards of school districts and community college districts, and is not legally compelled by the state.

Additionally, there are no statutes or regulations requiring the governing boards of K-12 school districts, county offices of education, and community college districts to construct or reconstruct unsafe buildings. The decision to reconstruct, or even abandon an unsafe building, is a decision left to the discretion of a school district. In *Santa Barbara School District v. Superior Court*, the California Supreme Court addressed a school district's decision to abandon two of its schools that were determined unsafe, instead of reconstructing a new building, as part of its desegregation plan.[28] The court held that absent proof that there were no school facilities to absorb the students, the school district, "in the reasonable exercise of its discretion, could lawfully take this action."[29] The court describes the facts and the district's decision as follows:

> On August 12, 1971, the Board received a report that the Jefferson school was structurally unsafe within the requirements of section 15503 [a former statute with

---

[22] See, *Hayes, supra,* 11 Cal.App.4th 1564, 1579, fn. 5; *California Teachers Assn. v. Huff* (1992) 5 Cal.App.4th 1513, 1524; *Hall v. City of Taft* (1956) 47 Cal.2d 177, 179.

[23] *Hayes, supra*, 11 Cal.App.4th 1564, 1579, fn. 5.

[24] *California Teachers Assn., supra*, 5 Cal.App.4th 1513, 1523; Education Code section 14000.

[25] Education Code sections 35162 and 70902.

[26] Education Code sections 17340, 17342.

[27] Education Code sections 81600, 81606, 81670 et seq., 81702 et seq.

[28] *Santa Barbara School District v. Superior Court* (1975) 13 Cal.3d 315, 337-338.

[29] *Id.* at page 338.

> language similar to Education Code sections 17367 and 81162]. The report recommended that a structural engineer be retained to determine whether the school should be repaired or abandoned, since if it cannot be repaired, it must be abandoned pursuant to section 15516. On May 15, 1972, three days before the final meeting of the Board, the superintendent received a report concerning the rehabilitation or replacement costs of the Jefferson school. The report found that it would cost $621,800 to make the existing structure safe and $655,000 to build an entirely new building. Accordingly, in fashioning the Administration Plan, the superintendent made provision therein for closing the Jefferson school. The Board would certainly be properly exercising its discretion in a reasonable manner were it to approve abandoning this building in view of the extreme cost. The determination of the questions whether a new school was needed to replace this structure or whether existing facilities could handle the Jefferson school students due to an expected drop in elementary enrollment, was properly within the Board's discretion.[30]

Therefore, the state has not legally compelled K-12 school districts, county offices of education, or community college districts to construct new school facilities or undertake other public works projects that *do not* involve repair or maintenance. Rather, "[w]here, when or how, if at all, a school district shall construct school buildings is within the sole competency of its governing board to determine."[31]

Absent legal compulsion the claimants bear the burden of providing evidence to support the claimants' allegation that K-12 school districts, county offices of education, and community college districts face practical compulsion to construct new school facilities or undertake other public works projects that *do not* involve repair or maintenance.[32] The claimants cite to a study and Proposition 55 ballot language, both of which state a need to build more schools in California. However, the question before the Commission is not whether there is a general need for more school facilities, but whether a K-12 school district or community college district faces practical compulsion by the state to build them.

The claimants have not provided evidence that K-12 school districts, county offices of education, and community college districts face certain and severe penalties, such as double taxation or other draconian consequences, such that the districts face practical compulsion to construct new school facilities or undertake other public works projects that *do not* involve repair or maintenance. Instead, public works projects that are entered into, other than for repair and maintenance for K-12 school districts and community college districts, are discretionary decisions of the districts. As a result, pursuant to *Kern High School Dist.*, any activities required by the test claim statutes resulting from a K-12 school district's or community college district's voluntary decision to undertake a public works project, other than for repair and maintenance, or

---

[30] *Id*. at page 337.

[31] *People v. Oken, supra,* 159 Cal.App.2d 456, 460.

[32] *Dept of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1366-1369.

to purchase other goods and services, are not mandated by the state and are not subject to article XIII B, section 6.[33]

Thus, the downstream activities required by the test claim statutes and regulations are considered mandated by the state only when they are triggered by contracts for the repair and maintenance of K-12 school district or community college district facilities and property, whether the repair or maintenance is classified as a public work or not. Downstream activities triggered by local decisions are not eligible for reimbursement.

In addition, because county offices of education are not required by the state, but are given broad local authority to undertake public projects or to purchase goods and services, including those for repair and maintenance, staff finds that any activities required by the test claim statutes are not mandated by the state on county offices of education and are not subject to article XIII B, section 6. As a result, county offices of education are not eligible for reimbursement under this test claim.

B. School Districts and Community College Districts are Required by State Law to Contract for Repair or Maintenance Services or Repair and Maintenance Public Works Projects Subject to Specific Limitations Based on the Cost of the Repair and Maintenance and the Hours Needed to Complete the Repair and Maintenance

Since the requirements imposed by the test claim statutes are limited to repair and maintenance of K-12 school district or community college district facilities and property performed under contract, it is necessary to determine whether the state requires K-12 school districts or community college districts to contract for repair or maintenance of school facilities or property, or whether the district can use its own forces for the project. The test claim statutes and regulations do not apply if a district uses its own forces. As further described below, the state requires districts to contract for repair and maintenance of school facilities and property in specified situations, depending upon project variables and the laws under which the district operates.

The Public Contract Code governs when districts are required to contract with private entities. Sections 20111 and 20651, which were pled as test claim statutes, generally require school districts and community college districts to contract with the lowest responsible bidder for construction, repairs and maintenance.[34] In regard to the repairs and maintenance activities found above to be required by the state, sections 20111 and 20651 generally require repairs and maintenance, not defined as public projects, to be let for contract when it involves an expenditure of more than $50,000.[35] For repair and maintenance public projects, K-12 school districts and community college districts are required to contract for projects involving an expenditure of $15,000 or more.[36]

However, there are exceptions to the general requirements established by section 20111 and 20651. For instance, when emergency repairs are needed for any facility to permit the

---

[33] *Kern High School Dist., supra,* 30 Cal.4th 727, 751.

[34] Public Contract Code sections 20111 and 20651.

[35] Public Contract Code section 20111(a)(3).

[36] Public Contract Code section 20651(a)(3).

continuance of existing classes or to avoid danger to life or property, the governing board of a school district or community college district is allowed to use its own forces to make such repairs.[37] In addition, the governing board of a school district or community college district is allowed to use its own forces to make repairs and other improvements under certain labor hour or material cost limits. For K-12 school districts, Public Contract Code section 20114 provides the following labor hour or material cost limits:

> (a) In each school district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 20115[38] by day labor, or by force account, whenever the total number of hours on the job does not exceed 350 hours. Moreover, in any school district having an average daily attendance of 35,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance, as defined in Section 20115, by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours, or when the cost of material does not exceed twenty-one thousand dollars ($21,000).
>
> (b) For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

For community college districts, Public Contract Code section 20655 provides the following labor hour or material cost limits:

> (a) In each community college district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 20656[39] by day labor, or by force account, whenever the total number

[37] Public Contract Code sections 20113 and 20654.

[38] Public Contract Code section 20115 defines "maintenance" in this instance as "routine, recurring, and usual work for the preservation, protection, and keeping of any publicly owned or publicly operated facility for its intended purpose in a safe and continually usable condition for which it was designed, improved, constructed, altered, or repaired." This includes, but is not limited to: "carpentry, electrical, plumbing, glazing, and other craftwork designed consistent with the definition set forth above to preserve the facility in a safe, efficient, and continually usable condition for which it was intended, including repairs, cleaning, and other operations on machinery and other equipment permanently attached to the building or realty as fixtures." These provisions express the Legislature's intent that maintenance does not include painting, repainting, or decorating other than touchup, but instead those activities are to be controlled directly by the work limits under section 20114.

[39] Public Contract Code section 20656 defines "maintenance" for this purpose in the same manner as Public Contract Code section 20115. Section 20656 expresses the Legislature's intent that maintenance does not include painting, repainting, or decorating other than touchup, but instead those activities are to be controlled directly by the work limits under section 20655.

of hours on the job does not exceed 350 hours. Moreover, in any district whose number of full-time equivalent students is 15,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance, as defined in Section 20656, by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours, or when the cost of materials does not exceed twenty-one thousand dollars ($21,000).

(b) For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

Notwithstanding the above provisions, a flat dollar threshold for public projects, as defined in Public Contract Code section 22002,[40] is established when a K-12 school district or community college district elects to operate under the Uniform Public Construction Cost Accounting Act (UPCCAA).[41] Public Contract Code section 22001 sets forth the following findings and declarations regarding the UPCCAA:

> The Legislature finds and declares that there is a statewide need to promote uniformity of the cost accounting standards and bidding procedures on construction work performed or contracted by public entities in the state. This chapter provides for the development of cost accounting standards and an alternative method for the bidding of public works projects by public entities.

---

[40] Subdivision (c) defines "public project" as:

> (1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and *repair* work involving any publicly owned, leased, or operated facility.[40]
> (2) Painting or repainting of any publicly owned, lease, or operated facility.
> (3) In the case of a publicly owned utility system, "public project" shall include only construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher. (Emphasis added.)

Subdivision (d) states that "public project" does not include "maintenance work" which includes all of the following:

> (1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.
> (2) Minor repainting.
> (3) Resurfacing of streets and highways at less than one inch.
> (4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.
> (5) Work performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems, including, but not limited to, dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

[41] Public Contract Code sections 22000 et seq.

Section 22030 provides that the UPCCAA is only applicable to a district whose governing board has by resolution elected to become subject to its procedures and has notified the State Controller of the election. Currently, there are 262 school districts, including co-claimant Clovis Unified School District, and 34 community college districts that have elected to become subject to the UPCCAA.[42]

Once the district has elected to become subject to the UPCCAA, in the event of a conflict with any other provision of law relative to bidding procedures, the alternative bidding procedures and cost threshold under the UPCCAA for public projects, as defined, shall apply.[43]

The UPCCAA provides that public projects, which exclude maintenance, of $45,000 or less may be performed by a school district or community college district by its own forces.[44] In cases of emergency when repair or replacements are necessary, the work may be done by a district with its own forces.[45] Thus, for those districts subject to the UPCCAA, when the public project is not an emergency, contracting is required for a public project, as defined, when the cost of such project will exceed $45,000. When the project is for maintenance or other work that does not fall within the definition of public project, districts subject to the UPCCAA *may* use the bidding procedures set forth under the UPCCAA and in that situation would likewise be required to contract when the cost of the project will exceed $45,000.[46] Here, repair or maintenance projects – those that are legally required by Education Code sections 17002, 17565, 17593 and 81601 as noted above – could fall under the UPCCAA definition for public project, or may not. But in either case, for districts subject to the UPCCAA, when the project is not an emergency, contracting is required only when the cost of the project will exceed $45,000.

Staff notes that prior to prior to January 1, 2007, the dollar limit under the UPCCAA was $25,000. On January 1, 2007 the amount was increased to $30,000,[47] and on January 1, 2012 the amount was increased to the current $45,000 limit.[48] The claimants filed this test claim in June 2003, and thus, the period of reimbursement for any activities approved in this analysis begins on July 1, 2001.[49] As a result, depending on when claimed activities took place, a different dollar threshold is applicable to K-12 school districts and community college districts subject to the UPCCAA.

---

[42] State Controller's Office, California Uniform Construction Cost Accounting Commission, *Participating Agency List: All Agencies by Agency Type* (February 28, 2012) <http://www.sco.ca.gov/Files-ARD-Local/cuccac_part_ag.pdf> as of March 15, 2012.

[43] Public Contract Code section 22030.

[44] Public Contract Code section 22032.

[45] Public Contract Code section 22035.

[46] Public Contract Code section 22003.

[47] Statutes 2006, chapter 643.

[48] Statutes 2011, chapter 683.

[49] Government Code section 17557(e).

Accordingly, staff finds that the state has required K-12 school districts and community college districts to repair or maintain their facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, via contract under the following circumstances:

1. For *K-12 school districts*, when repairs and maintenance do not constitute a public project as defined by Public Contract Code section 22002(c), and the repairs and maintenance are not an emergency as set forth in Public Contract Code section 20113; and
    a. for repairs, and maintenance as defined by Public Contract Code section 20115, that exceed $50,000; unless
        1. the district has an average daily attendance of less than 35,000, and the total number of hours on the job does not exceed 350 hours; or
        2. the district has an average daily attendance of 35,000 or greater, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.
2. For *K-12 school districts*, when repairs and maintenance constitute a public project as defined by Public Contract Code section 22002(c), and the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for repair and maintenance public projects that exceed $15,000; unless
        1. the district has an average daily attendance of less than 35,000, and the total number of hours on the job does not exceed 350 hours; or
        2. the district has an average daily attendance of 35,000 or greater, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.
3. For *community college districts*, when repairs and maintenance do not constitute a public project as defined by Public Contract Code section 22002(c), and the repairs and maintenance are not an emergency as set forth in Public Contract Code section 20654; and
    a. for repairs, and maintenance as defined by Public Contract Code section 20656, that exceed $50,000; unless
        1. the district has full-time equivalent students of fewer than 15,000, and the total number of hours on the job does not exceed 350 hours; or
        2. the district has full-time equivalent students of 15,000 or more, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.
4. For *community college districts*, when repairs and maintenance constitute a public project as defined by Public Contract Code section 22002(c), and the project is not an emergency as set forth in Public Contract Code section 20654; and
    a. for repair and maintenance public projects that exceed $15,000; unless
        1. the district has full-time equivalent students of fewer than 15,000, and the total number of hours on the job does not exceed 350 hours; or

2. the district has full-time equivalent students of 15,000 or more, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.

5. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and

   a. for contracts entered into between July 1, 2001 and January 1, 2007, the project cost will exceed $25,000;

   b. for contracts entered into between January 1, 2007 and January 1, 2012, the project cost will exceed $30,000; or

   c. for contracts entered into after January 1, 2012, the project cost will exceed $45,000.

Any activities found to constitute state-mandated new programs or higher levels of service in the analysis below will be limited to the above instances in which K-12 school districts and community college districts are required by the state to contract for the repair and maintenance of school buildings and property.

C. When K-12 School Districts and Community College Districts are Required to Contract for Repairs or Maintenance Some of the Test Claim Statutes and Regulations Impose State-Mandated New Programs or Higher Levels of Service Subject to Article XIII B, Section 6, of the California Constitution

With the limitations discussed above, the following discussion will analyze whether the 33 test claim statutes and five regulations pled by the claimants impose state-mandated new programs or higher levels of service on K-12 school districts or community college districts.

1. Public Contracting Provisions Specifically Applicable to K-12 School Districts and Community College Districts (Pub. Contract Code, §§ 20111, 20111.5, 20116, 20651, 20651.5, 20657, and 20659)

The public contract code sections discussed in this section are the parts of the Local Agency Public Construction Act that are specifically applicable to K-12 school districts and community college districts. These sections address: (1) the requirement to let a contract to the lowest bidder, the need to let a contract out for bid, and the requirement for bidder's to provide security; (2) the authority to establish a pre-qualification process; (3) the prohibition against splitting work orders, the retention of records, and the authority to use an informal bidding process; and (4) the requirements associated with making changes or alterations to contracts.

i. Letting Contracts; Necessity of Bids, and Bidder's Security (Pub. Contract Code, §§ 20111 and 20651)

Sections 20111 and 20651 set forth parallel provisions for K-12 school districts and community college districts regarding the requirement to contract for purchases of goods and services and for public projects over a specified amount. Portions of these code sections were already discussed above, and create part of the limitations on the remaining test claim statutes and regulations pled in this claim. The discussion below will specifically address whether the remaining provisions of sections 20111 and 20651 impose state-mandated activities, and whether the activities mandated constitute new programs or higher levels of service.

Sections 20111 provides in relevant part:

> (a) The governing board of any school district, in accordance with any requirement established by that governing board pursuant to subdivision (a) of Section 2000, shall let any contracts involving an expenditure of more than fifty thousand dollars ($50,000) for any of the following:
>
> (1) The purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district.
>
> (2) Services, except construction services.
>
> (3) Repairs, including maintenance as defined in Section 20115, that are not a public project as defined in subdivision (c) of Section 22002.
>
> The contract shall be let to the lowest responsible bidder who shall give security as the board requires, or else reject all bids.
>
> (b) The governing board shall let any contract for a public project, as defined in subdivision (c) of Section 22002, involving an expenditure of fifteen thousand dollars ($15,000) or more, to the lowest responsible bidder who shall give security as the board requires, or else reject all bids. All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:
>
> (1) Cash.
>
> (2) A cashier's check made payable to the school district.
>
> (3) A certified check made payable to the school district.
>
> (4) A bidder's bond executed by an admitted surety insurer, made payable to the school district.
>
> Upon an award to the lowest bidder, the security of an unsuccessful bidder shall be returned in a reasonable period of time, but in no event shall that security be held by the school district beyond 60 days from the time the award is made.

Section 20651 establishes the same requirements as applicable to community college districts. As discussed above, K-12 school districts and community college districts are not mandated to engage in the purchase of goods or services or engage in public projects, except for repair and maintenance. Thus, as found above, the provisions of sections 20111 and 20651 only mandate the letting of contracts for repairs and maintenance, whether or not classified as a public project, subject to the limitations established earlier in this analysis.

In addition, sections 20111 and 20651 mandate K-12 school districts and community college districts to award the contract to the lowest responsible bidder. In regard to public projects, K-12 school districts and community college districts are mandated to return the security of an unsuccessful bidder no later than 60 days from the time the contract is awarded to the lowest bidder.

The claimants assert that the provisions that all bids be presented under sealed cover and accompanied by one of four types of bidder’s security imposes a mandate on K-12 school

districts or community college districts.[50] However, these provisions do not impose any activities on the districts. Rather, these provisions impose requirements on *bidders* to present their bids under in a specified manner and accompanied with a bidder's security.

Thus, based on the above discussion, Public Contract Code sections 20111 and 20651 impose the following state-mandated activities on K-12 school districts and community college districts, for required repair and maintenance contracts:

1. Contract for repairs, including maintenance, not defined as a public project by Public Contract Code section 22002(c), that exceed $50,000. (Pub. Contract Code, §§ 20111(a)(3) and 20651(a)(3) (Stats. 1995, ch. 897).)
2. Contract for repair and maintenance of public projects involving the expenditure of $15,000 or more. (Pub. Contract Code, §§ 20111(b) and 20651(b) (Stats. 1995, ch. 897).)
3. Let contracts for repairs and maintenance, whether or not defined as a public project, to the lowest bidder. (Pub. Contract Code, §§ 20111(a) and (b); and 20651(a) and (b) (Stats. 1995, ch. 897).)
4. Return the security of an unsuccessful bidder on a repair and maintenance public project no later than 60 days from the time the contract is awarded to the lowest bidder.

However, since 1973, K-12 school districts and community college districts have been statutorily required to contract for repairs and maintenance and award the contract to the lowest bidder. In 1973, former Education Code section 15951, from which Public Contract Code sections 20111 and 20651 are derived, provided:

> The governing board of any school district shall let any contracts involving an expenditure of more than five thousand dollars ($5,000) for work to be done or more than eight thousand dollars ($8,000) for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise.[51]

The claimants assert that sections 20111 and 20651 now specifically provide for contracting for repairs and maintenance, that are not defined as public projects, and as a result, impose new programs or higher levels of service. The claimants are incorrect. Prior to 1975, districts were required to contract for "work" involving expenditures over a specified amount. The word "work" was not limited by definition in statute, and the plain meaning of "work" is inclusive of repairs and maintenance, whether defined as a public project or not.[52] As a result, immediately prior to the enactment of the test claim statutes K-12 school districts and community college districts were already required to engage in the mandated activities to contract for repairs or

---

[50] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 109-115; See also, Exhibit D, comments filed by the claimants in response to comments filed the Chancellor's Office and Department of Finance, dated May 7, 2004, p. 26.

[51] Former Education Code section 15951 (Stats. 1973, ch. 321).

[52] Webster's II, New Collegiate Dictionary, 1999, page 1271, column 1, defines "work" as, "Physical or mental effort or activity directed toward the production or accomplishment of something."

maintenance, whether or not defined as a public project, that exceed a specific dollar threshold, and to let the contract to the lowest bidder.

Moreover, the requirement to return the security of an unsuccessful bidder after a contract has been awarded, is a clarification of existing law and therefore not a new program or higher level of service.

The purpose of a "bidder's security" is to provide a guarantee to a contracting agency that the bidder execute his or her bid if the contract is awarded to the bidder. This purpose is evident by the statutory scheme provided in the Public Contract Code, which existed prior to 1975, that provides for the forfeiture of a bidder's security in the event that a bidder should fail or refuse to execute his or her bid, and a remedy for bidders seeking return of forfeited securities.[53] Implicit in the fact that a bidder would *forfeit* his or her security if he or she should fail or refuse to execute his or her bid if awarded the contract, is that upon submission of a bid and bidder's security the contracting agency does not obtain ownership of the security. Rather, the contracting agency is obligated to return the bidder's security to bidders that execute on their bids, and to bidders who were not even awarded the contract in the first place. To interpret this any other way would render the bidder's security useless. If the security was not required to be returned, a bidder who refuses or fails to execute on an awarded contract would stand in the same shoes as any other bidder, and as a result, face no consequence for failing to execute.

As a result, staff finds that the state-mandated activities imposed by Public Contract Code sections 20111 and 20651 do not constitute a new program or higher level of service.

ii. Prequalification Process (Pub. Contract Code, §§ 20101, 20111.5 and 20651.5)

Sections 20101, 20111.5, and 20651.5, address the authority to establish a prequalification process for bidding on contracts for public entities, K-12 school districts, and community college districts, and the resulting requirements imposed on these entities if they decide to establish a prequalification process.[54]

Sections 20101, 20111.5, and 20651.5 provide K-12 school districts and community college districts the authority to require prospective bidders to a contract to complete and submit a standardized questionnaire and financial statement as part of a prequalifying process for contracts.[55] If a K-12 school district or community college district requires bidders to complete and submit questionnaires and financial statements, the district is required to adopt and apply a uniform system of rating bidders on the basis of the questionnaires and financial statements to determine the size of contracts that bidders are deemed qualified to bid.[56] In addition, a K-12 school district and community college district must furnish prospective bidders in this process with a standardized proposal form that, when completed and executed, shall be submitted as the

[53] Public Contract Code section 5100 et seq. derived from former Government Code section 4200 et seq. (Stats. 1971, ch. 1584).

[54] Public Contract Code section 20101 is generally applicable to local public entities; section 20111.5 is applicable to K-12 school districts; and section 20651.5 is applicable to community college districts.

[55] Public Contract Code sections 20101(a), 20111.5(a) and 20651.5(a).

[56] Public Contract Code sections 20101(b), 20111.5(b) and 20651.5(b).

bidders' bids.[57] Section 20101 also provides that "public entities" that establish a prequalification process must establish a process that allows prospective bidders to dispute the bidders' prequalification ratings.[58] In addition, K-12 school districts and community college districts are authorized to use this prequalifying process on a quarterly basis and may authorize that the prequalification to be considered valid for up to one calendar year.[59]

The claimants allege that sections 20101, 20111.5 and 20651.5 require K-12 school districts and community college districts to establish the prequalifying process described above and comply with the resulting requirements. This, however, is contrary to the plain language of sections 20101, 20111.5, and 20651.5, which provide, "The governing board of the district [/community college district] *may require* that each prospective bidder for a contract . . . complete and submit to the district a standardized questionnaire and financial statement . . . ."[60] Thus, any activity regarding a prequalification process established by a K-12 school district or community college district is predicated on the district voluntarily establishing a prequalification process.

Despite the plain language of sections 20101, 20111.5, and 20651.5, the claimants repeat the following argument with slight variations:

> Public Contract Code sections 20101, et seq., are part of the Local Agency Public Construction Act, enacted by Chapter 972, Statutes of 1999. Section 1, an uncodified portion of the Act, provides:
>
> > "The Legislature hereby finds and declares that the establishment by public agencies of a uniform system to evaluate the ability, competency, and integrity of bidders on public works projects is in the public interest, will result in the construction of public works projects of the highest quality for the lowest costs, and is in furtherance of the objectives stated in Section 100 of the Public Contract Code." (Quotes in original.)
>
> In view of the findings and declaration of the Legislature that the Act will result in the construction of public works of the highest quality and for the lowest costs, the argument that section 20101[, 20111.5, and 20651.5] is permissive is not well taken.

In response to the Chancellor's Office and Finance's arguments that various activities claimed in this test claim are discretionary and therefore do not impose any state-mandates pursuant to *Kern High School Dist*., the claimants argue that legal compulsion is not necessary for a finding of a mandate.[61] The claimants discuss the cases leading the court in *Kern High School Dist*. to hold open the possibility of practical compulsion as applicable to state mandates, and assert:

---

[57] Public Contract Code sections 20111.5(c) and 20651.5(c).

[58] Public Contract Code section 20101(d).

[59] Public Contract Code sections 20101(c) and 20111.5(e).

[60] Public Contract Code sections 20111.5(a) and 20651.5(a). (Italics added.)

[61] Exhibit D, Comments filed by the claimants in response to comments filed by Chancellor's Office and Department of Finance, dated May 7, 2004, pgs. 2-6, and 24.

> Neither [Finance or the Chancellor's Office] has attempted to apply this test [for practical compulsion] to any portion of the test claim legislation and regulations. Therefore, their arguments lack any foundation when claiming that those statutes and regulations contain no reimbursable mandates because the test claim activities are discretionary.[62]

The claimants' first argument fails to draw a connection between the legislative findings and declarations cited and the ultimate conclusion asserted by the claimants (i.e. that the permissive language of the statute should be read as mandatory). The permissive nature of sections 20101, 20111.5, and 20651.5 is consistent with the findings and declarations cited to by the claimants. Specifically, statutes that require a public agency to utilize a uniform system of rating bidders *if the public agency voluntarily decides* to establish a prequalifying process is consistent with the Legislature's findings and declarations regarding the Local Agency Public Construction Act's purpose of establishing a uniform system to evaluate bidders on public works projects.

In addition, absent legal compulsion the claimants bear the burden of providing evidence to support the claimants' allegation that K-12 and community college districts face practical compulsion to engage in an activity that the districts are not legally compelled to engage in. Absent any evidence of practical compulsion, the Commission cannot make a finding that practical compulsion exists.[63] The claimants have not provided evidence that K-12 and community college districts face practical compulsion to establish and require the use of a prequalification process.

Based on the discussion above, staff finds that the Public Contract Code sections 20101, 20111.5, and 20651.5 do not impose any state-mandated activities.

iii. Prohibition Against Splitting Work Orders to Avoid Public Contracting; Keeping of Records; and Informal Bidding (Pub. Contract Code, §§ 20116 and 20657)

Sections 20116 and 20657 address the prohibition against splitting work orders to avoid public contracting, the duty to maintain records of public works projects in accordance with the California School Accounting Manual/Community College Budget and Accounting Manual, and requirements associated with informal bidding as applicable to K-12 school districts and community college districts.

As relevant to this discussion, the claimants allege reimbursable activities attributable to: (1) the duty to maintain records; and (2) the requirements associated with informal bidding. The following discussion will address each allegation in that order.

a. The Duty to Maintain Records of Public Works Projects in Accordance with the California School Accounting Manual/Community College Budget and Accounting Manual is not a New Program or Higher Level of Service

Sections 20116 and 20657 provide in relevant part:

> The district shall maintain job orders or similar records indicating the total cost expended on each project in accordance with the procedures established in the

[62] *Id.* at p. 6.

[63] *Kern High School Dist., supra,* 30 Cal.4th at p. 751; and *POBRA, supra,* 170 Cal.App.4th 1355, 1366-1369.

> most recent edition of the California School Accounting Manual[/Community College Budget and Accounting Manual] for a period of not less than three years after completion of the project.

Prior to 1975, both K-12 school districts and community college districts were required to, "[k]eep an accurate account of the receipts and expenditures of district moneys."[64] Additionally, the requirement to comply with the standardized procedures of the California School Accounting Manual/Community College Budget and Accounting Manual predates 1975 and the 1982 enactment of Public Contract Code sections 20116 and 20657.[65] In 1973, former Education Code 1959 section 17199 required the accounting system used to record the financial affairs of school districts and community college districts to be in accordance with the California School Accounting Manual.[66] This requirement was renumbered to current Education Code sections 41010 and 84030. Staff notes, that Education Code section 84030 was the subject of a previous test claim in which the Commission denied reimbursement, finding that Education Code section 84030 did not impose a new program or higher level of service.[67]

---

[64] For K-12 school districts see Education Code section 35250, added by Statutes 1976, chapter 1010; derived from former Education Code 1959 section 1031, last amended by Statutes 1969, chapter 371. For community college districts see former Education Code section 72600, added by Statutes 1976, chapter 1010; derived from former Education Code 1959 section 1031, last amended by Statutes 1969, chapter 371. Former Education Code section 72600 was repealed by Statutes 1990, chapter 1372, after the enactment of Public Contract Code section 20657 in 1983, thus there was no break in the requirement.

[65] Education Code sections 41010 and 84030, as added by Statutes 1976, chapter 1010; both of derived from former Education Code 1959 section 17199, provide in relevant part:

> The accounting system including the uniform fund structure used to record the financial affairs of any community college district shall be in accordance with the definitions, instructions, and procedures published in the California Community Colleges Budget and Accounting Manual as approved by the board of governors and furnished by the board of governors.

[66] Former Education Code 1959 section 17199, as amended by Statutes 1973, chapter 434; made applicable to community college districts by former Education Code 1959 section 25422.5 (Stats. 1970, ch. 102), which provided, "Except as otherwise provided in this code, the powers *and duties* of community colleges are such as are assigned to high school boards." (Italics added.)

[67] *Budget & Financial Reports* (97-TC-10), *Fiscal Management Reports* (97-TC-11), and *Financial & Compliance Audits* (97-TC-12) consolidated test claim, pgs. 5-6, at <http://www.csm.ca.gov/sodscan/022312.pdf> as of February 23, 2012. As relevant to this discussion, the Commission found:

> [C]ommunity college districts, whether part of the K-12 school district system or as a separately governed entity, were required to follow a standardized accounting system as expressed in a state-published accounting manual under prior law. Therefore, the Commission finds that required use of the budget and accounting definitions, instructions, and procedures published in the community college

Moreover, the duty to maintain records for a period of not less than three years after the completion of the project is not new. Before to the enactment of Public Contract Code sections 20116 and 20657, districts were required to maintain all detail records relating to land, building, and equipment indefinitely. Immediately before the enactment of Public Contract Code sections 20116 and 20657, whenever the destruction of records of a district was not otherwise authorized or provided for by law, the governing board of the district was authorized to destroy the records in accordance with the regulations adopted by the Superintendent of Public Instruction/Board of Governors.[68] The regulations adopted by the Superintendent of Public Instruction and by the Board of Governors classified "property records," which includes all detail records relating to land, buildings, and equipment, as "permanent records."[69] Pursuant to the regulations, "permanent records" are required to be "retained indefinitely." As a result, the maintenance of the records for "not less than three years after the completion of the project" is not a new program or higher level of service as compared to retaining the records indefinitely.

Thus, staff finds that maintaining job orders or similar records indicating the total cost expended on each project in accordance with the procedures established by the most recent edition of the California School Accounting Manual or Community College Budget and Accounting Manual for a period of not less than three years after the completion of the project does not constitute a new program or higher level of service.

b. The Requirements Associated with Informal Bidding do not Constitute State-Mandated Activities

In regard to the requirements associated with informal bidding, sections 20116 and 20657 provide:

> Informal bidding may be used on work, projects, services, or purchases that cost up to the limits set forth in this article. For the purpose of securing informal bids, the board shall publish annually in a newspaper of general circulation published in the district, or if there is no such newspaper, then in some newspaper in general circulation in the county, a notice inviting contractors to register to be notified of future informal bidding projects. All contractors included on the informal bidding list shall be given notice of all informal bid projects, in any manner as the district deems appropriate.

Based on the plain language of sections 20116 and 20657, "[i]nformal bidding *may* be used" by K-12 school districts and community college districts. Any requirements contained in the subsequent provisions of sections 20116 and 20657 are only triggered by a district's discretionary decision to use the informal bidding process. Based on the analysis in *Kern High School Dist.*, K-12 school districts and community college districts are not legally compelled to comply with the informal bidding requirements contained in sections 20116 and 20657. Absent

---

> Budget and Accounting Manual as described in Education Code section 84030 does not constitute a new program or higher level of service.

[68] Education Code section 35253 and former Education Code section 72603, as added by Statutes 1976, chapter 1010; derived from former Education Code 1959 section 1034, as added by Statutes 1963, chapter 629.

[69] California Code of Regulations, title 5, sections 16023 and 59023.

legal compulsion, the claimants bear the burden of providing evidence in the record sufficient to find that K-12 school districts and community college districts face practical compulsion to engage in informal bidding. The claimants have not provided any evidence for this purpose.

As a result, staff finds that Public Contract Code sections 20116 and 20657 do not require K-12 school districts or community college districts to engage in any state-mandated activities.

iv. Changes or Alterations of Contracts (Pub. Contract Code, §§ 20659)

Section 20659 addresses the steps that a community college district must take if any change or alteration of a contract is ordered by the district, and the authority of a district to authorize a contractor to proceed with the change without the formality of securing a bid if the costs do not exceed a specified amount.

Under Article XIII B, section 6 of the California Constitution, districts are not entitled to reimbursement for mandates enacted prior to January 1, 1975. In addition, Government Code section 17514 defines "costs mandated by the state" as any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of section 6 of Article XIII B of the California Constitution.

Any requirement in section 20659 predates January 1, 1975, and therefore, does not impose reimbursable costs mandated by the state pursuant to article XIII B, section 6 of the California Constitution Government Code section 17514. Specifically, in 1961 former Education Code section 15963 imposed the same requirements on community college districts.[70] In 1976, former Education Code section 15963 was renumbered to former Education Code section 81658, and in 1983 the requirement was carried over into the Public Contract Code as section 20659 without any break in the requirement.[71]

As a result, staff finds that Public Contract Code section 20659 does not mandate a new program or higher level of services and is therefore, not subject to reimbursement under Article XIII B, section 6 of the California Constitution.

2. Specification of Classification of Contractor's License on Plans and Notices Inviting Bids (Pub. Contract Code, § 3300)

Section 3300 requires K-12 school districts and community college districts to specify the classification of the contractor's license that a contractor must possess at the time a contract is awarded, on the plans and notices inviting bids for public projects. Specifically, section 3300 provides:

> (a) Any public entity, as defined in Section 1100, the University of California, and the California State University shall specify the classification of the contractor's license which a contractor shall possess at the time a contract is awarded. The specification shall be included in any plans prepared for a public project and in any notice inviting bids required pursuant to this code.

[70] Former Education Code section 15963 (Stats. 1961, ch. 1831).

[71] Former Education Code section 81658 (Stats. 1976, ch. 1010); recodified as Public Contract Code section 20659 (Stats. 1983, ch. 256).

> This requirement shall apply only with respect to contractors who contract directly with the public entity.
>
> (b) A contractor who is not awarded a public contract because of the failure of an entity, as defined in subdivision (a), to comply with that subdivision shall not receive damages for the loss of the contract.

Public Contract Code section 1100 defines "public entity" to mean, "the state, county, city, city and county, district, public authority, public agency, municipal corporation, or any other political subdivision or public corporation in the state." As political subdivisions in the state, K-12 school districts and community college districts are subject to the provisions of section 3300. The plain language of section 3300 mandates K-12 school districts and community college districts to specify the classification of the contractor's license which a contractor shall possess at the time the contract is awarded in any plans prepared for a public project and in any notice inviting bids required pursuant to the Public Contract Code.

Although, as pointed out by the Chancellor's Office, the licensing of contractors is highly regulated, the requirement to specify the classification of the contractor's license required for a project in any plans prepared for a public project and in any notice inviting bids is unique to public entities, including K-12 school districts and community college districts. By specifying the required classification of contractor's license a local agency implements the state policy behind the competitive bidding process. Specifically, it aids in guarding against favoritism, improvidence, extravagance, fraud, and corruption by specifying all of the requirements needed to be awarded a contract prior to the award of the contract. Thus, the mandated activity constitutes a "program."

In addition, the claimants have pled section 3300 as added in 1985.[72] Immediately prior to 1985, K-12 school districts and community college districts were not required to engage in the activity mandated by section 3300. As a result, staff finds that section 3300 requires K-12 school districts and community college districts to engage in the following state-mandated new program or higher level of service:

> Specify the classification of the contractor's license which a contractor shall possess at the time a contract for repair or maintenance is awarded in any plans prepared for a repair or maintenance public project and in any notice inviting bids required pursuant to the Public Contract Code. (Pub. Contract Code, § 3300(a) (Stats. 1985, ch. 1073).)

3. Notification of Mandatory Prebid Conferences (Pub. Contract Code, § 6610)

Section 6610 requires public agencies to include specified information regarding any mandatory prebid site visits, conferences, or other meetings set by the public agencies when inviting formal bids on public works contracts. Section 6610 was adopted to address the problem of contractors not receiving adequate notice of mandatory prebid site visits set by public agencies.[73]

---

[72] Exhibit A, test claim filed by claimants, dated June 24, 2003, pgs. 15-16, citing to Statutes 1985, chapter 1073.

[73] Assembly Committee on Appropriations, Analysis of Senate Bill Number 266 (1999-2000 Reg. Sess.) as amended July 15, 1999.

Section 6610 provides:

> Notice inviting formal bids for projects by a public agency that include a requirement for any type of mandatory prebid conference, site visit, or meeting shall include the time, date, and location of the mandatory prebid site visit, conference or meeting, and when and where project documents, including final plans and specifications are available. Any mandatory prebid site visit, conference or meeting shall not occur within a minimum of five calendar days of the publication of the initial notice. This provision shall not apply to the Regents of the University of California.

Based on the plain language of section 6610, the requirements to include in a notice inviting formal bids the time, date, and location of a mandatory prebid site visit, conference, or meeting, and when and where project documents are available, are triggered by a public agency's decision to require a mandatory prebid conference as part of the bid process. Staff has not found any statute or regulation, nor have the claimants provided any evidence in the record, that K-12 school districts or community college districts are legally or practically compelled to require a mandatory prebid site visit, conference, or other meeting for projects by the districts. Thus, under *Kern High School Dist*., staff finds that Public Contract Code section 6610 does not impose a state-mandated new program or higher level of service.

4. Contract Clause for Public Works Involving Digging Trenches or Other Excavations (Pub. Contract Code, § 7104)

Section 7104 addresses the inclusion of a differing site conditions clause in local public entities' public works contracts involving digging trenches or other excavations that extend deeper than four feet below the surface. This clause details the rights and duties of the contractor and local public entity in the event that the site conditions are different than indicated by information about the site prior to the bid submission deadline.

i. Public Contract Code Section 7104 Imposes a State-Mandated Activity on K-12 School Districts and Community College Districts

The plain language of section 7104 requires that any public works contract of a local public entity, including a K-12 school district and community college district, which involves digging trenches or other excavations that extend deeper than four feet below the surface, contain a differing site conditions clause. Section 7104 requires the clause to provide the following:

> (a) That the contractor shall promptly, and before the following conditions are disturbed, notify the local public entity, in writing, of any:
>
> (1) Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.
>
> (2) Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids.

(3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

(b) That the local public entity shall promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work shall issue a change order under the procedures described in the contract.

(c) That, in the event that a dispute arises between the local public entity and the contractor whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor's cost of, or time required for, performance of any part of the work, the contractor shall not be excused from any scheduled completion date provided for by the contract, but shall proceed with all work to be performed under the contract. The contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties.

Staff finds that the K-12 school districts and community college districts are mandated to include the above clause in any public works contract which involves digging trenches or other excavations that extend deeper than four feet below the surface. As discussed above, K-12 school districts and community college districts are given broad discretion on what public works projects the districts' undertake except for repair or maintenance described above, which the districts are required by the state to undertake. Because, there is no evidence in the record to indicate that K-12 school districts and community college districts are required to undertake public works projects in any other situation, the above mandated activity is limited to repair and maintenance contracts that involve digging trenches or other excavations that extend deeper than four feet below surface, and exceed the dollar amounts and project hours specified in subheading "B" of this analysis.

ii. The State-Mandated Activity Imposed by Public Contract Code Section 7104 Constitutes a New Program or Higher Level of Service

The mandated activity to include a differing site conditions clause in contracts for digging trenches or other excavations that extend deeper than four feet below surface is unique to local agencies. In addition, the activity shifts the risk of differing site conditions on K-12 school districts and community college districts instead of bidding contractors, who then do not need to add contingencies to their bids to cover the possible risks. The result is the government benefits from more accurate bidding, without inflation for risks which may not come about, implementing the state policy to have public works projects of the highest quality for the lowest costs.[74] Thus, staff finds that the state-mandated activity constitutes a "program."

In addition, the claimants have pled section 7104 as added in 1989.[75] Immediately prior to 1989, K-12 school districts and community college districts were not required to engage in the activity

[74] Statutes 1999, chapter 972, section1.

[75] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 20, citing to Statutes 1989, chapter 330.

mandated by section 7104. As a result, staff finds that section 7104 requires K-12 school districts and community college districts to engage in the following state-mandated new program or higher level of service for contracts for repair and maintenance that exceed the dollar amounts and project hours specified in subheading "B" of this analysis:

> Include in any public works contract for repair and maintenance, which involves digging trenches or other excavations that extend deeper than four feet below the surface, a clause that provides the following:
>
> (a) That the contractor shall promptly, and before the following conditions are disturbed, notify the local public entity, in writing, of any:
>
> (1) Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.
>
> (2) Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids.
>
> (3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.
>
> (b) That the local public entity shall promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work shall issue a change order under the procedures described in the contract.
>
> (c) That, in the event that a dispute arises between the local public entity and the contractor whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor's cost of, or time required for, performance of any part of the work, the contractor shall not be excused from any scheduled completion date provided for by the contract, but shall proceed with all work to be performed under the contract. The contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties. (Pub. Contract Code, § 7104 (Stats. 1989, ch. 330).)

5. Retention Proceeds (Pub. Contract Code, § 7107)

Section 7107 addresses the disbursement of retention proceeds, the withholding of retention proceeds in the event of a dispute, and the consequences of improperly withholding retention proceeds by a public entity contracting with an original contractor, and by the original contractor contracting with a subcontractor. Retention proceeds are a portion of the money earned by an original contractor or subcontractor that is retained by an owner, public agency, or original contractor pursuant to the terms of the contract to guarantee performance by the contractor or subcontractor.

Under section 7107, absent a dispute a public entity is required to release retention proceeds within 60 days after the date of completion of the work of improvement and within seven days of receiving all or a portion of the retention proceeds the original contractor is required to pay each of its subcontractors, from whom retention has been withheld, each subcontractor's share of the retention proceeds.[76] If there is a dispute between the public entity and original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount.[77] Likewise, if there is a dispute between the original contractor and subcontractor, the original contractor may also withhold 150 percent of the disputed amount.[78] If the retention payments are not made within the time periods required by section 7107, the public entity or original contractor withholding the unpaid amounts shall be subject to a charge of two percent per month on the improperly withheld amount, in lieu of any interest otherwise due.[79] Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorney's fees and costs.[80]

The claimants allege that section 7107 imposes the following reimbursable state-mandated new program or higher level of service:

> Pursuant to Public Contract Code Section 7107, subdivision (c), releasing retentions withheld within 60 days after the completion of the work, and in the event of a dispute, withholding an amount not to exceed 150 percent of the disputed amount from the final payment. Pursuant to subdivision (f), paying a charge of 2 percent per month on any improperly withheld amounts and, in the event of litigation paying the contract's attorney's fees and costs should he or she prevail.[81]

For the reasons below, staff finds that these activities do not constitute a "program" subject to article XIII B, section 6 of the California Constitution.

In order to be a reimbursable state-mandate, the required activity or task must constitute a "program" subject to article XIII B, section 6 of the California Constitution. Courts have defined "program" as one that carries out the governmental function of providing a service to the public, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, and does not apply generally to all residents and entities in the state.[82] Under this definition, the California Supreme Court in *City of Sacramento v. State of California* found that a statute requiring local governments to provide unemployment protection to their employees under the state's unemployment insurance program, protections that most private employers

---

[76] Public Contract Code section 7107(c) and (d).

[77] Public Contract Code section 7107(c).

[78] Public Contract Code section 7107(e).

[79] Public Contract Code section 7107(f).

[80] *Ibid*.

[81] Exhibit A, Test Claim filed by claimants, dated June 24, 2003, p. 95.

[82] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra*, 44 Cal.3d 830, 835; and *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 66-70.)

were already required to provide, did not constitute a "service to the public" nor was the state imposing a state policy "uniquely" on local governments.[83] Rather the court found that the extension of unemployment protection to local government employees by a statute applicable only to local agencies, "merely makes the local agencies 'indistinguishable in this respect from private employers.'"[84]

Similarly here, the activities alleged by the claimants do not carry out a governmental function of providing a service to the public nor are they unique requirements on local agencies as evidenced by the fact that the activities applicable to public entities are also applicable to original contractors, which are *private entities*. The activity of disbursing retention proceeds applies to both public entities contracting with original contractors (public/private interaction) *and* original contractors contracting with subcontractors (private/private interactions). Likewise, the ability to withhold 150 percent of the disputed amount from a final payment applies equally to public entities and original contractors, as do the consequences for improperly withholding retention proceeds.

That the activities alleged by the claimants do not constitute a governmental function of providing a service to the public and are not unique requirements on local government is further shown by the fact that Civil Code section 3260 sets forth provisions applicable to contracts between private entities that are substantially similar to those set forth in Public Contract Code section 7107.[85] Specifically, Civil Code section 3260 provides for the release of retention proceeds withheld from any payment by an owner from the original contractor within a specified period of time;[86] the ability to withhold an amount not to exceed 150 percent of a disputed amount between the owner and contractor;[87] the owner being subject to a charge of two percent per month on improperly withheld amounts, in lieu of any interest otherwise due;[88] and in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorney's fees and costs.[89]

Thus, disbursing retention proceeds, withholding retention proceeds, and the cost of improperly withholding retention proceeds are not a governmental function of providing a service to the public, nor are they unique requirements on local government. Rather, these activities are terms of contracting between contracting parties, both public and private, that affect the contracting parties. The application of these activities to K-12 school districts and community college districts as contracting parties makes the districts indistinguishable from private contracting parties.

---

[83] *City of Sacramento v. State of California, supra*, 50 Cal.3d 51, 66-70.

[84] *Ibid*.

[85] As of July 1, 2012, the provisions Civil Code section 3260 will be repealed, renumbered and reorganized as Civil Code section 8810 et seq., pursuant to Statutes 2010, chapter 697, section 16.

[86] Civil Code section 3260(c).

[87] *Ibid*.

[88] Civil Code section 3260(g).

[89] *Ibid*.

Based on the above discussion, section 7107 does not constitute a "program" subject to article XIII B, section 6 of the California Constitution. Therefore, staff finds that Public Contract Code section 7107 does not impose a state-mandated new program or higher level of service.

6. Antigraffiti Technology, Abatement, and Deterrence (Pub. Contract Code, § 7109)

Section 7109 authorizes a public entity to engage in specific graffiti abatement or deterrence activities if the entity determines that a public works project may be vulnerable to graffiti. Specifically, section 7109 provides in relevant part:

> If a public entity determines that a project may be vulnerable to graffiti and the public entity will be awarding a public works contract after January 1, 1996, for that project, it is the intent of the Legislature that the public entity *may* do one or more of the following:
>
> (1) Include a provision in the public works contract that specifies requirements for antigraffiti technology in the plans and specifications for the project.
>
> (2) Establish a method to finance a graffiti abatement program.
>
> (3) Establish a program to deter graffiti.[90]

The claimants allege that section 7109 mandates K-12 school districts and community college districts to undertake one or more of the actions listed above.[91] In response to the Chancellor's Office and Finance's comments asserting that section 7109 does not impose any state-mandated activities, the claimants argue:

> Public Contract Code section 7109 provides that, after a determination that a project may be vulnerable to graffiti, it is the intent of the Legislature that districts take preventative measures.
>
> [The Chancellor's Office] argues that the provision is discretionary as being only the "intent of the Legislature." [Finance] concurs. It is to be noted that the "intent" language appears only after the district has already made a determination that a project may be vulnerable to graffiti. It is implausible for the [Chancellor's Office] to argue that it is [*sic*] discretionary decision after that determination is made.[92] (Underline in original.)

Even assuming legislative intent language can impose requirements on K-12 school districts and community college districts the plain language of section 7109 provides that "it is the intent of the Legislature that the public entity *may* do one or more of the following." Thus, the intent of the Legislature is to *authorize* a district to engage in specified activities to deter or abate graffiti if a district makes a determination that a project may be vulnerable to graffiti. Section 7109 grants authority to K-12 school districts and community college districts. The grant of authority

---

[90] Public Contract Code section 7109(b). (Italics added.)

[91] Exhibit A, Test Claim filed by claimants, dated June 24, 2003, pgs. 95-96.

[92] Exhibit D, Comments filed by the claimants in response to comments filed by Chancellor's Office and Department of Finance, dated May 7, 2004, p. 14.

does not impose a requirement on K-12 school districts or community college districts to utilize the authority.

Additionally, the language of section 7109 does not impose a duty on K-12 school districts or community college districts to make the initial determination necessary to attain the authority in the first place. Rather, the authority to engage in one of the above graffiti abatement or deterrent activities is a result of a K-12 school district or community college district's initial determination that the project is vulnerable to graffiti. Thus, staff finds that the plain language of section 7109 does not impose any activities on K-12 school districts or community college districts.

7. Retention of Money from Progress Payments (Pub. Contract Code, § 9203)

Section 9203 addresses the retention of money from progress payments made to a contractor. Section 9203 provides in relevant part:

> Payment on any contract with a local agency for the creation, construction, alteration, repair, or improvement of any public structure, building, road, or other improvement, of any kind which will exceed in cost a total of five thousand dollars ($5,000), shall be made as the legislative body prescribes upon estimates approved by the legislative body, but progress payments shall not be made in excess of 95 percent of the percentage of actual work completed plus a like percentage of the value of material delivered on the ground or stored subject to, or under the control of, the local agency, and unused. The local agency shall withhold not less than 5 percent of the contract price until final completion and acceptance of the project. However, at any time after 50 percent of the work has been completed, if the legislative body finds that satisfactory progress is being made, it may make any of the remaining progress payments in full for actual work completed.

Since 1969, local agencies have been subject to the requirements set forth in section 9203. The requirements were set forth in former Government Code section 53067.[93] In 1984, the requirements were recodified as former Public Contract Code section 20103.[94] In 1990, former Public Contract Code section 20103 was renumbered to current Public Contract Code section 9203.[95]

Because the requirements set forth in Public Contract Code section 9203 existed prior to 1975, staff finds that Public Contract Code section 20659 does not impose a mandated new program or higher level of service under Article XIII B, section 6 of the California Constitution.[96]

---

[93] Former Government Code section 53067, as amended by Statutes 1969, chapter 1439.

[94] Former Public Contract Code section 20103, as added by Statutes 1984, chapter 885.

[95] Public Contract Code section 9203, as added by Statutes 1990, chapter 694.

[96] See Government Code section 17514.

8. Use of the Department of General Services for the Acquisition of Information Technology Goods and Services (Pub. Contract Code, §§ 10299 and 12109)

Sections 10299 and 12109 address the use of services provided by the Department of General Services (DGS) in order to increase buying power and for the acquisition of information technology (IT) goods and services.

i. Consolidation of the IT Needs of Multiple State Agencies in Order to Increase Buying Power (Pub. Contract Code, § 10299)

Section 10299 addresses the consolidation of needs of multiple state agencies in order to increase each agency's buying power. Under section 10299(a), DGS may consolidate the needs of multiple state agencies for IT goods and services and establish contracts, master agreements, multiple award schedules, cooperative agreements, and other types of agreements that leverage the state's buying power. State agencies and local agencies may contract with suppliers awarded the contracts without further competitive bidding. Section 10299(b) specifically allows the director of DGS to make the services of DGS available to school districts, "upon the terms and conditions agreed upon [by DGS and the districts], to any school district empowered to expend public funds." School districts that utilize DGS's services may utilize the contracts established by DGS without further competitive bidding.

The plain language of section 10299 does not impose any activities on school districts. Instead, it authorizes DGS, a state agency, to allow school districts to utilize DGS's services to school districts benefit. In turn, school districts are *authorized* to utilize DGS's services. Section 10299 does not contain any requirement for school districts to use this authority to utilize DGS's services. Therefore staff finds that section 10299 does not impose a state-mandated program on K-12 school districts or community college districts.

ii. Authority of DGS to Make its Services Available to School Districts for the Acquisition of IT Goods and Services (Pub. Contract Code, § 12109)

Section 12109 addresses the authority of DGS to make its services available to any tax-supported public agency for assisting the agency in the acquisition of IT goods or services. Specifically, Section 12109 provides:

> The Director of General Services may make the services of the department under this chapter available, upon the terms and conditions that may be deemed satisfactory, to any tax-supported public agency in the state, including a school district, for assisting the agency in the acquisition of information technology goods or services.

The claimants assert that the language above requires K-12 school districts and community college districts to comply with the director of DGS's terms and conditions. In response to the Chancellor's Office and Finance's comments asserting that section 12109 does not impose any mandated activities on districts, the claimants assert:

> [The Chancellor's Office] ignores section 12100 which requires that all contracts for the acquisition of information technology goods or services, whether by lease or purchase, be made by, or under the supervision of, the Department of General Services.

> [The Chancellor's Office] also ignores the findings of the Legislature in section 12100 that the unique aspects of information technology, and its importance to state programs warrant a separate acquisition authority and that this separate authority should enable the timely acquisition of information technology goods and services in order to meet the state's needs in the most value-effective manner.
>
> In view of these findings, the argument that using these services is discretionary is specious.[97]

The Chancellor's Office correctly ignored Public Contract Code section 12100 when interpreting whether section 12109 imposes state-mandated activities on K-12 school districts or community college districts. Sections 12100 and 12109 are part of a statutory scheme addressing contracting by *state* agencies. The legislative findings and directive regarding all contracts for the acquisition of IT goods or services is in reference to the acquisition of IT goods and services by *state* agencies.

In addition, regardless of the language of section 12100, the plain language of section 12109 does not impose *any* activities on K-12 school districts or community college districts. Instead the language of section 12109 *only* provides that DGS, a state agency, has the authority to make its services for state agencies available to any tax-supported public agency in the state, including a school district. Staff finds that section 12109 does not impose a state-mandated new program or higher level of service.[98]

9. General Provisions of the Local Agency Public Construction Act (Pub. Contract Code, §§ 20100, 20102, 20103.6, 20103.8, 20104, 20104.2, 20104.4, 20104.6, and 20104.50)

Public Contract Code sections 20100, 20102, 20103.6, 20103.8, 20104, 20104.4, 20104.6, and 20104.50 are all part of the Local Agency Public Construction Act.[99] These sections address: (1) the performance of work by day's labor; (2) the disclosure of indemnity provisions in contracts for architectural services; (3) the addition and deduction of items from a contract; (4) the resolution process of construction claims; and (5) the prompt payment of progress payments.

i. Performance of Work by Day's Labor (Pub. Contract Code, § 20102)

Section 20102 addresses the requirements associated with a public agency's decision to perform work by day's labor instead of putting a project out for bid after the agency has already prepared plans and specifications. Specifically, section 20102 provides:

> Notwithstanding any other provision of this part to the contrary, where plans and specifications have been prepared by a public agency, whose activities are subject to this part, in order for a public project to be put out for formal or informal bid, and, subsequently, the public agency elects to perform the work by day's labor,

---

[97] Exhibit D, Comments filed by the claimants in response to comments filed by Chancellor's Office and Department of Finance, dated May 7, 2004, p. 14.

[98] *In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1011.

[99] Public Contract Code section 20100, "This chapter [(consisting of Pub. Contract Code, §§ 20100-21641)] may be cited as the Local Agency Public Construction Act."

> the public agency shall perform the work in strict accordance with these same plans and specifications.
>
> Revisions of the plans and specifications may be made once a justification detailing the specific reasons for the change or changes has been approved by the public agency or its project director and a copy of the change and its justification is placed in the project file.

The reference to "day's labor" includes maintenance personnel employed by K-12 school districts and community college districts on a permanent or temporary basis. Public Contract Code sections 20114 and 20655 authorizes K-12 school districts and community college districts to make repairs and perform maintenance using their own maintenance personnel in limited circumstances, and therefore avoiding the competitive bidding process for public contracts. Read together with section 20102, any activity required by section 20102 is triggered by: (1) a district's voluntary decision to not use its own maintenance personnel for a project; (2) a district's voluntary decision to engage in the public contracting process and prepare plans and specifications for competitive bidding; and (3) a district's voluntary decision to change its mind and subsequently elect to use its own maintenance personnel for the project and avoid the competitive bidding process. Thus, the requirements imposed by section 20102 are triggered by the local decisions of a K-12 school district or community college district and are not legally compelled by section 20102.

The claimants argue that legal compulsion is not necessary for a finding of a mandate.[100] The claimants discuss the cases leading the court in *Kern High School Dist*. to hold open the possibility of practical compulsion as applicable to state mandates, and assert:

> Neither [Finance or the Chancellor's Office] has attempted to apply this test [for practical compulsion] to any portion of the test claim legislation and regulations. Therefore, their arguments lack any foundation when claiming that those statutes and regulations contain no reimbursable mandates because the test claim activities are discretionary.[101]

The claimants' assertion is incorrect. Although courts have held open the possibility of practical compulsion as applied to state mandates, courts have also found that a finding of practical compulsion requires a concrete showing in the record that a failure to engage in the activity at issue will result in certain and severe penalties.[102] Thus, no presumption of practical compulsion exists. Instead, the claimants bear the burden of providing evidence to support the claimants' allegation that K-12 and community college districts face practical compulsion to engage in an activity that the districts are not legally compelled to engage in.

Absent any evidence of practical compulsion, the Commission cannot make a finding that practical compulsion exists. The claimants have not provided evidence that K-12 school districts and community college districts face practical compulsion to: (1) not use its own maintenance personnel for a project; (2) engage in the public contracting process and prepare plans and

---

[100] Exhibit D, Comments filed by the claimants in response to comments filed by Chancellor's Office and Department of Finance, dated May 7, 2004, pgs. 2-6, and 17.

[101] *Id.* at p. 6.

[102] *POBRA, supra,* 170 Cal.App.4th at pgs. 1366-1369.

specifications for competitive bidding; and (3) subsequently elect to use its own maintenance personnel for the project and avoid the competitive bidding process.

Based on the discussion above, staff finds that the Public Contract Code section 20102 does not impose any state-mandated activities.

ii. Disclosure of Indemnity Provisions in Request for Proposals for Architectural Design Services (Pub. Contract Code, § 20103.6)

Section 20103.6 requires K-12 school districts and community college districts to disclose any indemnity provisions contained in contracts for architectural design services on requests for proposals or invitations to bid. Specifically, section 20103.6 provides:

> (a) (1) Any local agency subject to this chapter shall, in the procurement of architectural design services requiring an expenditure in excess of ten thousand dollars ($10,000), include in any request for proposals for those services or invitations to bid from a prequalified list for a specific project a disclosure of any contract provision that would require the contracting architect to indemnify and hold harmless the local agency against any and all liability, whether or not caused by the activity of the contracting architect.
>
> (2) The disclosure statement shall be prominently set forth in bold type.
>
> (b) In the event a local agency fails to comply with paragraph (1) of subdivision (a), that local agency shall (1) be precluded from requiring the selected architect to agree to any contract provision requiring the selected architect to indemnify or hold harmless the local agency against any and all liability not caused by the activity of the selected architect, (2) cease discussions with the selected architect and reopen the request for proposals or invitations to bid from a qualification list, or (3) mutually agree to an indemnity clause acceptable to both parties.
>
> (c) This section shall become operative on July 1, 1998.

The Chancellor's Office argues that there is no requirement that an indemnification provision be included in architectural design services contracts, and as a result, the requirement to include notice of such a provision in a request for proposals is not mandated by the state pursuant to *Kern High School Dist*. because it is triggered by a district's decision to include the provision. In response, the claimants argue that, "[a]ny suggestion by [the Chancellor's Office] that seeking indemnification is optional ignores the real life financial disasters which can result when an accident or catastrophe, through no fault of a district, occurs and the district is subjected to multi-million dollar claims."

Although it may be wise to include an indemnification clause in a contract for architectural design services by shifting some of the risk of liability away from a district, doing so would be a business decision made by a K-12 school district or community college district and not a decision mandated by the state. K-12 school districts and community college districts have the ability, but are not legally required by the state, to include such provisions in contracts for architectural design services. After weighing the pros and cons of including an indemnity provision in a contract for architectural services, a district can choose not to include such a provision in the contract. In addition, the claimants have not provided evidence that K-12 school districts or community college districts face practical compulsion to include an indemnity provision in architectural service contracts. Rather, the claimants only generally assert "real life

financial disasters" which could result when an accident or catastrophe occurs. Absent evidence of practical compulsion, the Commission cannot make a finding that practical compulsion exists.

Thus, based on the analysis in *Kern High School Dist*., because the requirement to provide notice of an indemnity provision in a request for proposals or invitation to bid is triggered by a K-12 school district's or community college district's decision to include such a provision in a contract for architectural services, staff finds that section 20103.6 does not impose any state-mandated activities.

iii. Items That May be Added to or Deducted From the Scope of Work in the Contract (Pub. Contract Code, § 20103.8)

Section 20103.8 addresses the use of additive and deductive items by public agencies in public works contracts. Additive and deductive items in a public works contract are items priced separately from the base bid for a public works contract, which a public agency can add or remove from the contract. In contrast, the base bid is the part of a bid covering most of the project.

Section 20103.8 provides that "[a] local agency may require bids for a public works contract to include prices for items that may be added to, or deducted from, the scope of work in the contract for which the bid is being submitted." If a local agency uses this authority, the local agency must specify in the bid solicitation which method, out of the following four methods, will be used to determine the lowest bid for purposes of awarding the contract: (1) the lowest bid shall be the lowest bid price on the base contract without consideration of the prices on the additive or deductive items; (2) the lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that were specifically identified in the bid solicitation as being used for the purposes of determining the lowest bid price; (3) the lowest bid shall be the lowest total of the bid prices on the base contract and those additive or deductive items that when taken in order from a specifically identified list of those items in the solicitation, and added to, or subtracted from, the base contract, are less than, or equal to, a funding amount publicly disclosed by the local agency before the first bid is opened; or (4) the lowest bid shall be determined in a manner that prevents any information that would identify any of the bidders or proposed subcontractors or suppliers from being revealed to the public entity before the ranking of all bidders from lowest to highest has been determined. If no method is specified in the bid solicitation, the first method described must be used.

Based on the plain language of section 20103.8, the requirement to specify the method used to determine the lowest bid in a bid solicitation requiring the inclusion of additive or deductive items is triggered by a local agency's discretionary decision to utilize the authority provided by section 20103.8.

Despite the language of section 20103.8, the claimants argue:

> Public Contract Code sections 20101, et seq., set forth the Local Agency Public Construction Act, enacted by Chapter 972, Statutes of 1999. Section 1, an uncodified portion of the Act, provides:
>
> "The Legislature hereby finds and declares that the establishment by public agencies of a uniform system to evaluate the ability, competency, and integrity of bidders on public works projects is in the public interest, will result in the construction of public works projects of the highest quality for

> the lowest costs, and is in furtherance of the objectives stated in Section 100 of the Public Contract Code."
>
> In view of the findings and declaration of the Legislature that the Act will result in the construction of public works of the highest quality and for the lowest costs, the argument that section 23108.8 [*sic*] is permissive is not well taken.

In response to the Chancellor's Office and Finance's arguments that various activities claimed in this test claim are discretionary and therefore do not impose any state-mandates pursuant to *Kern High School Dist*., claimants argue that legal compulsion is not necessary for a finding of a mandate.[103] The claimants discuss the cases leading the court in *Kern High School Dist*. to hold open the possibility of practical compulsion as applicable to state mandates, and assert:

> Neither [Finance or the Chancellor's Office] has attempted to apply this test [for practical compulsion] to any portion of the test claim legislation and regulations. Therefore, their arguments lack any foundation when claiming that those statutes and regulations contain no reimbursable mandates because the test claim activities are discretionary.[104]

The claimants' first argument fails to draw a connection between the legislative findings and declarations cited and the ultimate conclusion asserted by the claimants (i.e. that reading Pub. Contract Code, § 20103.8 as discretionary is inconsistent with the Legislature's findings and declarations). The permissive nature of section 20103.8 is *consistent* with the findings and declarations. Specifically, a statute that requires a public agency to specify which *uniform method* will be used to determine the lowest bid *if the public agency voluntarily decides* to require additive or deductive items in bids for a public works contract, is consistent with the Legislature's findings and declarations regarding the Local Agency Public Construction Act's purpose of establishing a uniform system to evaluate bidders on public works projects.

The claimants bear the burden of providing evidence to support the claimants' allegation that K-12 and community college districts face practical compulsion to engage in an activity that the districts are not legally compelled to engage in. Absent any evidence of practical compulsion, the Commission cannot make a finding that practical compulsion exists. The claimants have not provided evidence that K-12 and community college districts face practical compulsion to require additive or deductive items.

Based on the above discussion, staff finds that Public Contract Code section 20103.8 does not impose a state-mandated program on K-12 school districts or community college districts.

iv. Resolution of Construction Claims (Pub. Contract Code, §§ 20104, 20104.2, 20104.4, and 20104.6)

Sections 20104, 20104.2, 20104.4, and 20104.6 establish a resolution process for public works claims which arise between a contractor and a local agency, including K-12 school districts and community college districts. "Claim" is defined by section 20104 as a separate demand by the contractor for: (1) a time extension; (2) payment of money or damages arising from work done

[103] Exhibit D, Comments filed by the claimants in response to comments filed by Chancellor's Office and Department of Finance, dated May 7, 2004, pgs. 2-6, and 24.

[104] *Id.* at p. 6.

by, or on behalf of, the contractor pursuant to the contract for a public work and payment of which is not otherwise expressly provided for or the claimant is not otherwise entitled to; or (3) an amount the payment of which is disputed by the local agency.[105]

The process consists of a pre-litigation dispute resolution process under which the local contracting agency receives and responds to claims and the claiming contractor has the ability to appeal the local agency's decisions. In the event that the pre-litigation dispute resolution process does not resolve the contractor's dispute and files a civil action against the local agency, the code sections provide for mediation and judicial arbitration in an attempt to settle the dispute before going to trial.

Prior to the enactment of sections 20104-20104.6, no *pre-litigation* dispute resolution process existed to resolve construction contract claims brought by contractors. Instead, K-12 school districts and community college districts could *choose* to resolve claims through arbitration pursuant to Public Contract Code section 10240 et seq., or the parties could go directly to court to resolve the dispute. As a result, districts were not required to attempt to resolve claims arising from public projects outside of court.

These code sections were enacted to provide adequate incentive for local agencies to resolve construction contract claims. According to the sponsor:

> When disputes arise between contractors and local agencies over public works contracts, there is no requirement for local agencies to resolve them. State and local agencies can submit disputes to arbitration under the State Contract Act, but this authority is simply permissive. In many, cases, local agencies withhold payment of the entire contract price until the dispute is resolved.
>
> Many contractors have experienced delays of two years or more in resolving disputes over what the contract or claims and what the local agency thinks the costs should be. Until agreement is reached, the contractor is unable to recover his or her costs or bid on any other jobs. The Engineering and Utility Contractors Association desires a fair and timely process in law for resolving disputes.[106]

In effect, the code sections level the playing field in the resolution of construction contract disputes by encouraging the settlement of claims between contractors and local agencies. The following discussion will address whether dispute resolution processes established by sections 20104, 20104.2, 20104.4, and 20104.6, impose state-mandated new programs or higher levels of service on K-12 school districts or community college districts.

a. Inclusion of the Dispute Resolution Provisions in Plans or Specifications (Pub. Contract Code, § 20104)

Section 20104 defines the terms used in sections 20104-20104.6 and establishes the scope of their applicability as described above. In addition, section 20104 requires K-12 school districts and community college districts to set forth the provisions, or a summary thereof, of Article 1. 5, Chapter 1, Part 3, Division 2, of the Public Contract Code (Pub. Contract Code, §§ 20104,

[105] Public Contract Code section 20104(b)(2).

[106] Senate Committee on Judiciary, Analysis of AB 4165 (1989-1990 Reg. Sess.) as amended August 14, 1990.

20104.2, 20104.4, and 20104.6) in the plans or specifications for any public works which may give rise to a claim of $375,000 or less.

Based on the plain language of section 20104 the provisions of sections 20104, 20104.2, 20104.4, and 20104.6, apply only to claims of $375,000 or less, and are inapplicable to contracts in which the public agency has elected to resolve any disputes by arbitration pursuant to Public Contract Code section 10240 et seq. The Chancellor's Office argues, and Finance concurs, that based on the analysis in *Kern High School Dist*., K-12 school districts and community college districts are not mandated to comply with section 20104 et seq. because K-12 school districts and community college districts can choose to resolve disputes by arbitration pursuant to section 10240 et seq. The Chancellor's Office and Finance are incorrect, as *Kern High School Dist*. is distinguishable from this situation.

In *Kern High School Dist*., K-12 school districts faced the option to participate in a voluntary program to receive funding triggering associated requirements on the districts or to not participate in the voluntary program and not have to engage in any activities. Here, the districts must engage in the dispute resolution process set forth in Public Contract Code section 20104 et seq., *or* 10240 et seq. Thus, a finding that sections 20104-20104.6 impose state-mandated activities is not precluded by the *Kern High School Dist*. decision.

Staff notes, however, that Public Contract Code section 10240 et seq. was not pled as part of this test claim. As a result, staff makes no independent findings regarding section 10240 et seq. In addition, K-12 school districts and community college district that do not utilize section 20104 et seq. have not incurred any costs mandated by section 20104 et seq., and thus, cannot claim for any activities found to be mandated by the sections. However, where K-12 school districts and community college have not elected to resolve disputes by arbitration pursuant to Public Contract Code section 10240 et seq., staff finds that section 20104 mandates K-12 school districts and community college districts to set forth the provisions, or a summary thereof, of Public Contract Code sections 20104-20104.6 in the plans or specifications for any public works projects which may give rise to a claim of $375,000 or less.

Next, it must be determined whether the mandated activity to set forth the provisions, or a summary thereof, of Public Contract Code sections 20104, 20104.2, 20104.4, and 20104.6 in the plans or specifications for any public works which may give rise to a claim of $375,000 or less, constitutes a new program or higher level of service.

The mandate to include the provisions, or a summary, of Public Contract Code section 20104 et seq. is a unique requirement on K-12 school districts and community college districts and does not apply generally to all residents and entities in the state. Additionally, by setting forth the terms of the dispute resolution process in the plans or specifications for public works projects, contractors are provided reassurance that they are able to recover their costs and bid on other jobs. Thus, this mandated activity implements the state policy to provide all qualified bidders with a fair opportunity to enter the bidding process, and thereby stimulating competition in a manner conducive to sound fiscal practices.[107]

[107] Public Contract Code section 100(c).

In addition, the claimants pled section 20104 as added in 1990.[108] Immediately prior to the enactment of section 20104, K-12 school districts and community college districts were not required to set forth the dispute resolution process set forth in sections 20104-20104.6. As a result, staff finds that section 20104 mandates K-12 school districts and community college districts to engage in the following new program or higher level of service:

> Set forth in the plans or specifications for any public work for repair and maintenance which may give rise to a claim of $375,000 or less which arise between a contractor and a K-12 school district or community college district, excluding those districts that elect to resolve claims pursuant to Article 7.1 (commencing with section 10240) of Chapter 1 of Part 2 of the Public Contract Code.
>
> "Claim" is defined as a separate demand by the contractor for (A) a time extension, (B) a payment of money or damages arising from work done by, or on behalf of, the contractor pursuant to the contract for a public work and payment of which is not otherwise expressly provided for or the claimant is not otherwise entitled to, or (C) an amount the payment of which is disputed by the K-12 school district or community college district. (Pub. Contract Code, § 20104(c) (Stats. 1994, ch. 726).)

b. Pre-Litigation Claims Procedures (Pub. Contract Code, § 20104.2)

Public Contract Code section 20104.2 sets forth the pre-litigation process K-12 school districts and community college districts must engage in to resolve claims filed by a contractor. For claims of less than $50,000 a district is mandated to respond in writing to any written claim within 45 days of receipt of the claim.[109] For claims of over $50,000 and less than or equal to $375,000 the K-12 school district or community college district is mandated to respond in writing to all written claims within 60 days of receipt of the claim.[110] If the contractor-claimant disputes the K-12 school district's or community college district's response and requests an informal conference to meet and confer for settlement of the issues in dispute, the K-12 school district or community college district is mandated to schedule a meet and confer conference within 30 days for settlement of the dispute.[111]

Section 20104.4(e) provides that, if after the informal conference, the claim or any portion remains in dispute, the contractor-claimant is authorized to file a claim as provided in Government Code, Title 1, Division 3.6, Part 3, Chapter 1 (commencing with Government Code section 900) and Chapter 2 (commencing with Government 910).[112] These provisions of the Government Code set forth a process in which individuals seeking to bring a suit against a public agency must first submit a claim with the local agency, the purpose of which is to provide

---

[108] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 26, citing to States 1990, chapter 1414.

[109] Public Contract Code section 20104.2(b)(1).

[110] Public Contract Code section 20104.2(c)(1).

[111] Public Contract Code section 20104.4(d).

[112] Public Contract Code section 20104.4(e).

governmental agencies with notice of the claims against them and provide them sufficient information to investigate and settle claims, if appropriate, without the expense of litigation.[113]

The claimants assert that this authorization requires K-12 school districts and community college districts to file responsive pleadings and appear and defend any civil action brought by a claimant.[114] However, section 20104.4(e) does not impose any mandated activities on K-12 school districts or community college districts. Instead, it only provides that the a contractor-claimant may file a claim with the district governing boards pursuant to Government Code, Title 1, Division 3.6, Part 3, Chapters 1 and 2. As a result, staff finds that section 20104.4(e) does not impose any state-mandated activities on K-12 school districts or community college districts.

The mandated activities described above are unique activities imposed on K-12 school districts and community college districts. In addition, by providing a fair and timely process for resolving disputes, the requirements implement the state policy to provide all qualified bidders with a fair opportunity to enter the bidding process, and thereby stimulating competition in a manner conducive to sound fiscal practices.[115]

Additionally, the claimants pled section 20104.2 as added in 1990.[116] Immediately prior to the enactment of section 20104, K-12 school districts and community college districts were not required to engage in the pre-litigation dispute resolution process set forth in section 20104.2. As a result, staff finds that section 20104.2 mandates K-12 school districts and community college districts to engage in the following new programs or higher level of services:

1. For claims of less than $50,000 resulting from a public works contract for repair or maintenance, respond in writing to any written claim within 45 days of receipt of the claim. (Pub. Contract Code, § 20104.2(b)(1) (Stats. 1994, ch. 726).)
2. For claims of more than $50,000 and less than or equal to $375,000 resulting from a public works contract for repair or maintenance, respond in writing to any written claim within 60 days of receipt of the claim. (Pub. Contract Code, § 20104.2(c)(1) (Stats. 1994, ch. 726).)
3. Upon demand by a contractor disputing a K-12 school district's or community college district's response to a claim, schedule a meet and confer conference within 30 days for settlement of the dispute. (Pub. Contract Code, § 20104.2(d) (Stats. 1994, ch. 726).)

As used in these activities, "claim" is defined by Public Contract Code section 20104(b)(2) (Stats. 1994, chapter 726).

c. Litigation Claims Procedures (Pub. Contract Code, § 20104.4)

Section 20104.4 establishes procedures for all civil actions filed by a contractor to resolve public works claims of $375,000 or less that were not successfully resolved pursuant to the pre-

---

[113] *Goleta Union Elementary School Dist. v. Ordway* (C.D.Cal. 2002) 248 F.Supp.2d 936, 940.

[114] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 101, citing to Public Contract Code section 20104.4(e).

[115] Public Contract Code section 100(c).

[116] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 26, citing to States 1990, chapter 1414.

litigation dispute resolution procedures in section 20104.2. Section 20104.4(a) requires a court to submit the matter to nonbinding mediation unless waived by mutual stipulation by both parties. If the matter remains in dispute after mediation, section 20104.4(b)(1) provides that a court is required to submit the matter to judicial arbitration as set forth in Code of Civil Procedure, Part 3, Title 3, Chapter 2.5 (commencing with section 1141.10).[117] Also, section 20104.4(b)(1) provides that the Civil Discovery Act of 1986 (commencing with Code of Civil Procedure section 2016) applies to any proceedings brought under this section.

The language of section 20104.4 does not impose any required activities on K-12 school districts or community college districts. Instead, as described above, the language requires the *court* to engage in specific activities, specifically, submit the matter to mediation and judicial arbitration. Additionally, any resulting requirement on K-12 school districts and community college districts to comply with a court's order is not new. Courts have fundamental inherent equity, supervisory, and administrative powers, as well as, inherent power to control litigation before them.[118] Thus, to the extent that K-12 school districts and community college districts are engaged in litigation, compliance with a court's order, whether it is to engage in mediation, judicial arbitration, or any other order, is not new. Staff finds that section 20104.4(a) and (b)(1) does not impose a state-mandated new program or higher level of service on K-12 school districts or community college districts.

In addition to the above provisions, section 20104.4 addresses the payment of the arbitrators compensation. Specifically, section 20104.4(b)(2) provides:

> Notwithstanding any other provision of law, upon stipulation of the parties, arbitrators appointed for purposes of this article [(Pub. Contract Code, §§ 20104-20104.6)] shall be experienced in construction law, and, upon stipulation of the parties, mediators and arbitrators shall be paid necessary and reasonable hourly rates of pay not to exceed their customary rate, and such fees and expenses shall be paid equally by the parties, except in the case of arbitration where the arbitrator, for good cause, determines a different division. In no event shall these fees or expenses be paid by state or county funds.

The claimants assert that the above language mandates K-12 school districts and community college districts to pay one-half of the necessary and reasonable fees of the arbitrator.[119] Staff disagrees with the claimants.

The plain language of section 20104.4(b)(2) provides that payment of the necessary and reasonable hourly rates of arbitrators by the parties occurs by stipulation of the parties, which would require a K-12 school district or community college district to voluntarily agree to this provision. This interpretation of section 20104.4 is consistent with the statutory provisions regarding judicial arbitration (Civ. Code of Procedure, §§ 1141.10-1141.31) which provide for the payment of all administrative costs of judicial arbitration, including the compensation of arbitrators, by the court in which the arbitration costs are incurred.[120] Only when the parties

---

[117] Public Contract Code section 20104.4(b)(1).

[118] *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967.

[119] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 102.

[120] Civil Code of Procedure section 1141.28(a).

voluntarily agree to participate in judicial arbitration, does the Code of Civil Procedure provide that the parties pay the compensation of the arbitrators in equal shares.[121] Therefore, consistent with the analysis in *Kern High School Dist*., staff finds that section 20104.4(b)(2) does not impose a state-mandated activity on K-12 school districts or community college districts.

In addition to the payment of the arbitrator's compensation, section 20104.4 provides for the payment of costs, fees, and attorney fees if a party who receives an award under judicial arbitration requests a trial de novo but does not obtain a more favorable award. Section 20104.4(b)(3) provides:

> In addition to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, any party who after receiving an arbitration award requests a trial de novo but does not obtain a more favorable judgment shall, in addition to payment of costs and fees under that chapter, pay the attorney's fees of the other party arising out of the trial de novo.

The claimants allege that section 20104.4(b)(3) mandates K-12 school districts and community college districts to pay costs, fees, and attorney's fees of the contractor-claimant when a more favorable result is not obtained after request a trial de novo. The claimants are incorrect.

The payment of costs, fees, and attorney's fees by K-12 school districts or community college districts under section 20104.4(b)(3) is triggered only when a district voluntarily requests a trial de novo and does not obtain a more favorable judgment. The claimants face no legal or practical compulsion to request a trial de novo. Although from a business or policy perspective a district may find it desirable to request a trial de novo, the state does not mandate this decision. As a result, staff finds that section 20104.4(b)(3) does not impose a state-mandated activity on K-12 school districts or community college districts.

Based on the above discussion, staff finds that Public Contract Code section 20104.4 does not impose a state-mandated new program or higher level of service on K-12 school districts or community college districts.

d. Payment of Interest on Arbitration Awards or Judgments (Pub. Contract Code, § 20104.6)

Section 20104.6 prohibits a local agency from failing to pay money as to any portion of a claim which is undisputed. In addition, section 20104.6 provides:

> In any suit filed under Section 20104.4, the local agency shall pay interest at the legal rate on any arbitration award or judgment. The interest shall begin to accrue on the date the suit is filed in a court of law.[122]

The claimants assert that this provision imposes a state-mandated new program on K-12 school districts and community college districts to pay interest at the legal rate on any arbitration award or judgment arising out of a suit filed pursuant to section 20104.4.[123] However, the payment of

[121] Civil Code of Procedure section 1141.28(b).

[122] Public Contract Code section 20104.6(b).

[123] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 102.

interest on an arbitration award or judgment is not a mandated program or service provided to the public.

Judicial arbitration awards and judgments issued by a court must be based on law and fact.[124] Because of this a judicial arbitration award or judgment in favor of a contractor is in essence a finding by the arbitrator or judge that based on the facts and law that the K-12 school district or community college district is and was obligated to pay the awarded amount to the contractor. Thus, the payment of the award is not the result of a state mandate, rather it is the result of a K-12 school district's or community college district's decision to not pay an amount the district was obligated to pay the contractor. Similarly, the payment of interest of such an award is a result of this decision.

Based on the above discussion, staff finds that section 20104.6 does not impose a state-mandated activity on K-12 school districts or community college districts.

v. Prompt Payment (Pub. Contract Code, § 20104.50)

Section 20104.50 sets forth the review and response procedures local agencies must take for the timely payment of progress payments by local agencies to a contractor after the receipt of an undisputed payment request from the contractor. Timely payment of an undisputed and properly submitted payment request is established at 37 days.[125] This includes seven days for review of the claim, and 30 days to make the payment.

a. Public Contract Code Section 20104.50 Imposes State-Mandated Activities on K-12 School Districts and Community College Districts

The plain language of section 20104.50 mandates local agencies, including K-12 school districts and community college districts, to review each payment request as soon as practicable after receipt for the purpose of determining that the payment request is a proper payment request.[126] Also, local agencies are mandated to return to the contractor any payment request determined not to be a proper payment request suitable for payment not later than seven days after receipt.[127] A returned request must be accompanied by a document setting forth in writing the reasons why the payment request is not proper.[128] In addition, local agencies are mandated to set forth in the terms of any contract public works contract the provisions of Public Contract Code section 20104.50, or a summary thereof.[129]

If a local agency fails to make a payment of an undisputed and properly submitted payment request within 37 days after receipt of the request section 20104.50(b) imposes a penalty on the local agency in the form of interest equivalent to the legal rate set forth in subdivision (a) of

---

[124] *Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 345, noting that arbitrators in judicial arbitration, unlike contractual arbitration, must decide the law and facts of the case and make an award accordingly.

[125] Public Contract Code section 20104.50(b) and (c).

[126] Public Contract Code section 20104.50(c)(1).

[127] Public Contract Code section 20104.50(c)(2).

[128] *Ibid.*

[129] Public Contract Code section 20104.50(f).

Section 685.010 of the Code of Civil Procedure.[130] The claimants allege that section 20104.50(b) mandates K-12 school districts and community college districts to pay interest to the contractor "when the district fails to make any progress payment within 30 days after receipt of an undisputed and properly submitted payment request . . . ."[131] The claimants are incorrect.

Under *Kern High School Dist.*, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[132] Here, the requirement to pay interest is triggered by a K-12 school district's or community college district's discretionary decision to not make a progress payment of "an *undisputed* and *properly submitted* payment request" within the 37 day period described above. Districts face no legal compulsion to *not* make a payment of an undisputed and properly submitted payment request. Nor have the claimants provided evidence to support a finding that K-12 school districts and community college districts face practical compulsion to *not* pay undisputed and properly submitted payment requests. Thus, staff finds that the payment of interest, triggered by a K-12 school district's or community college district's failure to make a payment on an undisputed and properly submitted payment request, is not a state-mandated activity.

b. <u>The Activities Mandated by Public Contract Code Section 20104.50 Constitute New Programs or Higher Levels of Service</u>

Although private entities face prompt payment requirements which require the prompt payment of progress payments within 30 days to contractors where there is no good faith dispute between parties,[133] the activities mandated by section 20104.50 imposes unique requirements on K-12 school districts and community college districts. Specifically, private entities are not required to engage in the review and response process as specified in Public Contract Code section 20104.50. In addition, private entities are not required to include the provisions of section 20104.50 or similar provisions in any construction contract between private parties. Therefore, Public Contract Code section 20104.50 imposes unique requirements on K-12 school districts and community college districts to implement the state policy regarding prompt payment of undisputed and properly submitted payment requests for public projects.[134] Additionally, the prompt payment of undisputed amounts allows qualified contractors to pay its subcontractors and to enter bids for other public projects, thereby stimulating competition, lowering costs, and increasing the quality of public projects, and thus, providing a service to the public.

---

[130] Code of Civil Procedure section 685.010(a) provides that, "Interest accrues at the rate of 10 percent per annum on the principle amount of any money judgment remaining unsatisfied."

[131] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 102; Exhibit D, comments filed by the claimants in response to comments filed by the Chancellor's Office and Department of Finance, dated May 7, 2004, pgs. 21-22.

[132] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743.

[133] Civil Code section 3260.1, which will be repealed and replaced with Civil Code section 8800 on July 1, 2012, pursuant to Statutes 2010, chapter 697, section 16.

[134] Public Contract Code section 20104.50(a).

The claimants have pled section 20104.50 as added in 1992.[135] Immediately prior to 1992, K-12 school districts and community college districts were not required to engage in the activities mandated by section 20104.50. As a result, staff finds that the following activities constitute state-mandated new programs or higher levels of service:

1. Review each payment request from a contractor for repair and maintenance as soon as practicable after the receipt of the request to determine if the payment request is a proper payment request. "As soon as practicable" is limited by the seven day period in the activity mandated by Public Contract Code section 20104.50(c)(2). (Pub. Contract Code, § 20104.50(c)(1) (Stats. 1992, ch. 799).)

2. Return to the contractor for repair and maintenance any payment request determined not to be a proper payment request suitable for payment as soon as practicable, but no later than seven days after receipt of the request.

   A returned request shall be accompanied by a document setting forth in writing the reasons why the payment request is not proper. (Pub. Contract Code, § 20104.50(c)(2) (Stats. 1992, ch. 799).)

3. Require Article 1.7, Chapter 1, Part 3, Division 2 of the Public Contract Code (Pub. Contract Code, § 20104.50) or a summary thereof, to be set forth in the terms of any repair and maintenance contract. (Pub. Contract Code, § 20104.50(f) (Stats. 1992, ch. 799).)

10. Contract Provisions Regarding Performance Retentions and Substitute Security (Pub. Contract Code, § 22300)

i. Public Contract Code Section 22300 Mandates K-12 School Districts and Community College Districts to Include Substitution of Securities Provisions in any Invitation for Bid and in any Contract Documents

The plain language of section 22300(a) requires the inclusion in any invitation for bid and in any contract documents of provisions to permit the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract. The requirement to include the substitution of securities provision does not apply to contracts in which there will be financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. Sec. 1921 et seq.), and where federal regulations or policies, or both, do not allow the substitution of securities.

The remaining portion of section 22300 describes the options a contractor has in regard to substitution of securities and payment of retentions earned, all of which occur at the request and at the expense of the contractor.

Based on the plain language of section 22300(a), staff finds that K-12 school districts are mandated to include in any invitation for bid and in any contract documents for provisions to permit the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract, except where there will be financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the

[135] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 37, citing to Statutes 1992, chapter 799.

Consolidated Farm and Rural Development Act (7 U.S.C. Sec. 1921 et seq.), and where federal regulations or policies, or both, do not allow the substitution of securities.

ii. The Inclusion of Substitution of Securities Provisions in any Invitation for Bid and in any Contract Documents Constitutes a New Program or Higher Level of Service

Unlike any private contracting parties, K-12 school districts and community college districts are mandated to include substitution of securities provisions in any invitation for bid and in any contract documents. This unique requirement, which does not apply generally to all residents and entities in the state, implements a state policy to encourage full participation by contractors and subcontractors in public contract procedures.[136] In addition, the claimants have pled Public Contract Code section 22300 as added in 1988 and last amended in 1998.[137] Immediately prior to 1988, K-12 school districts and community college districts were not required to include the substitution of securities provision in repair and maintenance contract documents. Thus, staff finds that section 22300 requires K-12 school districts and community college districts to engage in the following state-mandated new program or higher level of service:

> In any invitation for bid and in any repair and maintenance contract documents, include provisions to permit the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract. This excludes invitations for bid and contract documents for projects where there will be financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. Sec. 1921 et seq.), and where federal regulations or policies, or both, do not allow the substitution of securities. (Pub. Contract Code, § 22300(a) (Stats. 1988, ch. 1408).)

11. Verification of Bidder's License Status (Bus. & Prof. Code, § 7028.15 and Pub. Contract Code, § 20103.5)

Business and Professions Code section 7028.15 makes it a misdemeanor for any person to submit a bid to a public agency without having a license to perform the proposed work, but excludes local agency projects where federal funds are involved. Where federal funds are involved, Public Contract Code section 20103.5 requires a contractor to be properly licensed at the time the contract is awarded.

i. Business and Professions Code Section 7028.15 and Public Contract Code Section 20103.5 Mandate K-12 School Districts and Community College Districts to Verify Whether a Contractor Awarded a Contract is Properly Licensed

As relevant to K-12 school districts and community college districts, Business and Professions Code section 7028.15 requires a public agency, before awarding a contract or purchase order, to verify with the Contractors' State License Board (CSLB) that the contractor was properly licensed when the contractor submitted the bid. Where federal funds are involved, Public Contract Code section 20103.5 requires a public agency, before making the first payment for

[136] Public Contract Code section 22300(e)

[137] Exhibit A, test claim filed by claimants, dated June 24, 2003, pgs. 16 and 43, citing to Statutes 1988, chapter 1408; and Statutes 1998, chapter 857.

work or material under a contract, to verify with the CSLB that the contractor was licensed when the contract was awarded.

Public Contract Code section 20103.5 also provides that public agencies shall include a statement in the standard form of prequalification questionnaire and financial statement, that any bidder or contractor not licensed at the time a contract is awarded shall be subject to all legal penalties imposed by law, including, but not limited to, any appropriate disciplinary action by the CSLB. However, this requirement must be read in context of Public Contract Code sections 20101, 20111.5, and 20651.5, which provide public agencies, K-12 school districts, and community college districts, with the authority to require the use of a standard form of prequalification questionnaire and financial statement.

As discussed with Public Contract code sections 20101, 20111.5, and 20651.5, although K-12 school districts and community college districts have the authority to require the use of a prequalification process, districts are not required to utilize this authority. Absent this use of authority by K-12 school districts and community college districts, districts would not be required to include a statement into contracts for projects involving federal funds regarding the penalties that a bidder or contract may be subject to. As discussed above for Public Contract Code sections 20101, 20111.5, and 20651.5, absent legal compulsion, the claimants bear the burden to provide sufficient evidence that districts face practical compulsion. The claimants have not provided evidence that K-12 and community college districts face practical compulsion to establish and require the use of a prequalification process. Thus, under *Kern High School Dist*., K-12 school districts and community college districts are not mandated by the state to include this statement into contracts for projects involving federal funds.

Based on the above discussion, staff finds that K-12 school districts and community college districts are mandated to verify with the CSLB whether a contractor was properly licensed when the contractor submitted the bid (for projects not involving federal funds), and when the contractor was awarded the bid (for projects involving federal funds).

ii. <u>The Mandate to Verify Whether a Contractor was Properly Licensed Constitutes a New Program or Higher Level of Service</u>

The mandate to verify a contractor's license carries out a governmental function of prohibiting unlicensed contracting, which prevents "a threat to the health, welfare, and safety of the people of the State of California."[138] The claimants have pled Business and Professions Code section 7028.15 as amended in 1990 and Public Contract Code section 20103.5 as added in 1990.[139] Immediately prior to 1990, K-12 school districts and community college districts were not required to verify whether a contractor was licensed at the time the contractor placed the bid or when the bid was awarded. Thus, staff finds that the following state-mandated activities constitute a new program or higher level service:

1. Before awarding repair and maintenance contract to a contractor for a project that *is not* governed by Public Contract Code section 20103.5 (which addresses projects that involve federal funds), verify with the Contractors' State Licensing Board that the contractor was

[138] Business and Professions Code section 145 and

[139] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 23, 24, and 26, citing to Statutes 1990, chapter321; and Statutes 1990, chapters 321 and 1414..

properly licensed when the contractor submitted the bid. (Bus. & Prof. Code, § 7028.15(e) (Stats. 1990, ch. 321).)

2. Before making the first payment for work or material to a contractor under any repair and maintenance contract for a project where federal funds are involved, verify with the Contractors' State Licensing Board that the contract was properly licensed at the time that the contract was awarded to the contractor. (Pub. Contract Code, § 20103.5 (Stats. 1990, ch. 1414).)

12. Bidder's Security for Contracts subject to the State School Building Aid Law of 1949 (Pub. Contract Code, § 20107)

Public Contract Code section 20107 sets forth the requirements imposed on bidders to a K-12 school project subject to the State School Building Aid Law of 1949 must be presented under sealed cover and accompanied by a bidder's security. Upon award to the lowest bidder, districts are required to return the security of unsuccessful bidders in a reasonable time. However, Public Contract Code section 20107 is *only* applicable to contracts subject to the State School Building Aid Law of 1949 (Ed. Code, §§ 15700-15795), and participation in the State School Building Aid Law of 1949 is discretionary.[140]

The State School Building Aid Law of 1949, which was not pled as part of this test claim, is a program established by the Legislature to provide funding to aid K-12 school districts in the purchase and improvement of school sites; the purchase of desks, tables, chairs, and built-in or fixed equipment; and the planning and construction, reconstruction, alteration of, and addition to, school buildings.[141] Under the State School Building Aid Law of 1949, if a school district wants funding pursuant to the State School Building Aid Law the district must apply to the State Allocation Board for funding.[142] However, from the plain language of the State School Building Aid Law, districts are not legally required to apply for funding under this law. Any activity contained in Public Contract Code section 20107 is triggered by a K-12 school district's discretionary decision to apply for funding under the State School Building Aid Law of 1949. In other words, K-12 districts do not face legal compulsion to apply for funding under the State School Building Aid Law of 1949.

As discussed above, absent legal compulsion, the courts have held open the possibility of practical compulsion as applied to state-mandates. Courts have also found that a finding of practical compulsion requires a concrete showing in the record that a failure to engage in the activity at issue will result in certain and severe penalties.[143] The initial burden to make a concrete showing of practical compulsion lies with the claimants. Staff finds that the claimants have failed to meet this burden.

---

[140] Public Contract Code section 20105 provides that Public Contract Code sections 20105-20106 "shall apply to contracts subject to the State School Building Aid Law of 1949" provided for in Education Code sections 15700-15795.

[141] Education Code section 15706.

[142] Education Code section 15713.

[143] *POBRA, supra,* 170 Cal.App.4th at pgs. 1366-1369.

In response to the Chancellor's Office and Finance's comments that K-12 school districts are not required to participate in the State School Building Aid Law of 1949, and therefore, not mandated to comply with Public Contract Code section 20107, the claimants cite to their general argument that school construction is not voluntary. In support of this argument the claimants summarize the various Education Code provisions that provide K-12 school districts with bond authority and conclude that the ability to borrow is limited.[144] In addition, the claimants rely on a study and Proposition 55 ballot language, both of which state a need to build more schools in California, to conclude that the state's ability to fully fund needed school facilities is limited and subsequent actions by voters have note abated the need for school facilities.[145] From this general argument the claimants assert that K-12 school districts are mandated to participate in the various school facilities funding programs referred to in the test claim legislation.[146]

The State School Building Aid Law of 1949 is the only facilities funding program related to this test claim. In this general argument the claimants do not specifically address the State School Building Aid Law of 1949, nor do the claimants state why participation in the State School Building Aid Law of 1949 is practically compelled. Instead this general argument is the same argument made by the claimants in the *School Facilities Funding Requirements* (02-TC-30, 02-TC-43, and 09-TC-01) test claim.[147] As noted by the Commission in its decision, the question before the Commission is not whether additional school facilities are needed as suggested by the claimants, but whether K-12 school districts are legally or practically compelled to build them *and* to utilize various state grant programs for that purpose.[148] The Commission found that K-12 school districts are not mandated by the state to undertake discretionary projects and participate in the voluntary funding programs pled in the test claim, which would subject them to SFFRs.[149]

In the Commission's decision, the Commission noted that there are school districts that do not participate in the voluntary funding programs, and found that there is no evidence of "draconian" consequences for failing to participate in the programs. Rather, the district will simply forgo the state matching funds for new construction and will need to figure out another way to house its students.[150] In addition, the Commission found that the claimant failed to show that reliance on

---

[144] Exhibit D, comments filed by the claimants in response to comments filed by the Chancellor's Office and Department of Finance, dated May 7, 2004, pgs. 6-7.

[145] *Id*. at pgs. 8-12, citing "School Facility Financing-A History of the Role of the State Allocation Board and Options for the Distribution of Proposition 1A Funds" (Cohen, Joel, February 1999.) and Proposition 55 Ballot Pamphlet from 2004, which identified a need to construct schools to house one million pupils and modernize schools for an additional 1.1 million students.

[146] Exhibit D, comments filed by the claimants in response to comments filed by the Chancellor's Office and Department of Finance, dated May 7, 2004, pgs. 6-12, and 22.

[147] *School Facilities funding Requirements* (02-TC-30, 02-TC-43, and 09-TC-01) test claim, at <http://www.csm.ca.gov/sodscan/033011a.pdf> as of February 17, 2012.

[148] *Id.* at p. 49.

[149] *Ibid.*

[150] *Id.* at pgs. 48 and 50.

any of the alternatives to acquiring new school sites, building new school facilities or modernizing existing schools and accepting state school facilities funding would result in certain and severe penalties. Some of the alternatives that the Commission noted include transferring students to other schools, double session kindergarten classes, district boundary changes, multi-track year round scheduling, busing, and reopening closed school sites in the district.[151]

As in the *School Facilities Funding Requirements* (02-TC-30, 02-TC-43, and 09-TC-01) test claim, the claimants have not provided evidence in the record in this test claim to support a finding that districts are practically compelled to participate in the State School Building Aid Law of 1949. Here, the claimants have not provided evidence of certain or severe penalties resulting from a K-12 districts decision to not receive funding pursuant to the State School Building Aid Law of 1949.

Thus, based on the analysis in *Kern High School Dist.*, staff finds that Public Contract Code section 20107 does not impose any state-mandated activities.

13. Minority, Women, and Disabled Business Enterprise Participation in Public Contracts (Pub. Contract Code, §§ 2000 and 2001; and Cal. Code Regs., tit. 5, §§ 59500, 59504, 59505, 59506, and 59509)

The test claim statutes and regulations analyzed in this section address the actions that K-12 districts and community college districts are authorized to take in order to aid in the participation in K-12 district and community college district contracts by minority business enterprises (MBE), women business enterprises (WBE), and disabled veteran business enterprises (DVBE).

In general, for any contract over a specified amount K-12 school districts and community college districts are required to award the contract to the lowest responsible bidder.[152] However, Public Contract Code sections 2000 and 2001 authorizes "local agencies"[153] to award a contract to the lowest responsible bidder that also meets, or makes a good faith effort to meet, goals and requirements "established by the local agency" relating to participation in the contract by MBEs, WBEs, and DVBEs. Similarly, California Code of Regulations, title 5, sections 59500, 59504, 59505, 59506, and 59509, authorize a community college district to award a contract to the lowest responsible bidder that meets the objective established by the district to meet the system-wide MBE/WBE/DVBE participation that districts are expected to contribute to achieving.[154]

The following discussion will first address whether the Public Contract Code sections applicable to local agencies impose state-mandated new programs or higher levels of service on K-12 school and community college districts. The discussion will then address whether the title 5 sections applicable to community college districts impose state-mandated new programs or higher levels of service on community college districts.

---

[151] *School Facilities funding Requirements* (02-TC-30, 02-TC-43, and 09-TC-01) test claim, at <http://www.csm.ca.gov/sodscan/033011a.pdf> as of February 17, 2012, pgs. 50-51.

[152] Public Contract Code sections 20111 and 20651.

[153] "Local agency" is defined for purposes of Public Contract Code sections 2000 and 2001 as, "a county or city, whether general law or chartered, city and county, school district

[154] The claimants included in the test claim filing California Code of Regulations, title 5, sections 59500, 59504, 59505, 59506, and 59509, as added by Register 94, number 6 (January 1, 1994).

i. Public Contract Code Sections do not Impose State-Mandated New Programs or Higher Levels of Service on K-12 School and Community College Districts

Public Contract Code section 2000 authorizes a "local agency" to require bidders to a contract to meet or make a good faith effort to meet the local agency's goals and requirements regarding MBE and WBE participation in the contract. Public Contract Code section 2001 requires a "local agency" that requires bidders to meet or make a good faith effort with the local agency's goals and requirements for MBE, WBE, or DVBE participation in contracts to require in the general conditions und which bids will be received specified information related to the MBE, WBE, or DVBE participation in the contract.

The claimants and the Chancellor's Office disagree as to whether community college districts fall within the definition of a "local agency" subject to Public Contract Code sections 2000 and 2001.[155] However, for purposes of this test claim it is unnecessary to resolve this dispute. Even assuming that community college districts are included in the definition of "local agency," as further discussed below, the plain language of the code sections provide for a discretionary program and there is no evidence in the record that indicates that the claimants face practical compulsion to participate in the program.

The California Supreme Court held in *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) that when analyzing state mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[156] The court also held open the possibility that a reimbursable state mandate might be found in circumstances short of legal compulsion, where "'certain and severe … penalties' such as 'double … taxation' and other 'draconian' consequences,'"[157] would result if the local entity did not comply with the program, such that the local entity faces practical compulsion to participate. The court in *Dept of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, explained further that a finding of "practical compulsion" requires a concrete showing in the record that a failure to engage in the activity at issue will result in certain and severe penalties.[158]

Public Contract Code section 2000 provides in relevant part, "[A]ny local agency *may* require that a contract be awarded to the lowest responsible bidder who also . . . [¶] [m]eets goals and requirements *established by the local agency* relating to participation in the contract by minority business enterprises and women business enterprises."[159] If the bidder does not meet the goals and requirements established by the local agency, the contract can be awarded to the bidder if the

---

[155] Public Contract Code section 2000(d) defines "local agency as "a county or city, whether general law or chartered, city and county, school district, or other district." The dispute arises over the definition of "school district" and "other district" as used in these sections. From the plain language of the Public Contract Code sections 2000 and 2001 it is unclear if the Legislature intended "school district" or "other district" to include community college districts.

[156] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743.

[157] *Id*. at p. 751.

[158] *POBRA*, *supra*, 170 Cal.App.4th at pgs. 1366-1369.

[159] Public Contract Code section 2000(a)(1).

bidder made a good faith effort to comply with the goals and requirements.[160] The remaining language of section 2000 relates to criteria used to determine if a bidder made a good faith effort to comply with the locally established goals and requirements.

Public Contract Code section 2001 provides that "[a]ny *local agency . . . that requires* that contracts be awarded to the lowest responsible bidder meeting, or making a good faith effort to meet, participation goals for minority, women, or disabled veteran business enterprises . . ." shall include specific provisions in the general conditions under which the bids will be received that require specific information from the bidders.

As indicated by the language of sections 2000 and 2001, local agencies are authorized to require bidders to meet locally established goals and requirements regarding MBE, WBE, and DVBE participation. However, local agencies are not legally compelled to impose these requirements. In addition, absent legal compulsion the claimants bear the burden of providing evidence to support the claimants' allegation that K-12 school districts and community college districts face practical compulsion to engage in an activity that the districts are not legally compelled to engage in. Absent any evidence of practical compulsion, the Commission cannot make a finding that practical compulsion exists. The claimants have not provided evidence that K-12 and community college districts face practical compulsion to require bidders to meet locally established goals and requirements regarding MBE, WBE, and DVBE participation.

Based on the above discussion, staff finds that Public Contract Code sections 2000 and 2001 do not impose any reimbursable state-mandated activities on K-12 districts or community college districts.

ii. Some of the Title 5 Sections Impose State-Mandated New Programs or Higher Levels of Service on Community College Districts

Title 5 sections 59500, 59504, 59505, 59506, and 59509, apply *only* to community college districts. The Title 5 sections set forth: (1) the Board of Governors intent to reach a statewide goal for MBEs, WBEs, and DVBEs participation in community college district contracts; (2) requirements of bidders if a district elects to apply MBEs, WBEs, or DVBEs goals to any contract; and (3) monitoring and reporting of district participation in the Board of Governors statewide goal for MBEs, WBEs, and DVBEs participation in community college district contracts.

The statutory provisions that are the source of the goals in the title 5 sections were the subject of litigation that ultimately resulted in courts finding that the statutory provisions were unconstitutional. In 2005 and 2006, the title 5 sections were substantively amended.

Because of the history surrounding the use of MBE, WBE, and DVBE goals, in order to analyze whether title 5 sections 59500, 59504, 59505, 59506, and 59509, impose state-mandated new programs or higher levels of service, it is necessary to discuss: (1) the legal context in which these regulations were adopted; (2) whether the title 5 sections mandate community college districts to engage in activities; (3) whether the mandated activities constitute a new program or higher level of service; and (4) the effect of court decisions and executive orders issued after the adoption of these regulations, and the subsequent amendments to the regulations.

[160] Public Contract Code section 2000(a)(2).

a. Legal Context

The title 5 sections were adopted in order to implement Education Code section 71028, which requires the Board of Governors to adopt regulations to ensure that the California Community Colleges, as a system, establish and apply the statewide participation goals for contracting with MBEs and WBEs specified in Public Contract Code section 10115. Public Contract Code section 10115, which has been found to be unconstitutional,[161] provides that state agencies, departments, officers, or other state governmental entities awarding contracts shall have statewide participation goals of not less than 15 percent for MBEs, 5 percent for WBEs, and 3 percent for DVBEs.

In addition, the title 5 sections were adopted within the constraints of the Equal Protection Clause of the federal and state constitutions. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall … deny to any person within its jurisdiction the equal protection of the laws."[162]

Under the Equal Protection Clause, the United States Supreme Court has found that gender based government action must be justified by an exceedingly persuasive justification.[163] This burden is met only by a showing that the classification serves important governmental objectives, and that the means employed are substantially related to the achievement of those objectives.[164] In regard to racial classifications, the Supreme Court has found that racial classifications are inherently "suspect" and must meet strict scrutiny in order to be constitutional. In the context of affirmative action, in order to meet strict scrutiny, the classifications must be a narrowly tailored remedy for past discrimination, active or passive, by the governmental entity making the classification.[165]

Like the United States Constitution, the California Constitution provides that, "A person may not be . . . denied equal protection of the laws."[166] In addition, under the California Constitution, classifications based on race were found to be inherently suspect and subject to strict scrutiny.[167] Unlike the Equal Protection Clause of the United States Constitution, under California law, a classification based on gender is considered "suspect" for purposes of an equal protection analysis, and therefore, must also meet strict scrutiny.[168]

---

[161] *Monterey Mechanical Co. v. Wilson* (9th Cir. 1997) 125 F.3d 702.

[162] U.S. Constitution, 14th Amendment, section 1.

[163] *Mississippi University for Women v. Hogan* (1982) 458 U.S. 718, 723-724.

[164] *Ibid*.

[165] *Wygant v. Jackson Board of Education* (1986) 476 U.S. 267, 280-283.

[166] California Constitution, article 1, section 7.

[167] *Hiatt v. City of Berkeley* (1982) 130 Cal.App.3d 298, 309-310.

[168] *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17-20. Also *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 37.

Within this constitutional framework, federal and state courts have examined gender and racial classifications, and have found affirmative action programs setting up rigid quotas violative of the Equal Protection clauses of the United States and California Constitution.[169]

b. The Title 5 Sections Mandate Community College Districts to Engage in Appropriate Efforts to Provide Participation Opportunities, and Monitoring and Reporting Activities

It is within the constraints of the Equal Protection Clause of both the United States and the California Constitutions and the court cases interpreting these clauses that the title 5 sections were adopted by the Board of Governors. The result is a regulatory scheme with language strongly indicating the Board of Governors' *desire* to achieve a statewide goal of a specific percent of MBE, WBE, and DVBE participation in district contracts, but also a regulatory scheme careful not to *actually* require individual districts to impose the MBE, WBE, and DVBE participation goals so as to avoid a requirement that possibly violates federal and state constitutional law.

Title 5 section 59500 provides:

> (a) The California Community Colleges shall provide opportunities for minority, women, and disabled veteran business enterprise participation in the award of district contracts consistent with this Subchapter [Cal. Code Regs., tit. 5, §§ 59500-59509]. The statewide goal for such participation is not less than 15 percent minority business enterprise participation, not less than 5 percent women business enterprise participation, and not less than 3 percent disabled veteran business participation of the dollar amount expended by all districts each year for construction, professional services, materials, supplies, equipment, alteration, repair, or improvement. However, each district shall have flexibility to determine whether or not to seek participation by minority, women, and disabled veteran business enterprises for any given contract.
>
> (b) Nothing in this Subchapter authorizes any district to discriminate in awarding contracts on the basis of ethnic group identification, ancestry, religion, age, sex, race, color, or physical or mental disability.[170]

Focusing on the language "The California Community Colleges shall provide opportunities... ," the claimants argue that this means that "colleges ***shall*** provide these opportunities."[171] Additionally, the claimants argue that the above language:

> [C]learly indicate[s] that community college districts are required to provide opportunities for minority, women and disabled veteran business enterprise participation in the award of district contracts, in a minimum amount measured in

---

[169] *Regents of University of California v. Bakke* (1978) 438 U.S. 265; and *Hiatt v. City of Berkeley, supra*, 130 Cal.App.3d 298.

[170] Register 94, number 6.

[171] Exhibit D, Comments filed by the claimants in response to comments filed by Chancellor's Office and Department of Finance, dated May 7, 2004, p. 28-29. (Original emphasis.)

> percentages of dollar amounts awarded, and that a district shall have flexibility in deciding which contracts will be used as a vehicle of compliance.[172]

The claimants misinterpret the language section 59500(a). Section 59500(a) sets forth intent language of the Board of Governors in regard to a *statewide* goal for the "California Community Colleges" as a statewide *system*. Section 59500(a) does not impose a mandatory duty upon individual community college districts to attain MBE, WBE, and DVBE participation in a "minimum amount." Instead it indicates an intent, expectation, and authorization for districts to apply MBE, WBE, and DVBE goals, but stops short of *requiring* districts to apply the MBE, WBE, and DVBE goals to any district contracts.

To interpret section 59500(a), or any of the title 5 sections, as requiring community college districts to provide opportunities to MBEs, WBEs, and DVBEs to participate in district contracts in a specified minimum percentage, as suggested by the claimants, would be inconsistent with the remaining regulatory scheme. In defining "goal" as used in the title 5 sections, section 59502 provides "Goals *are not* quotas, set-asides, or rigid proportions."[173] Rather, "goal" as defined in the title 5 sections is a "numerically expressed objective for *systemwide* MBE/WBE/DVBE participation that districts are *expected* to contribute to achieving."[174] Also, section 59504 provides that community college districts are to undertake efforts to contribute to the systemwide goal "as the *district may deem* appropriate pursuant to Section 59505." Section 59505 provides that, "*If a district elects to apply* MBE/WBE/DVBE goals to any contract ..." then the community college district is required to include a statement in its bidding notice that certain conditions must be met in order for a bidder to be considered a responsive bidder.[175] In addition to conflicting with the regulatory scheme, requiring community college districts to provide opportunities for MBEs and WBEs in a specified minimum amount would be violative of the constitutional constraints described above. Thus, the title 5 sections provide community college districts the discretion to apply MBE/WBE/DVBE goals to district contracts, but do not require districts to actually do so.

Although community college districts are not required to apply MBE/WBE/DVBE goals to district contracts, title 5 section 59504 mandates community college districts to undertake "appropriate efforts" to provide participation opportunities for MBEs/WBEs/DVBEs in district contracts. Section 59504 provides in relevant part:

> Each district shall undertake appropriate efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises in district contracts. Appropriate efforts may include vendor and service contractor orientation programs related to participating in district contracts or in understanding and complying with the provisions of this [Cal. Code Regs., tit. 5, § 59500 et seq.], developing a listing of minority, women, and disabled veteran business enterprises potentially available as contractors or suppliers, or such other

---

[172] *Ibid*.

[173] California Code of Regulations, title 5, section 59502(f) (Register 94, No. 6) (Emphasis added). This section was not pled by the claimants.

[174] *Ibid*. (Emphasis added.)

[175] California Code of Regulations, title 5, section 59505(a) (Register 94, No. 6).

> activities they [*sic*] may assist interested parties in being considered for participation in district contracts.[176]

Based on the plain language of the section 59504, community college districts are mandated to undertake appropriate efforts as described in the section. It is important to note the distinction between the "appropriate efforts" required by section 59504, and the goals for MBE, WBE, and DVBE participation that community college districts can elect to apply. The "appropriate efforts" mandated by section 59504 relate to activities independent of any individual contract (e.g. orientation programs, and developing a list of MBEs, WBEs, and DVBEs). Thus, this activity excludes the application of MBE, WBE, and DVBE goals to district contracts.

In addition to taking "appropriate efforts," community college districts are mandated to engage in monitoring MBE, WBE, and DVBE participation in district contracts and to report the level of participation to the Chancellor of the California Community Colleges. Title 5 section 59509 provides:

> Each district shall monitor its participation as specified in [Cal. Code Regs., tit. 5, §§ 59500-59509]. Beginning October 15, 1994, and by each October 15 thereafter, each district shall report to the Chancellor the level of participation by minority, women, and disabled veteran business enterprises pursuant to [Cal. Code Regs., tit. 5, §§ 59500-59509] for the previously completed fiscal year. Even if a district elects not to apply minority, women, and disabled veteran business enterprise goals to one or more particular contract(s), all such contracts shall be reported to the Chancellor and shall be taken into account in determining whether the community college system as a whole has achieved the goals set forth in Section 59500.
>
> The Chancellor shall prescribe forms to be used by the districts in making their yearly reports.[177]

Title 5 sections 59505(d) and 59506(a) provide the specification referred to in section 59509. Title 5 section 59505(d) directs districts to:

> [A]ssess the status of each of its contractors and, if the contractor is a certified or self-certified minority, women, and disabled veteran business enterprise subcontractors and/or suppliers to the satisfaction of the district, the district may include the actual dollar amount attributable to minority, women, and disabled veteran business enterprise participation in reporting its participation activity pursuant to Section 59509.[178]

Section 59506 provides:

> (a) Each district shall establish a process to collect and retain certification information by a business enterprise claiming minority, women, and disabled veteran business enterprise status.

---

[176] Register 94, number 6.

[177] Register 94, number 6.

[178] *Ibid*.

(b) The process described in subsection (a) shall include notification to responsive bidders subject to Section 59505(a) of the requirements for qualification as a responsive bidder.[179]

Based on the language of title 5 sections 59505(d), 59506(a), and 59509, even if a community college district does not apply MBE, WBE, and DVBE participation *goals* to its contracts, the district is mandated to monitor and report MBE, WBE, and DVBE participation levels in community college district contracts to the Chancellor as specified in the title 5 sections.

Although section 59506(b) provides that the process to collect and retain certification information described in 59506(a) is to include notification of the requirements for qualification as a responsive bidder, this requirement is limited to "responsive bidders *subject* to Section 59505(a)." As discussed above, section 59505(a) provides that community college districts can *elect* to apply MBE, WBE, and DVBE goals to district contracts. Thus, the requirement to include notification of the requirements for qualification as a responsive bidder in the process to collect and retain certification information is triggered by an underlying discretionary decision made by a community college district, and therefore, not mandated by the state under *Kern High School Dist.*

Thus, based on the above discussion title 5 sections 59504, 59505(d), 59506(a), and 59509, *community college districts* are mandated to engage in the following activities:

1. Undertake appropriate efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises in district contracts for repair and maintenance. Appropriate efforts may include: (1) vendor and service contractor orientation programs related to participating in district contracts or in understanding and complying with the provisions of California Code of Regulations, title 5, section 59500 et seq.; (2) developing a listing of minority, women, and disabled veteran business enterprises potentially available as contractors or suppliers; or (3) such other activities that may assist interested parties in being considered for participation in district contracts.

   Appropriate activity does not include the application of the systemwide goals established in California Code of Regulations, title 5, section 59500 to district contracts. (Cal. Code Regs., tit. 5, § 59504 (Register 94, No. 6).)

2. Assess the status of each of its contractors regarding whether a contractor is a certified or self-certified minority, women, and disabled veteran business enterprise subcontractor and/or supplier. (Cal. Code Regs., tit. 5, §§ 59505(d) and 59509 (Register 94, No. 6).)

3. Establish a process to collect and retain certification information by a business enterprise claiming minority, women, and disabled veteran business enterprise status. (Cal. Code Regs., tit. 5, §§ 59506(a) and 59509 (Register 94, No. 6).)

4. Each October 15, report to the Chancellor the level of participation by minority, women, and disabled veteran business enterprises in community college district contracts for repair and maintenance for the previously completed fiscal year. (Cal. Code Regs., tit. 5, § 59509 (Register 94, No. 6).)

[179] *Ibid.*

c. The Activities Mandated by the Title 5 Sections Constitute a New Program or Higher Level of Service

The activities mandated by the title 5 sections constitute a "program" by imposing unique requirements on community college districts to implement the following state policy:

> [T]o aid the interests of minority, women, and disabled veteran business enterprises in order to preserve reasonable and just prices and a free competitive enterprise, to ensure that a fair proportion of the total number of contracts or subcontracts for commodities, supplies, technology, property, and services are awarded to minority, women, and disabled veteran business enterprises, and to maintain and strengthen the overall economy of the state.[180]

In addition, the claimants have pled the title 5 regulations as filed on December 29, 1993, and operative on January 28, 1994.[181] Immediately prior to 1994, community college districts were not required to engage in the mandated activities. As a result, staff finds that the activities mandated by the title 5 sections constitute a state-mandated new program or higher level of service for community college districts.

d. Court Decisions and Executive Orders Issued After the Adoption of the Title 5 Sections

On January 28, 1994 the title 5 sections became operative. In 1997, the statutory scheme that laid out the statewide participation goals that were to be included in the title 5 sections was held violative of the Equal Protection Clause of the United States Constitution by a federal court of appeals.[182] In 1998, Governor Pete Wilson issued an executive order directing the California Community Colleges to take all necessary action to comply with the intent and the requirements of the executive order which directed all state agencies to cease enforcement of the MBE and WBE participation goals and good faith effort requirements of Public Contract Code section 10115 et seq.[183] In 2001, a California Court of Appeals recognized the statutory scheme as unconstitutional, but found the requirement on state agencies to report MBE, WBE, and DVBE participation levels in state contracts to the Legislature to be constitutional and severable.[184] In 2005 and 2006, the title 5 sections were substantively amended.[185]

The title 5 sections did not contain the same requirements imposed by Public Contract Code sections 10115 et seq. found to be unconstitutional by the decisions described above. In addition, because the title 5 regulations were not placed in issue in any of the decisions finding Public Contract Code section 10115 et seq. unconstitutional, the provisions of the title 5

---

[180] Public Contract Code section 10115 (Stats. 1992, ch. 1329). Public Contract Code section 10115 sets forth the MBE, WBE, and DVBE goals used in the title 5 sections.

[181] Exhibit A, test claim filed by claimants, dated June 24, 2003, p. 85. This coincides with the regulations as added in Register 94, number 6, operative January 28, 1994.

[182] *Monterey Mechanical Co. v. Wilson* (9th Cir. 1997) 125 F.3d 702.

[183] Governor Pete Wilson's Executive Order No. W-172-98, issued March 10, 1998.

[184] *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16.

[185] Register 2005, number 10 (March 2, 2005); and Register 2006, number 17 (March 15, 2006).

regulations are presumed to be constitutional. As a result, the title 5 regulations remained in effect and unchanged until the 2005 and 2006 amendments.

In 2005, the Board of Governors repealed the reporting requirement found in title 5 section 59509.[186] This amendment became operative on April 1, 2005. In 2006, the Board of Governors amended the regulations to make discretionary all monitoring requirements of the 1994 version of the title 5 sections.[187] This amendment became operative on April 14, 2006. Thus, the only mandated activity which remains in effect is the mandate to undertake appropriate efforts to provide participation opportunities.

Based on the above discussion, staff finds that the title 5 sections require community college districts to engage in the following state-mandated new programs or higher levels of service for contracts for repair and maintenance that exceed the dollar amounts and project hours specified in subheading "B" of this analysis:

1. Undertake appropriate efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises in district contracts for repair and maintenance. Appropriate efforts may include: (1) vendor and service contractor orientation programs related to participating in district contracts or in understanding and complying with the provisions of California Code of Regulations, title 5, section 59500 et seq.; (2) developing a listing of minority, women, and disabled veteran business enterprises potentially available as contractors or suppliers; or (3) such other activities that may assist interested parties in being considered for participation in district contracts.

   Appropriate activity does not include the application of the systemwide goals established in California Code of Regulations, title 5, section 59500 to district contracts. (Cal. Code Regs., tit. 5, § 59504 (Register 94, No. 6).)

2. Assess the status of each of its contractors regarding whether a contractor is a certified or self-certified minority, women, and disabled veteran business enterprise subcontractor and/or supplier. (Cal. Code Regs., tit. 5, §§ 59505(d) and 59509 (Register 94, No. 6), beginning July 1, 2001 through April 13, 2006.)

3. Establish a process to collect and retain certification information by a business enterprise claiming minority, women, and disabled veteran business enterprise status. (Cal. Code Regs., tit. 5, §§ 59506(a) and 59509 (Register 94, No. 6), beginning July 1, 2001 through April 13, 2006.)

4. Each October 15, report to the Chancellor the level of participation by minority, women, and disabled veteran business enterprises in community college district contracts for repair and maintenance for the previously completed fiscal year. (Cal. Code Regs., tit. 5, § 59509 (Register 94, No. 6), beginning July 1, 2001 through March 31, 2005.)

[186] Register 2005, number 10.

[187] Register 2006, number 17.

Issue 2: The Test Claim Statutes and Regulations Impose Costs Mandated by the State within the Meaning of Government Code Sections 17514 and 17556

The final issue is whether the state-mandated new programs or higher levels of service impose costs mandated by the state,[188] and whether any statutory exceptions listed in Government Code section 17556 apply to the claim. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

"Any increased costs" for which claimants may seek reimbursement include both direct and indirect costs.[189] Government Code section 17556 sets forth a number of exceptions under which the Commission is prohibited from finding costs mandated by the state as defined by section 17514. Most relevant to the arguments raised in this claim, is Government Code section 17556(e) which states that the Commission shall not find costs mandated by the state when the statute, executive order, or an appropriation in a Budget Act or other bill includes additional revenue that is specifically intended to fund the costs of the state mandate in an amount sufficient to fund the costs of the state mandate.

Government Code section 17564 states that no test claim or reimbursement claim shall be made, nor shall any payment be made, unless claims exceed $1,000. The claimants estimate that the costs to carry out the program exceed $1,000 per year.[190] Thus, the claimants have met the minimum burden of showing costs necessary to file a test claim pursuant to Government Code section 17564.

However, Finance argues that:

> The State School Deferred Maintenance Program and the Community Colleges Facility Deferred Maintenance and Special Repair Program provide State-matching funds, on a dollar-for-dollar basis, to assist school and community college districts with expenditures for major repair or replacement of existing school building components. Therefore, any projects funded through the State School Deferred Maintenance Program or the Community College Facility Deferred Maintenance and Special Repair Program would have received funding to cover the State's share of any necessary costs of the Local Agency Public Construction Act.

Thus, Finance suggests that reimbursement is not required because funding sufficient to cover the costs of the program has been provided to school districts. Financer has provided no legal authority to support this assertion.

---

[188] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

[189] Government Code section 17564.

[190] Exhibit A, test claim filed by claimants, dated June 24, 2003, Exhibit 1 "Declaration of William McGuire" p. 20; and "Declaration of Cheryl Miller" p. 23.

The State School Deferred Maintenance Program (DMP) provides that DMP funds may be used by participating K-12 school districts for the purpose of major repair or replacement of plumbing, heating, air conditioning, electrical, roofing, and floor systems, the exterior and interior painting of school buildings, the inspection, sampling, and analysis of building materials to determine the presence of asbestos-containing materials, the encapsulation or removal of asbestos-containing materials, the inspection, identification, sampling, and analysis of building materials to determine the presence of lead-containing materials, the control, management, and removal of lead-containing materials, and any other items of maintenance approved by the State Allocation Board.[191] The Community Colleges Facilities Deferred Maintenance and Special Repair Program (DMSRP) provides that the funds allocated pursuant to DMSRP may be used by participating community college districts for the purpose of unusual, nonrecurring work to restore a facility to a safe and continually useable condition for which it was intended.[192] Thus, pursuant to the language of DMP and DMSRP the use of program funds are limited to the cost of the actual maintenance and repair work. Finance has not provided any legal authority that would support another interpretation.

The state-mandated new programs or higher levels of service found in this test claim consist of activities associated with the *contracting* for repair and maintenance services and public projects, *not* the actual repair and maintenance services and public projects. Use of DMP and DMSRP funds for this purpose is not permitted under the language of the programs. Thus, staff finds that DMP and DMRP funds cannot be used to offset the costs of the state-mandated new programs or higher levels of service found in this test claim and that Government Code section 17556(e) does not apply here to deny the test claim.

Based on the above discussion, staff finds that the state-mandated new programs or higher levels of service impose costs mandated by the state within the meaning of article XIII B, section 6, and Government Code sections 17514 and 17556.

IV. Conclusion

For the reasons discussed above, the Commission finds that the following activities constitute a reimbursable state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, but only when those activities are triggered by repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593, and 81601, when the repair and maintenance must be let to contract under the following circumstances:

1. For *K-12 school districts*, when repairs and maintenance do not constitute a public project as defined by Public Contract Code section 22002(c), and the repairs and maintenance are not an emergency as set forth in Public Contract Code section 20113; and
    a. for repairs, and maintenance as defined by Public Contract Code section 20115, that exceed $50,000; unless
        1. the district has an average daily attendance of less than 35,000, and the total number of hours on the job does not exceed 350 hours; or

[191] Education Code section 17582(a).

[192] Education Code section 84660.

2. the district has an average daily attendance of 35,000 or greater, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.

2. For *K-12 school districts*, when repairs and maintenance constitute a public project as defined by Public Contract Code section 22002(c), and the project is not an emergency as set forth in Public Contract Code section 20113; and

    a. for repair and maintenance public projects that exceed $15,000; unless

        1. the district has an average daily attendance of less than 35,000, and the total number of hours on the job does not exceed 350 hours; or

        2. the district has an average daily attendance of 35,000 or greater, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.

3. For *community college districts*, when repairs and maintenance do not constitute a public project as defined by Public Contract Code section 22002(c), and the repairs and maintenance are not an emergency as set forth in Public Contract Code section 20654; and

    a. for repairs, and maintenance as defined by Public Contract Code section 20656, that exceed $50,000; unless

        1. the district has full-time equivalent students of fewer than 15,000, and the total number of hours on the job does not exceed 350 hours; or

        2. the district has full-time equivalent students of 15,000 or more, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.

4. For *community college districts*, when repairs and maintenance constitute a public project as defined by Public Contract Code section 22002(c), and the project is not an emergency as set forth in Public Contract Code section 20654; and

    a. for repair and maintenance public projects that exceed $15,000; unless

        1. the district has full-time equivalent students of fewer than 15,000, and the total number of hours on the job does not exceed 350 hours; or

        2. the district has full-time equivalent students of 15,000 or more, and the total number of hours on the job does not exceed 750 hours, or the material cost does not exceed $21,000.

5. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and

    a. for contracts entered into between July 1, 2001 and January 1, 2007, the project cost will exceed $25,000;

    b. for contracts entered into between January 1, 2007 and January 1, 2012, the project cost will exceed $30,000; or

c. for contracts entered into after January 1, 2012, the project cost will exceed $45,000.

Only the following activities for the foregoing projects are reimbursable:

For K-12 School Districts and Community College Districts

1. Specify the classification of the contractor's license which a contractor shall possess at the time a contract for repair or maintenance is awarded in any plans prepared for a repair or maintenance public project and in any notice inviting bids required pursuant to the Public Contract Code. (Pub. Contract Code, § 3300(a) (Stats. 1985, ch. 1073).)

2. Include in any public works contract for repair and maintenance, which involves digging trenches or other excavations that extend deeper than four feet below the surface, a clause that provides the following:

   (a) That the contractor shall promptly, and before the following conditions are disturbed, notify the local public entity, in writing, of any:

   (1) Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.

   (2) Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids.

   (3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

   (b) That the local public entity shall promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work shall issue a change order under the procedures described in the contract.

   (c) That, in the event that a dispute arises between the local public entity and the contractor whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor's cost of, or time required for, performance of any part of the work, the contractor shall not be excused from any scheduled completion date provided for by the contract, but shall proceed with all work to be performed under the contract. The contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties.

   (Pub. Contract Code, § 7104 (Stats. 1989, ch. 330).)

3. Set forth in the plans or specifications for any public work for repair and maintenance which may give rise to a claim of $375,000 or less which arise between a contractor and a K-12 school district or community college district, excluding those districts that elect to

resolve claims pursuant to Article 7.1 (commencing with section 10240) of Chapter 1 of Part 2 of the Public Contract Code. (Pub. Contract Code, § 20104(c) (Stats. 1994, ch. 726).)

"Claim" is defined by Public Contract Code section 20104(b)(2) (Stats. 1994, chapter 726).

4. For claims of less than $50,000 resulting from a public works contract for repair or maintenance, respond in writing to any written claim within 45 days of receipt of the claim. (Pub. Contract Code, § 20104.2(b)(1) (Stats. 1994, ch. 726).)

   "Claim" is defined by Public Contract Code section 20104(b)(2) (Stats. 1994, chapter 726).

5. For claims of more than $50,000 and less than or equal to $375,000 resulting from a public works contract for repair or maintenance, respond in writing to any written claim within 60 days of receipt of the claim. (Pub. Contract Code, § 20104.2(c)(1) (Stats. 1994, ch. 726).)

   "Claim" is defined by Public Contract Code section 20104(b)(2) (Stats. 1994, chapter 726).

6. Upon demand by a contractor disputing a K-12 school district's or community college district's response to a claim, schedule a meet and confer conference within 30 days for settlement of the dispute. (Pub. Contract Code, § 20104.2(d) (Stats. 1994, ch. 726).)

   "Claim" is defined by Public Contract Code section 20104(b)(2) (Stats. 1994, chapter 726).

7. Review each payment request from a contractor for repair and maintenance as soon as practicable after the receipt of the request to determine if the payment request is a proper payment request. "As soon as practicable" is limited by the seven day period in the activity mandated by Public Contract Code section 20104.50(c)(2). (Pub. Contract Code, § 20104.50(c)(1) (Stats. 1992, ch. 799).)

8. Return to the contractor for repair and maintenance any payment request determined not to be a proper payment request suitable for payment as soon as practicable, but no later than seven days after receipt of the request.

   A returned request shall be accompanied by a document setting forth in writing the reasons why the payment request is not proper. (Pub. Contract Code, § 20104.50(c)(2) (Stats. 1992, ch. 799).)

9. Require Article 1.7, Chapter 1, Part 3, Division 2 of the Public Contract Code (Pub. Contract Code, § 20104.50) or a summary thereof, to be set forth in the terms of any repair and maintenance contract. (Pub. Contract Code, § 20104.50(f) (Stats. 1992, ch. 799).)

10. In any invitation for bid and in any repair and maintenance contract documents, include provisions to permit the substitution of securities for any moneys withheld by a public agency to ensure performance under a contract. This excludes invitations for bid and contract documents for projects where there will be financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the

Consolidated Farm and Rural Development Act (7 U.S.C. Sec. 1921 et seq.), and where federal regulations or policies, or both, do not allow the substitution of securities. (Pub. Contract Code, § 22300(a) (Stats. 1988, ch. 1408).)

11. Before awarding repair and maintenance contract to a contractor for a project that *is not* governed by Public Contract Code section 20103.5 (which addresses projects that involve federal funds), verify with the Contractors' State Licensing Board that the contractor was properly licensed when the contractor submitted the bid. (Bus. & Prof. Code, § 7028.15(e) (Stats. 1990, ch. 321).)

12. Before making the first payment for work or material to a contractor under any repair and maintenance contract for a project where federal funds are involved, verify with the Contractors' State Licensing Board that the contract was properly licensed at the time that the contract was awarded to the contractor. (Pub. Contract Code, § 20103.5 (Stats. 1990, ch. 1414).)

For Community College Districts Only

1. Undertake appropriate efforts to provide participation opportunities for minority, women, and disabled veteran business enterprises in district contracts for repair and maintenance. Appropriate efforts may include: (1) vendor and service contractor orientation programs related to participating in district contracts or in understanding and complying with the provisions of California Code of Regulations, title 5, section 59500 et seq.; (2) developing a listing of minority, women, and disabled veteran business enterprises potentially available as contractors or suppliers; or (3) such other activities that may assist interested parties in being considered for participation in district contracts.

   Appropriate activity does not include the application of the systemwide goals established in California Code of Regulations, title 5, section 59500 to district contracts. (Cal. Code Regs., tit. 5, § 59504 (Register 94, No. 6).)

2. Assess the status of each of its contractors regarding whether a contractor is a certified or self-certified minority, women, and disabled veteran business enterprise subcontractor and/or supplier. (Cal. Code Regs., tit. 5, §§ 59505(d) and 59509 (Register 94, No. 6), beginning July 1, 2001 through April 13, 2006.)

3. Establish a process to collect and retain certification information by a business enterprise claiming minority, women, and disabled veteran business enterprise status. (Cal. Code Regs., tit. 5, §§ 59506(a) and 59509 (Register 94, No. 6), beginning July 1, 2001 through April 13, 2006.)

4. Each October 15, report to the Chancellor the level of participation by minority, women, and disabled veteran business enterprises in community college district contracts for repair and maintenance for the previously completed fiscal year. (Cal. Code Regs., tit. 5, § 59509 (Register 94, No. 6), beginning July 1, 2001 through March 31, 2005.)

Any other test claim statutes and allegations not specifically approved above, do not impose a reimbursable state mandated program subject to article XIII B, section 6 of the California Constitution.

V. Staff Recommendation

Staff recommends that the Commission adopt this analysis to partially approve this test claim.

DEPARTMENT OF FINANCE

EDMUND G. BROWN JR. ▪ GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

May 1, 2012

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Halsey:

Commission on State Mandates Draft Staff Analysis—Public Contracts (02-TC-35)

We reviewed the Commission on State Mandates (Commission) April 3, 2012 draft staff analysis of the *Public Contracts* test claim (02-TC-35) and agree that Public Contract Code (PCC) sections 20111, 20111.5, 20116, 20651, 20651.5, 20657, 20659, 6610, 7107, 7109, 9203, 10299, 12109, and 20107 do not constitute a reimbursable state mandate. However, we disagree with the staff analysis that the following activities are a reimbursable state mandate for required repair and maintenance contracts:

- Specifying the classification of the contractor's license that a contractor must possess at the time a contract is awarded in the plans and bid notices (PCC section 3300).
- Including a differing site conditions clause in public works contracts (PCC section 7104).
- Activities associated with the resolution process of construction claims and the prompt payment of progress payments (PCC sections 20104, 20104.2, and 20104.50).
- Permitting the substitution of securities for any money retained by districts in any invitation for bid and in any contract documents (PCC section 22300).
- Verifying that a contractor is properly licensed (Business and Professions Code section 7028.15).
- Providing participation in community college contracts and to report to minority business enterprises, women business enterprises, and disabled veteran business enterprises (California Code of Regulations, title 5, sections 59500, 59504, 59505, 59506, and 59509).

We disagree that these activities constitute a reimbursable state mandate because: (1) projects for new construction proposed by school districts and community college districts are discretionary; and (2) costs incurred complying with general provisions of the Local Agency Public Construction Act are offset with funding available from various existing state grants and programs.

1) Projects for new construction proposed by school districts and community college districts are discretionary.

Current law provides school districts with flexibility, discretion, and choice over the manner in which districts elect to house their student populations. For example, school districts have the discretion to operate year round multi-track schools or two kindergarten sessions per day, use

Received
May 1, 2012
Commission on
State Mandates

portable classrooms, or transport students to under-used schools. Community colleges can offer night/weekend classes or lease offsite facilities. It is the district's voluntary decision to construct a facility rather than using an aforementioned alternative. It is this voluntary decision that compels districts to carry out activities required under the Local Agency Public Construction Act. Therefore, any costs of complying with the Local Agency Public Construction Act are voluntary and not reimbursable. We note that this rationale is consistent with the statement of decision provided by the Commission on March 24, 2011 regarding the *School Facilities Funding Requirements* test claim (02-TC-30) which states:

> 6. The statutes below, which generally require compliance school facility funding requirements, do not mandate school districts to perform any activities because:
> a) School districts are not legally compelled to do any of the following activities which would trigger the requirement to comply with the school facilities funding requirements contained in the test claim statutes and regulations: acquire new school sites, build new schools, undertake modernization projects, add portable classrooms, participate in other state programs to further such projects, request and accept SFP funding, or issue local bonds.
> b) There is no evidence in the record to support a finding that school districts are practically compelled to: acquire new school sites, build new schools, undertake modernization projects, add portable classrooms, request and accept SFP funding, issue local bonds, or opt to participate in other state programs to further such projects, which would trigger the requirement to comply with SFFRs contained in the test claim statutes and regulations.

2) The costs incurred complying with the Local Agency Public Construction Act are offset with funding available from various existing state grants and programs.

The Department of Finance (Finance) disagrees with the draft staff analysis that the use of funds under the various school facilities programs in the state are limited to only the cost of actual maintenance and repairs (excluding contracting). It appears the draft staff analysis attempts to cite the absence of a program that provides funding solely for contracting for repairs and maintenance to support partial approval of this claim. Finance disagrees with this rationale as costs for contracting for repairs and maintenance are eligible expenditures of state funds in both the School Facilities Program and the Deferred Maintenance Program as long as the costs can be attributed to a specific project. Education Code Section 17070.98 specifically allows districts that do not have staff with construction management experience to use state funding for construction management services. Finance also notes that there are various programs currently available for district participation that do not expressly prohibit use of funds for contracting, thus, these programs should be viewed as providing offsetting revenues for the activities included in this claim. To this point, the modernization, new construction, State School Deferred Maintenance and Community College Facility Deferred Maintenance and Special Repair, and Emergency Repair programs provided $770 million, $653 million, $250.9 million, and $51 million respectively in 2010-11 to help districts pay for the costs of school construction, including contracting for repair and maintenance services. Additionally, districts are required to maintain a Routine Restricted Maintenance account to assist in funding these activities. In the event that a district needs further financial assistance to perform these activities, they have the discretion to levy fees against any construction within district boundaries for the purpose of funding school construction.

- The State Allocation Board provides modernization and new construction grants through the State School Facilities Program to cover the State's share of all necessary project costs, which would include costs incurred complying with the Local Agency Public Construction Act. The State's share is typically 50 percent for new construction and 60

Received
May 1, 2012
Commission on
State Mandates

percent for modernization, but may be up to 100 percent if a district receives financial hardship funding. The State budget act also appropriates capital outlay funds for community college districts to construct and modernize facilities. These funds can cover up to 100 percent of the projects costs and require no matching funds. Therefore, funding received from the State would offset any necessary costs of the Local Agency Public Construction Act for modernization and new construction projects.

- The State School Deferred Maintenance Program and the Community Colleges Facility Deferred Maintenance and Special Repair Program provide State-matching funds, on a dollar-for-dollar basis, to assist school and community college districts with expenditures for major repair or replacement of existing school building components. Therefore, any projects funded through the State School Deferred Maintenance Program or the Community Colleges Facility Deferred Maintenance and Special Repair Program would have received funding to cover the State's share of any necessary costs of the Local Agency Public Construction Act.

- Some districts utilize the Emergency Repair Program grant funding in order to perform school site maintenance. This grant program is for emergency repair or replacement projects that pose a health and safety threat to pupils and staff. Generally, something is eligible to be funded from this program if a component is broken or not functioning properly or if a system or component creates a health and safety hazard. Although not every district will receive grant funding through this program, many districts will be able to fund repairs or replacement of existing items in order to restore them to a safely functioning state.

- Districts are required to maintain a Routine Restricted Maintenance Fund that dedicates one percent of their general fund budget to this purpose. In addition, they can receive state funds for deferred maintenance projects as long as they provide matching local funds.

- At the discretion of a school district, fees can be levied against any construction within its district boundaries for the purpose of funding school construction. Section 17556(d) of the Government Code provides that the Commission on State Mandates shall not find a reimbursable mandate in a statute or executive order if the affected local agencies have authority to levy service charges, fees, or assessments sufficient to pay for the mandated program in the statute or executive order.

If you have any questions regarding this letter, please contact Chris Ferguson, Principal Program Budget Analyst at (916) 445-0328.

Sincerely,

Nick Schweizer
Program Budget Manager

5 Cal.App.4th 1513, 7 Cal.Rptr.2d 699, 74 Ed. Law Rep. 165
(Cite as: 5 Cal.App.4th 1513)

FN*CALIFORNIA TEACHERS ASSOCIATION et al., Plaintiffs and Respondents,
v.
THOMAS W. HAYES, as Director of the Department of Finance, etc., Defendant and Respondent, BILL HONIG, as Superintendent of Public Instruction, etc., Defendant and Appellant; CALIFORNIA CHILDREN'S LOBBY et al., Real Parties in Interest and Appellants.

No. C009444.

Court of Appeal, Third District, California.
Apr 30, 1992.

FN* Reporter's Note: This case was previously entitled "California Teachers Association v. Huff."

SUMMARY

A teacher's association and three of its officers filed a petition for a writ of mandate against the Superintendent of Public Instruction and other state officials to prohibit the inclusion of funding for the Child Care and Development Services Act (Ed. Code, § 8200 et seq.) within the education funding guarantee of Prop. 98 (Classroom Instructional Improvement and Accountability Act). The trial court concluded that Prop. 98 was not intrinsically ambiguous, and that its plain meaning required that only appropriations allocated to, and administered by, school districts satisfied its minimum funding requirement. Accordingly, the trial court issued a writ of mandate prohibiting defendants from including any funds allocated to or administered by any entity or agency, other than a school district as defined in Ed. Code, § 41302.5, within the Prop. 98 education funding guaranties. The trial court also declared that Ed. Code, §§ 8203.5, subd. (c), 41202, subd. (f), which include funding for the Child Care and Development Services Act within the Prop. 98 guaranties, were unconstitutional. (Superior Court of Sacramento County, No. 363630, Michael T. Garcia, Judge.)

The Court of Appeal reversed. The court held that education and operation of the public schools are matters of statewide rather than local or municipal concern. Likewise, the court held that school moneys belong to the state, and the apportionment of funds to a school district does not give that district a proprietary right therein. Although the inclusion of funding for the act deprived school districts of absolute control over the funds the state is required to devote to education under Prop. 98, the court held that the measure did not expressly restrict the Legislature's plenary authority for education in the state, nor did it grant to school districts exclusive control over education funds. Accordingly, it held that the Legislature's inclusion of funding for the Child Care and Development Services Act within the Prop. 98 education funding guaranty was not facially unconstitutional. (Opinion by Sparks, Acting P. J., with Marler and Nicholson, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Universities and Colleges § 2--Organization and Affiliation--University of California.

The University of California is a public trust that finds its roots in the Constitution of 1849. The University of California has full powers of organization and government, subject only to limited legislative control. As such, it is not part of the public school system, and is subject to entirely different legal standards.

(2) Schools § 4--School Districts--Control and Operation--State Interest.

Although it is the legislative policy to strengthen and encourage local responsibility for control of public education through local school districts (Ed. Code, § 14000), education and operation of the public schools remain matters of statewide rather than local or municipal concern. Thus, local school districts are deemed agencies of the state for the administration of the school system, they are not a distinct and independent body politic, and they are not free and independent of legislative control.

(3) Schools § 4--School Districts--Control and Operation--Legislature's Powers.

The Legislature's power over the public school system has been variously described as exclusive, plenary, absolute, entire, and comprehensive, subject

only to constitutional constraints. Consequently, regulation of the education system by the Legislature is controlling over any inconsistent local attempts at regulation or administration of the schools. No one may obtain rights vested against state control by virtue of local provisions, ordinances or regulations. The Legislature has the power to create, abolish, divide, merge, or alter the boundaries of school districts. Indeed, the state is the beneficial owner of school property and local districts hold title as trustee for the state. School moneys belong to the state, and the apportionment of funds to a school district does not give that district a proprietary right therein. Thus, the Legislature can transfer property and apportion debts between school districts as it sees fit.

(4) Schools § 11--School Funds--Determination of Educational Purpose-- Legislative Discretion.

In including the Child Care and Development Services Act (Ed. Code, § 8200 et seq.) within the funding guarantee of Prop. 98 (Classroom Instructional Improvement and Accountability Act), the Legislature was not arbitrary and unreasonable in its determination that the act advanced the purposes of public education. Although the Legislature is given broad authority over education, it cannot divert education funds for other purposes. However, education is a broad and comprehensive matter, and the state Constitution places a broad meaning upon education. Moreover, the Legislature is given broad discretion in determining the types of programs and services which further the purposes of education.

(5) Constitutional Law § 23--Constitutionality of Legislation--Raising Question of Constitutionality--Burden of Proof--Facial Challenge to Statute.

When a challenge is made to the facial validity of a statute, a reviewing court's task is to determine whether the statute can constitutionally be applied. To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.
[See 7 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 58.]
(6) Constitutional Law § 27--Constitutionality of Legislation--Rules of Interpretation--Purpose, Wisdom, and Motives of Legislature.

The authority to make policy is vested in the Legislature, and neither arguments as to the wisdom of an enactment, nor questions as to the motivation of the Legislature, can serve to invalidate particular legislation. Where a petitioner makes a facial challenge to an enactment, a reviewing court's role is limited to determining whether the Legislature's choice is constitutionally prohibited.

(7a, 7b) Schools § 11--School Funds--Proposition 98 Funding Guarantee-- Legislative Control.

The Legislature's inclusion of funding for the Child Care and Development Services Act (Ed. Code, § 8200 et seq.) within the Prop. 98 (Classroom Instructional Improvement and Accountability Act) education funding guarantee was not facially unconstitutional. Although the inclusion of funding for the act deprived school districts of absolute control over the funds the state is required to devote to education under Prop. 98, the measure did not expressly restrict the Legislature's plenary authority for education in the state, nor did it grant to school districts exclusive control over education funds. The Constitution makes education and the operation of the public schools a matter of statewide rather than local or municipal concern. School districts do not have a proprietary interest in moneys which are apportioned to them. Accordingly, even though child care and development programs are not included within the definition of school districts, legislative programs which advance the educational mission of school districts and community college districts may constitutionally be included within the funding guaranty of Prop. 98.

(8) Constitutional Law § 39--Distribution of Governmental Powers--Between Branches of Government--Legislative Power.

Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. Accordingly, the entire lawmaking authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution. In addition, all intendments favor the exercise of the Legislature's plenary authority. If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and

limitations imposed by the Constitution are to be construed strictly, and are not to be extended to include matters not covered by the language used.

(9) Constitutional Law § 10--Construction of Constitutions--Initiative Amendments--Conformation of Parts.

In an action challenging the propriety of including the Child Care and Development Services Act (Ed. Code, § 8200 et seq.) within the funding guarantee of Prop. 98 (Classroom Instructional Improvement and Accountability Act), construction of the constitutional provisions added by Prop. 98 had to be considered in light of all other relevant provisions of the Constitution. These provisions include those that contain, define, and limit the status of school districts and their relationship to the state. An initiative amendment to the Constitution must be interpreted in harmony with the other provisions of the organic law of this state of which it has become a part. To construe it otherwise would be to break down and destroy the barriers and limitations that the Constitution, read as a whole, has cast about legislation, both state and local.
[See **Cal.Jur.3d (Rev),** Constitutional Law, § 28.]
COUNSEL

Joseph R. Symkowick, Roger D. Wolfertz and Allan H. Keown for Defendant and Appellant.

James R. Wheaton, Gray, Cary, Ames & Frye and Paul J. Dostart as Amici Curiae on behalf of Defendant and Appellant.

Robert C. Fellmeth, Carl K. Oshiro and Terry A. Coble for Real Parties in Interest and Appellants.

Barbara C. Carlson, Abby J. Cohen and Carol S. Stevensen as Amici Curiae on behalf of Real Parties in Interest and Appellants.

Remcho, Johansen & Purcell, Joseph Remcho, Barbara A. Brenner and Julie M. Randolph for Plaintiffs and Respondents.

Kronick, Moskovitz, Tiedemann & Girard and Rochelle B. Schermer as Amici Curiae on behalf of Plaintiffs and Respondents.

Daniel E. Lungren, Attorney General, N. Eugene Hill, Assistant Attorney General, Cathy Christian and Marsha A. Bedwell, Deputy Attorneys General, for Defendant and Respondent.

SPARKS, Acting P. J.

At the November 1988 General Election, the electorate adopted Proposition 98, an initiative measure entitled "The Classroom Instructional Improvement and Accountability Act" [FN1] In general, Proposition 98 seeks to improve public education in California by establishing a minimum funding guarantee for public schools and by changing the way our state government treats its excess revenues. As the Legislative Analyst noted in her analysis of the initiative, Proposition 98 establishes a minimum level of funding for public schools and community colleges; requires the state to spend any excess revenues, up to a specified maximum, for public schools and community colleges; requires the Legislature to establish a state reserve fund; and requires the school districts to prepare and distribute "School ***1518** Accountability Report Cards" each year. (Ballot Pamp. analysis of Prop. 98 by Legislative Analyst as presented to the voters, Gen. Elec. (Nov. 8, 1988), p. 78, some capitalization and all paragraphing omitted.)

> FN1 Proposition 98 (Stats. 1988, p. A-264 et seq.) added two sections to the California Constitution, amended two other constitutional provisions and added six sections to the Education Code. It added section 5.5 to article XIII B of the California Constitution, amended section 2 of article XIII B, amended section 8 of article XVI, added section 8.5 to article XVI, and added sections 33126, 35256, 41300.1, 14020.1, 14022 and 41302.5 to the Education Code.
>
> The full text of Proposition 98 is set out in the appendix to this opinion.

To these ends, Proposition 98 sets a minimum funding level for "the monies to be applied by the state for the support of school districts and community college districts. ..." (Cal. Const., art. XVI, § 8, subd. (b).) It is around this phrase that the present controversy swirls. At issue in this case is the validity of the Legislature's decision to include funding for the Child Care and Development Services Act (Ed. Code, § 8200 et seq.) within the educational funding guarantees of Proposition 98. This decision was implemented by the enactment of Education Code section 41202,

subdivision (f), which declares that " 'monies to be applied by the state for the support of school districts and community college districts,' as used in Section 8 of Article XVI of the California Constitution, shall include funds appropriated for the Child Care and Development Services Act ...."

The California Teachers Association and three of its officers filed a petition for writ of mandate against the Director of Finance, the state Treasurer and the state Superintendent of Public Instruction to prohibit the inclusion of funding for the Child Care and Development Services Act within the Proposition 98 education funding guarantee. By stipulation, the California Children's Lobby, the Professional Association of Childhood Educators, the California Assocation for the Education of Young Children, and the Child Development Administrators Assocation, intervened in the action as real parties in interest. The trial court issued a writ of mandate prohibiting defendants from including any funds allocated to or administered by any entity or agency other than a school district as defined in Education Code section 41302.5, within the Proposition 98 educational funding guarantees, and declaring that Education Code sections 8203.5, subdivision (c), and 41202, subdivision (f), which include funding for the Child Care and Development Services Act within the Proposition 98 guarantees, are unconstitutional. Bill Honig, the State Superintendent of Public Instruction, and the real parties in interest appeal. We shall reverse.

I Procedural Background

Proposition 98 provides for the improvement of public education in two basic ways. The first, which is not implicated in this appeal, involves the allocation of state revenues in excess of the state appropriations limitation to elementary, high school and community college districts on a per-enrollment ***1519** basis for use solely for the purposes of instructional improvement and accountability. (Cal. Const., art. XIII B, § 2; art. XVI, § 8.5.) The second way, and the one involved here, establishes a minimum guaranteed state education funding level for "the moneys to be applied by the State for the support of school districts and community college districts ...." (Cal. Const., art. XVI, § 8, subd. (b).) [FN2]

FN2 Under Proposition 98 the minimum funding level is set as the greater of (1) the same percentage of general fund revenues as was set aside for school districts and community colleges in the 1986-1987 school year, or (2) the amount necessary to ensure that total state and local allocations be equal to the prior year's allocations, adjusted for cost of living and enrollment changes. (Cal. Const., art. XVI, § 8, subd. (b).) A third test was added at the June 1990 Primary Election by the passage of Proposition III. That measure is not involved here.

After its passage, the Legislature acted to implement Proposition 98. (Ed. Code, § 41200 et seq. [unless otherwise specified, all further statutory references will be to the Education Code].) One aspect of the Legislature's implementation is at issue in this appeal. As we have noted, in section 41202, subdivision (f), the Legislature provided, among other things: " 'State General Fund revenues appropriated for school districts and community college districts, respectively' and 'monies to be applied by the state for the support of school districts and community college districts,' as used in Section 8 of Article XVI of the California Constitution, shall include funds appropriated for the Child Care and Development Services Act pursuant to Chapter 2 (commencing with Section 8200) of Part 6 ...."

In order to ensure that the Child Care and Development Services Act serves the purposes of public education, the Legislature enacted section 8203.5, which provides: "(a) The Superintendent of Public Instruction shall ensure that each contract entered into under this chapter to provide child care and development services, or to facilitate the provision of those services, provides support to the public school system of this state through the delivery of appropriate educational services to the children served pursuant to the contract. [¶] (b) The Superintendent of Public Instruction shall ensure that all contracts for child care and development programs include a requirement that each public or private provider maintain a developmental profile to appropriately identify the emotional, social, physical, and cognitive growth of each child served in order to promote the child's success in the public schools. To the extent possible, the State Department of Education shall provide a developmental profile to all public and private providers using existing profile instruments that are most cost efficient. The provider of any program operated pursuant to a contract under Section 8262 shall be responsible for

maintaining developmental profiles upon entry through exit from a child developmental program. [¶] Notwithstanding any other provision of law, 'moneys to be applied by the [s]tate,' as used in subdivision (b) of ***1520** Section 8 of Article XVI of the California Constitution, includes funds appropriated for the Child Care and Development Services Act pursuant to Chapter 2 (commencing with Section 8200) of Part 6, whether or not those funds are allocated to school districts, as defined in Section 41302.5, or community college districts. [¶] (d) This section is not subject to Part 34 (commencing with Section 62000)." [FN3] ***1521**

FN3 In an uncodified provision the Legislature explained its purpose for including child care and development funds in the Proposition 98 funding guarantee: "The Legislature finds and declares as follows: [¶] (a) Since 1932, early childhood education and child development programs have been operated as part of the school programs that are conducted under the authority of the Superintendent of Public Instruction. In the 1988-89 fiscal year, 110,000 children in California were served in the state program of early childhood education and child development administered by the Superintendent of Public Instruction, as set forth in Chapter 2 (commencing with section 8200) of Part 6 of the Education Code. [¶] (b) Participation and enrollment in an early childhood education or child development program provides an opportunity for many children to hear their first English words (one in three speaks another language), to be introduced to the idea of numbers, to develop basic language concepts, to learn how to get along with other children and adults, and to begin to develop a positive self-image. [¶] (c) The Legislature has stated its intent that early childhood education and child development programs be a 'concomitant part of the educational system' by providing young children an equal opportunity for later school success. Those programs are considered by the general public to be an integral and essential part of the state's public education system. [¶] (d) Early childhood education programs for chldren of low-income families have been shown to increase high school graduation rates and college entry rates, to reduce the need for special education and grade level retention, and to reduce high school dropout rates. [¶] (e) In the state's early childhood education and development programs, each child is to receive an education program which is appropriate to his or her developmental, cultural, and linguistic needs. Each child is to receive a developmental profile, updated at regular intervals, which will be passed on to his or her elementary school. [¶] (f) In view of the unique function of early childhood education and child development programs, in supporting school districts by directly preparing children for participation in the public schools and by assisting those children in resolving special school-related problems, these programs constitute an essential and integral component of the overall system to carry out the mission of the public schools. Accordingly, in order to fully implement subdivision (b) of Section 8 of Article XVI of the California Constitution, which requires, in its introductory paragraph, a minimum level of funding 'for the support of' school districts, as defined, and community college districts, it is necessary to include, within the calculation of that funding, the funding provided by the Legislature for all early childhood education and development programs. Moreover, in accordance with the educational role of those programs, it is the responsibility of the Superintendent of Public Instruction to continue to ensure that all contracts for early childhood education and child develpment programs provide support to the public school system of this state through the delivery of appropriate educational services to the children served by the program. In addition, Section 8262.1 of the Education Code, as added by this act [in fact there is no section 8262.1], constitutes a necessary statutory implementation of that determination, which is consistent with the legislative history of the statutes that provide for the operation of early childhood education and child development programs. [¶] (g) For the period from the 1986-87 fiscal year to the present, the state's early childhood education and development programs have received funding adjustments for cost-of-living and enrollment increases that have been lower, overall, than the comparable adjustments for base revenue limits for school dis-

> tricts. [¶] However, it is the intent of the Legislature that the inclusion of early childhood education and child development programs within the calculation of the state's education funding obligation pursuant to Proposition 98 is not to result in requiring in that calculation the use of the lower level of funding received by these programs in the 1986- 87 fiscal year." (Stats. 1989, ch. 1394, § 1.)

The Child Care and Development Services Act is contained in sections 8200 through 8498. It is a comprehensive statewide master plan for child care and development services for children to age 14 and their parents. (§ 8201, subd. (a).) Among other things it includes such items as resource and referral programs (§§ 8210-8215), campus child care and development programs (§ 8225), migrant child care and development programs (§§ 8230-8233), preschool programs (§ 8235), general child care and development programs (§§ 8240-8242), and programs for children with special needs (§§ 8250-8252). Services under this statutory scheme may be provided directly by school districts or local education agencies or by contracts through such agencies, or services may be provided by private parties contracting with the state Department of Education. (See rep., Child Development, Program Facts, prepared by the Dept. of Ed., Child Development Div., Field Services Branch (1989) pp. 12-13.) Programs under the Child Care and Development Services Act are under the general supervision of the Superintendent of Public Instruction. (§ 8203.) In some instances federal funding is available and the Legislature has declared that federal reimbursement shall be claimed where available and that the Department of Education is designated as "the single state agency" responsible for the programs under federal requirements. (§§ 8205-8207.)

Plaintiffs filed this action to prohibit the inclusion of funding for the Child Care and Development Services Act within the Proposition 98 education funding guarantee. [FN4] They maintain that funds which are not allocated directly to and administered by school districts cannot be included within the provisions of Proposition 98. [FN5] The trial court agreed with plaintiffs. It concluded that Proposition 98 is not intrinsically ambiguous and that its ***1522** plain meaning requires that only appropriations allocated to, and administered by, school districts satisfy its minimum funding requirement. As the trial court saw it, "[t]he phrase 'monies to be applied by the state for the support of school districts,' taken as a whole, clearly refers to financial allocations for the financial support of school districts, and not the financial support of private child care and development programs which incidentallly benefit school districts." Judgment was entered accordingly and this appeal followed.

> FN4 Plaintiffs also contested the inclusion of funding for certain other types of programs within the Proposition 98 guarantee. In his answer defendant Bill Honig, as Superintendent of Public Instruction, conceded that plaintiffs are correct with respect to these other programs and no other party contests this concession. This appeal concerns only funding for the Child Care and Development Services Act.

> FN5 The Director of the Department of Finance, filed an answer in which he agreed with plaintiffs and he is a respondent in this appeal. The former state Treasurer successfully demurred on the ground that his function in this regard is purely ministerial and the Treasurer is not a party on appeal. Defendant Honig contested the petition with respect to child care and development programs and he is an appellant herein. As we have noted, the parties stipulated that the Children's Lobby et alia be permitted to intervene as real parties in interest and they are also appellants in this appeal. Amici curiae briefs in support of appellants have been filed by the state Legislature, the California Congress of Parents, Teachers and Students, Inc., and certain child advocacy and care provider organizations.

II Historical Background

There can be no doubt that education has historically been accorded an ascendant position in this state. Indeed, at the very start, article IX of our 1849 Constitution created the office of Superintendent of Public Instruction; required the Legislature to encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement; required the Legislature to establish a system of common schools; and established a fund for the support of the common schools. (See Stats. 1849, p. 32.)

As this recitation will demonstrate, the preeminent position of education in California has been a constant in a world of governmental flux. Section 1 of article IX of the Constitution now provides, as it has since 1879: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." Section 5 of article IX presently mandates, as it has since 1879: "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established." Since 1933, our 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. (Cal. Const., art. XVI, § 8, subd. (a); see former art. XIII, § 15, Stats. 1935, p. IXIX.)

Section 6 of article IX of our Constitution establishes a State School Fund. That section provides, in relevant part: "The Legislature shall add to the State School Fund such other means from the revenues of the State as shall provide in said fund for apportionment in each fiscal year, an amount not less than one hundred eighty dollars ($180) per pupil in average daily attendance in the kindergarten schools, elementary schools, secondary schools, and technical schools in the Public School System during the next ***1523** preceding fiscal year. [¶] The entire State School Fund shall be apportioned in each fiscal year in such manner as the Legislature may provide, through the school districts and other agencies maintaining such schools, for the support of, and aid to, kindergarten schools, elementary schools, secondary schools, and technical schools except that there shall be apportioned to each school district in each fiscal year not less than one hundred twenty dollars ($120) per pupil in average daily attendance in the district during the next preceding fiscal year and except that the amount apportioned to each school district in each fiscal year shall be not less than twenty-four hundred dollars ($2,400)."

Article IX, section 6, of the Constitution also provides in part: "The Public School System shall include all kindergarten schools, elementary schools, secondary schools, technical schools, and State colleges, established in accordance with law and, in addition, the school districts and other agencies authorized to maintain them. (1)**(See fn. 6.)** No school or college or any other part of the Public School System shall be, directly or indirectly, transferred from the Public School System or placed under the jurisdiction of any authority other than one included within the Public School System." [FN6]

> FN6 The University of California is a public trust which finds its roots in the Constitution of 1849. (See Stats. 1849, p. 32; and see Cal. Const., art. IX, § 9.) The University of California has "full powers of organization and government" subject only to limited legislative control. (*Ibid.*) As such, it is not part of the Public School System and is subject to entirely different legal standards. The University of California is beyond the scope of the issues presented in this appeal.

For the administration of this public school system, the Constitution creates the office of Superintendent of Public Education and establishes a State Board of Education. (Cal. Const., art. IX, §§ 2, 2.1.) It provides for county boards of education and superintendents of schools. (Cal. Const., art. IX, §§ 3-3.3.) It permits city charters to provide for the election or appointment of boards of education. (Cal. Const., art. IX, § 16.) Section 14 of article IX provides: "The Legislature shall have power, by general law, to provide for the incorporation and organization of school districts, high school districts, and community college districts, of every kind and class, and may classify such districts. [¶] The Legislature may authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established."

(2) It has been and continues to be the legislative policy of this state to strengthen and encourage local responsibility for control of public education ***1524** through local school districts. (§ 14000.) [FN7] Nevertheless, education and the operation of the public schools remain matters of statewide rather than local or municipal concern. (*Hall v. City of Taft* (1956) 47 Cal.2d 177, 179 [302 P.2d 574]; *Esberg v. Badaracco* (1927) 202 Cal. 110, 115- 116 [259 P. 730]; *Kennedy v. Miller* (1893) 97 Cal. 429, 431 [32 P. 558];

Whisman v. San Francisco Unified Sch. Dist. (1978) 86 Cal.App.3d 782, 789 [150 Cal.Rptr. 548].) Hence, local school districts are deemed to be agencies of the state for the administration of the school system and have been described as quasi-municipal corporations. (*Hall v. City of Taft*, *supra*, 47 Cal.2d at p. 181; *Pass School Dist. v. Hollywood Dist.* (1909) 156 Cal. 416, 418 [105 P. 122]; *Hughes v. Ewing* (1892) 93 Cal. 414, 417; *Town of Atherton v. Superior Court* (1958) 159 Cal.App.2d 417, 421 [324 P.2d 328].) Thus, a school district is not a distinct and independent body politic and is not free and independent of legislative control. (*Allen v. Board of Trustees* (1910) 157 Cal. 720, 725-726 [109 P. 486].)

FN7 Although state funding for education is designed to enhance local responsibility for education, the Legislature has found it undesirable to yield total monetary authority to school districts. In the Statutes of 1981, chapter 100, section 1, at page 653, it is said: "The Legislature finds and declares that as a matter of policy the setting aside of categorical support for school districts is necessary to ensure the adequate funding for programs such as the provision of textbooks, pupil transportation, teacher retirement, special education for individuals with exceptional needs, and for educationally disadvantaged youths. The Legislature supports this policy of appropriating separately funds for special purposes because it provides funds for the intended purposes of the programs and because the substantial variation from district to district in terms of financial need for the programs cannot be accommodated adequately in general school support formulas. Although this act does not appropriate funds for inflation for categorical programs, it is the intent of the Legislature that, because categorical programs provide essential educational services, these programs should receive general inflation funds as provided in the Budget Act for other state programs." Our Supreme Court has determined that under our Constitution education is uniquely important and cannot be left totally under local monetary control. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 614 [96 Cal.Rptr. 601, 487 P.2d 1241].)

(3) The Legislature's power over the public school system has been variously described as exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints. (*Hall v. City of Taft*, *supra*, 47 Cal.2d at p. 181; *Pass School Dist. v. Hollywood Dist.*, *supra*, 156 Cal. at p. 419; *San Carlos Sch. Dist. v. State Bd. of Education* (1968) 258 Cal.App.2d 317, 324 [65 Cal.Rptr. 711]; *Town of Atherton v. Superior Court*, *supra*, 159 Cal.App.2d 417, 421.) Indeed, it is said that the Legislature cannot delegate ultimate responsibility over education to other public or private entities. (*Hall v. City of Taft*, *supra*, 47 Cal.2d at p. 181; *Piper v. Big Pine School* Dist. (1924) 193 Cal. 664, 669 [226 P. 926].) Consequently, regulation of the education system by the Legislature will be held to be controlling over any inconsistent local attempts at regulation or administration of the schools. (*Hall v. City of Taft*, *supra*, 47 Cal.2d at p. 181; ***1525***Esberg v. Badaracco*, *supra*, 202 Cal. at pp. 115- 116; *Whisman v. San Francisco Unified Sch. Dist.*, *supra*, 86 Cal.App.3d at p. 789.) And no one may obtain rights vested against state control by virtue of local provisions, ordinances or regulations. (*Whisman v. San Francisco Unified Sch. Dist.*, *supra*, 86 Cal.App.3d at p. 789.)

The Legislature, in the exercise of its sweeping authority over education and the school system, has the power to create, abolish, divide, merge, or alter the boundaries of school districts. (*Allen v. Board of Trustees*, *supra*, 157 Cal. at pp. 725-726; *Pass School Dist. v. Hollywood Dist.*, *supra*, 156 Cal. at p. 418; *Hughes v. Ewing*, *supra*, 93 Cal. at p. 417.) Indeed, the state is the beneficial owner of school property and local districts hold title as trustee for the state. (*Hall v. City of Taft*, *supra*, 47 Cal.2d at pp. 181-182; *Chico Unified Sch. Dist. v. Board of Supervisors* (1970) 3 Cal.App.3d 852, 855 [84 Cal.Rptr. 198]; *Town of Atherton v. Superior Court*, *supra*, 159 Cal.App.2d at p. 421.) "School moneys belong to the state, and the apportionment of funds to a school district does not give that district a proprietary right therein." (*Butler v. Compton Junior College Dist.* (1947) 77 Cal.App.2d 719, 729 [176 P.2d 417]; see also *Gridley School District v. Stout* (1901) 134 Cal. 592, 593 [66 P. 785].) It follows that the Legislature can transfer property and apportion debts between school districts as it sees fit. (*Pass School Dist. v. Hollywood Dist.*, *supra*, 156 Cal. at pp. 418-419; *Hughes v. Ewing*, *supra*, 93 Cal. at p. 417; *San Carlos Sch. Dist. v. State Bd. of Education*, *supra*, 258 Cal.App.2d at p. 324.)

While few will deny the critical importance of education, the needs of the public education system often conflict with other desires of the electorate, especially that of minimizing the tax burden imposed upon the populace. Fewer still would deny that financing the public educational system in this state is Byzantine in its intricacy and complexity. Public education financing involves two basic, broad, and interrelated problems: public school resource production (how the funds are raised), and public school resource deployment (how the funds are spent). (See Andrews, *Serrano II: Equal Access to School Resources and Fiscal Neutrality-A View From Washington State* (1977) 4 Hast. Const.L.Q. 425, 429, fn. 18 [hereafter *Equal Access to School Resources*].) Public school financing is complicated by such matters as whether revenue should be raised through state or local taxation or some combination of both (see *Serrano v. Priest* (1976) 18 Cal.3d 728, 747 [135 Cal.Rptr. 345, 557 P.2d 929] [hereafter *Serrano II*]; and see *Equal Access to School Resources, supra,* 4 Hast. Const.L.Q. at pp. 445-446); disparate tax base to units of average daily attendance (ADA) ratios among various districts (see *Serrano v. Priest, supra,* 5 Cal.3d at p. 592 [hereafter *Serrano I*]); the willingness (or ability) of local voters to authorize increased taxes or expenditures for education (see *Serrano II, supra,* 18 Cal.3d at p. 769); the ***1526** availability of federal funding for educational programs and the sometimes inflexible qualification criteria for such funding (see Stats. 1981, ch. 100, § 1.3, pp. 653-654); the differing needs of schools and their students (see Stats. 1981, ch. 100, § 1, p. 653); and the difficulty of determining what types of services or programs should or should not be included within the educational budget (see *Equal Access to School Resources, supra,* 4 Hast. Const.L.Q. at pp. 441-442.) Although these matters are by no means exhaustive, they do illustrate the inherent complexity involved in developing an adequate formula for school support.

In the past 20 years state funding for education has been significantly influenced by several legal and political events. The changes began in 1971, a time when the major source of school revenue was derived from local real property taxes. (*Serrano I, supra,* 5 Cal.3d at p. 592.) The state then contributed aid to school districts in two forms: "basic state aid," which was a flat financial grant per pupil per year; and "equalization aid," which was based upon the assessed valuation of property per pupil within the district. (*Id.* at p. 593.) This educational status quo was challenged in *Serrano I,* a class action in which the plaintiffs maintained that the public school financing system created disparate educational opportunities based upon wealth. It was asserted that due to a substantial dependence upon local property taxes children from wealthy districts received greater educational opportunities than children from poorer districts. [FN8] In 1971, the California Supreme Court held that wealth is a suspect classification and that education constitutes a fundamental interest and thus the state plan should be subjected to strict scrutiny under equal protection principles. (*Id.* at pp. 614-615.) The high court concluded that an educational system which produces disparities of opportunity based upon district wealth would fail to meet constitutional requirements and the action was remanded for trial of the factual allegations of the complaint. (*Id.* at p. 619.)

> FN8 It has been pointed out that the wealth of a school district will not necessarily reflect the wealth of families it serves. For example, a district might have a high assessed valuation to ADA ratio because it includes areas which are heavily developed for commercial or industrial purposes, yet serve families who live near such areas because they cannot afford to move to more affluent areas. Conversely, a suburban or rural district may serve relatively affluent students yet lack a high assessed valuation to ADA ratio because it lacks any commercially developed areas within its boundaries. In *Serrano I* the Court disregarded this possibility because it was reviewing a demurrer to a complaint which alleged that there was a correlation between the wealth of a district and its residents and for the more basic reason that it did not believe that disparities in educational opportunities could be permitted simply because they reflected the wealth of the district rather than the individual. (*Id.* at pp. 600-601.)

After *Serrano I,* the Legislature modified the formula for state education aid in an effort to eliminate its objectionable features. The parties stipulated that the modified formula should be considered at trial. (***1527***Serrano II, supra,* 18 Cal.3d at pp. 736-737.) Also during the pendency of the trial court proceedings, the United States Supreme Court rendered its

opinion in *San Antonio School District v. Rodriguez* (1973) 411 U.S. 1 [36 L.Ed.2d 16, 93 S.Ct. 1278]. There, the Texas public school financing system, which was substantially similar to ours, was upheld by the federal high court. The court concluded that the Texas system did not result in a suspect classification based upon wealth and did not affect a fundamental interest and thus needed only to meet the "rational relationship" test under equal protection principles. (*Id.* at pp. 33-34, 48-55, 61-62 [36 L.Ed.2d at pp. 42-43, 51-56, 59-60].) Thereafter the *Serrano* trial court held that California's public education financing scheme violated independent state equal protection guarantees. In *Serrano II*, the California Supreme Court affirmed the judgment of the trial court which gave the state six years for bringing the public school financing system into constitutional compliance. (18 Cal.3d at pp. 749, 777.)

Meanwhile, at the June 1978 Primary Election the voters enacted Proposition 13, which added article XIII A to the California Constitution. That measure changed California's real property tax system from a current value system to an acquisition value system and limited the tax rates which could be imposed upon real property. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 220, 238 [149 Cal.Rptr. 239, 583 P.2d 1281].) In an effort to mitigate the effects of article XIII A upon local governments and schools, the Legislature enacted a bailout bill to distribute surplus state funds to local agencies. (See *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 297 [152 Cal.Rptr. 903, 591 P.2d 1].) Article XIII A also forced the state to assume a greater responsibility for financing the public school system. (§ 41060.)

In the November 1979 Special Statewide Election the voters enacted Proposition 4 to add article XIII B to the California Constitution. Article XIII B imposes limitations upon the power of all California governmental entities to appropriate funds for expenditures. (Cal. Const., art. XIII B, §§ 1, 8, subds. (a), (b).) Revenues received by any governmental entity in excess of its appropriations limit must be returned by a revision of tax rates or fee schedules within the next two fiscal years. (Cal. Const., art. XIII B, § 2.) The measure also provides that whenever the state mandates a new program or higher level of service upon local governments, it must provide a subvention of funds to reimburse local government for the added costs. (Cal. Const., art. XIII B, § 6.)

It can be seen that as a result of the events of the 1970's the already difficult task of financing public education was made even more formidable. ***1528** As a result of article XIII A, the state was forced to assume a greater share of the responsibility for funding education. Any formula for funding education would be required to meet equal protection principles as set forth in the *Serrano* decisions. And as a result of article XIII B, there was certain to be greater competition for the state revenues within the appropriations limit. It was against this background that the voters enacted Proposition 98 at the November 1988 General Election.

III Matters Not in Issue

The question presented in this appeal can best be addressed when it is narrowed to its appropriate scope by elimination of what is not involved. We are not here concerned with whether the Child Care and Development Services Act in fact completely entails an educationally related program. (4) While the Legislature is given broad authority over education, it cannot divert education funds for other purposes. (*Crosby v. Lyon* (1869) 37 Cal. 242, 245.) But plaintiffs did not and cannot reasonably contend that the child care program under attack does not at least in part serve an educational purpose. Education is a broad and comprehensive matter. (*Board of Trustees v. County of Santa Clara* (1978) 86 Cal.App.3d 79, 84 [150 Cal.Rptr. 109].) It "[c]omprehends not merely the instruction received at school or college, but the whole course of training; moral, religious, vocational, intellectual, and physical. Education may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all. [It includes the] [a]cquisition of all knowledge tending to train and develop the individual." (Black's Law Dict. (5th ed. 1979) p. 461, col. 2.) Our Constitution places a similarly broad meaning upon education when it requires the Legislature to "encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." (Cal. Const., art. IX, § 1.) [FN9] Moreover, under our Constitution the Legislature is given broad discretion in determining the types of programs and services which further the purposes of education. (*Veterans' Welfare Board v. Riley* (1922) 189 Cal. 159, 164-166 [208 P. 678, 22 A.L.R. 1531]; *University of*

So. California v. Robbins (1934) 1 Cal.App.2d 523, 528 [37 P.2d 163].) It cannot be said that the Legislature has been arbitrary and unreasonable in its determination that the Child Care and Development Services Act furthers the purposes of public education.

> FN9 While "education" is sufficiently broad to include religious training, specific provisions of the state and federal Constitutions exclude religious training from governmental education programs. (U.S. Const., Amend. I; Cal. Const., art. I, § 4, art. IX, § 8.)

We are not here concerned with the question whether the Legislature's implementation of Proposition 98 is partially invalid or invalid as applied. ***1529** Plaintiffs claim that the inclusion of funding for the Child Care and Development Services Act within the Proposition 98 funding requirement is invalid in toto and on its face. They argue that Proposition 98 funds must be transferred to school districts which then have total discretion to determine how those funds should be spent. They did not present evidence or argument to establish that portions of the Child Care and Development Act lack a sufficient nexus to education to be included in education funding or that the manner in which it is carried out by the Superintendent of Public Instruction does not support and further the purpose of education. (5) "Because this is a challenge to the facial validity of the [the statute], our task is to determine whether the statute can constitutionally be applied. 'To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute. ... Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.' " (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267 [5 Cal.Rptr.2d 545, 825 P.2d 438], italics in original.)

We are not here concerned with the advisability or wisdom of the Legislature's decision. [FN10] (6) Under our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation. (*City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 913 [120 Cal.Rptr. 707, 534 P.2d 403]; *County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 727 [119 Cal.Rptr. 631, 532 P.2d 495]; *Galvan v. Superior Court* (1969) 70 Cal.2d 851, 869 [76 Cal.Rptr. 642, 452 P.2d 930]; *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 359 [55 Cal.Rptr. 23, 420 P.2d 735].) As a court of review our role is limited to determining whether the Legislature's choice is constitutionally prohibited. (*Ibid.*)

> FN10 For this reason we deny the request of amici curiae that we take judicial notice of certain legislative materials. The submitted documents tend to establish the value of, and the need for, funding for child care and development programs. Those are matters within the Legislature's prerogative and we may not superintend its determination.

Furthermore, we are not concerned here with statutory inconsistency. Instead, the issue relates solely to the construction of constitutional provisions. Proposition 98 added certain statutory provisions to the Education Code, Section 13 of Proposition 98 provides: "No provision of this Act may be changed except to further its purposes by a bill passed by a vote of two-thirds of the membership of both houses of the Legislature and signed ***1530** by the Governor." The legislation challenged by plaintiffs was enacted by the requisite two-thirds majorities and signed by the Governor. Accordingly, it is the constitutional provisions of Proposition 98 which are at issue in this case.

Finally, we are not here concerned with article XVI, section 8.5 of the Constitution, also added by Proposition 98. In that provision the voters determined that, within certain limits, state revenues in excess of the state appropriations limit should be used to improve education in the elementary and secondary schools and community colleges rather than be returned to the populace. The measure is self-executing; it requires no legislative action. Each year the Controller must transfer and allocate such excess revenues to the state school fund restricted for school districts and community colleges, and then must allocate those funds to the districts and community colleges on a per-enrollment basis. (Cal. Const., art. XVI, § 8.5, subds. (a), (c).) Those sums may be expended solely for purposes of instructional improvement and accountability. (Cal. Const., art. XVI, § 8.5, subd. (d).)

Article XVI, section 8.5 is an entirely different matter than article XVI, section 8. Section 8.5 deals with revenues which are constitutionally beyond the Legislature's spending prerogatives under article XIII B. Section 8.5 does not extend the Legislature's spending power to excess revenues; rather it imposes a self-executing, ministerial duty upon the Controller to transfer such excess revenues to a restricted portion of the school fund and thence to allocate such revenues to school districts and community college districts on a per-enrollment basis. Section 8.5 specifically restricts the purposes for which those funds may be expended. The specific provisions of section 8.5 would prohibit the Legislature from retaining and utilizing those funds for purposes of the Child Care and Development Services Act.

IV Issue on Appeal

In this case we are concerned with whether funding for the Child Care and Development Services Act is on its face beyond the educational funding requirements of article XVI, section 8, of the Constitution as enacted by Proposition 98.

Defendant Honig contends that the Legislature has plenary power to define how California's public school system operates as well as what entities constitute that system. Given that absolute authority, which remains undiminished by the enactment of Proposition 98, the Legislature was empowered to include funds for early childhood education and child development within the minimum funding guarantee established by that initiative. ***1531** He argues that the trial court, contrary to the settled and fundamental principles of constitutional adjudication, misconstrued the critical phrase "moneys to be applied by the State for the support of school districts" to be limited to funds directly allocated to school districts. In his view, "the definition of 'school districts' set forth in Proposition 98 is far from precise. Its uncertainty in fact made it necessary for the Legislature to refine and clarify which entities in the public school system were to be counted as falling within its minimum funding guarantee. This the Legislature did, three times. [¶] More importantly, nothing in Proposition 98 or any other provision of law either expressly or implicitly restricted the Legislature from including [the California Department of Education's] direct provision of child development services through contracts with private agencies within that guarantee. Since 1972, the Legislature has determined that private agencies, as well as public agencies, have been integral to the statewide provision of such services under the Child Development Act, and thereby to California's public school system. Accordingly, the Legislature's implementation of Proposition 98 in Sections 41202(f) and 8203.5(c) was not only possible and reasonable, it was consistent with its prior acts which made private agency child development services a recognized part of the public school system."

(7a) Plaintiffs counter that the plain language of Proposition 98 demonstrates that the funds must go directly to school districts and not to private entities contracting with the Department of Education. As they read the key phrase of the initiative, "monies to be applied by the State for the support of school districts" means funds "allocated to" or "appropriated for" school districts. Consequently, so their argument goes, the inclusion of non-school-district programs within the initiative's guarantee nullifies the central purpose of Proposition 98.

Real parties in interest argue alternatively that child development programs funded directly by the Department of Education are included within the phrase "school districts" but even if they are not, the Legislature has the power to amend the statutory definition of "school districts" contained in Proposition 98.

In analyzing these constitutional contentions we are bound by several fundamental principles of constitutional adjudication. (8) " 'Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. Two important consequences flow from this fact. First, the entire lawmaking authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers *which are not expressly, or by necessary implication* ****1532*** *denied to it by the Constitution. ...* [¶] Secondly, all intendments favor the exercise of the Legislature's plenary authority: "If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. *Such restrictions and limitations* [*imposed by the Constitution*] *are to be construed strictly, and are not to be extended to include matters not covered by the language used.*" ' (Italics added.)" (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d

168, 180 [172 Cal.Rptr. 487, 624 P.2d 1215], citing *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691 [97 Cal.Rptr. 1, 488 P.2d 161], citations omitted.)

(9) Another principle of constitutional adjudication requires that the constitutional provisions added by Proposition 98 be considered in light of all other relevant provisions of the Constitution, including those that contain, define, and limit the status of school districts and their relationship to the state. "The initiative amendment to the [C]onstitution itself must be interpreted in harmony with the other provisions of the organic law of this state of which it has become a part. To construe it otherwise would be to break down and destroy the barriers and limitations which the [C]onstitution, read as a whole, has cast about legislation, both state and local." (*Galvin v. Board of Supervisors* (1925) 195 Cal. 686, 692 [235 P. 450]. See also *Edler v. Hollopeter* (1931) 214 Cal. 427, 430 [6 P.2d 245].) In *Galvin v. Board of Supervisors, supra*, 195 Cal. 686, the petitioners sought to compel a county board of supervisors to submit an initiative ordinance to the local voters. The Supreme Court held that the provisions of the Constitution which reserve the initiative power to local voters must be construed in light of other provisions which contain, define, and limit the scope of permissible local legislation. (*Id.* at p. 692.) This precluded local voters from accomplishing by initiative that which was beyond the powers of the local board of supervisors. (*Id.* at p. 693. See also *Giddings v. Board of Trustees* (1913) 165 Cal. 695, 698 [133 P. 479].) That principle of construction applies here.

(7b) When we consider Proposition 98 in light of other provisions of our Constitution, specifically article IX, which is devoted to education, and the long, unbroken line of authorities interpreting such provisions, we must reject an underlying premise of plaintiffs' argument. According to plaintiffs, the challenged legislation is invalid because it divests school districts of complete and total control over the funds the state is required to devote to education under Proposition 98. As plaintiffs put it: "Of course, if a school district decides to use part of its funding for child care and development programs, it is entitled to do so. It is also entitled to ignore child care and development altogether, and use its funding for other programs that it considers to be a higher priority." Nothing in Proposition 98 states or implies ***1533** that school districts are to have the autonomy claimed by plaintiffs. Article IX, section 5, of our Constitution still provides for one system of common schools, which implies a "unity of purpose as well as an entirety of operation, and the direction to the [L]egislature to provide 'a' system of common schools means *one* system which shall be applicable to all the common schools within the state." (*Kennedy v. Miller* (1893) 97 Cal. 429, 432 [32 P. 558], italics original; see also *Serrano I, supra*, 5 Cal.3d at p. 595.)

Since Proposition 98 did not alter the state's role in education, the Constitution continues to make education and the operation of the public schools a matter of statewide rather than local or municipal concern. (*Hall v. City of Taft, supra*, 47 Cal.2d at p. 179; *Esberg v. Badaracco, supra*, 202 Cal. at pp. 115-116; *Kennedy v. Miller, supra*, 97 Cal. at p. 431; *Whisman v. San Francisco Unified School Dist., supra*, 86 Cal.App.3d at p. 789.) Local school districts remain agencies of the state rather than independent, autonomous political bodies. (*Allen v. Board of Trustees, supra*, 157 Cal. at pp. 725-726.) The Legislature's control over the public education system is still plenary. (*Hall v. City of Taft, supra*, 47 Cal.2d at pp. 180-181; *Pass School Dist. v. Hollywood Dist., supra*, 156 Cal. at p. 419; *San Carlos Sch. Dist. v. State Bd. of Education, supra*, 258 Cal.App.2d at p. 324; *Town of Atherton v. Superior Court, supra*, 159 Cal.App.2d at p. 421.) The Legislature still has ultimate and nondelegable responsibility for education in this state. (*Hall v. City of Taft, supra*, 47 Cal.2d at p. 181; *Piper v. Big Pine School Dist., supra*, 193 Cal. at p. 669.) All school properties are still held in trust with the state as the beneficial owner. (*Hall v. City of Taft, supra*, 47 Cal.2d at p. 182; *Chico Unified Sch. Dist. v. Board of Supervisors, supra*, 3 Cal.App.3d at p. 855; *Town of Atherton v. Superior Court, supra*, 159 Cal.App.2d at p. 421.) And school districts still do not have a proprietary interest in moneys which are apportioned to them. (*Gridley School District v. Stout, supra*, 134 Cal. at p. 593; *Butler v. Compton Junior College Dist., supra*, 77 Cal.App.2d at p. 729.) Of course, if the electorate chose to alter our constitutional scheme for education it could do so. Education could be made a matter of local concern and school districts could be given greater autonomy. But we cannot conclude that such a major governmental restructuring was accomplished by implication in a measure dealing with public finance which spoke not at all on such matters.

5 Cal.App.4th 1513, 7 Cal.Rptr.2d 699, 74 Ed. Law Rep. 165
(Cite as: 5 Cal.App.4th 1513)

In light of the Legislature's plenary authority over education and its legal relationship with school districts, we do not find Proposition 98 to be clear and unambiguous as asserted by plaintiffs. The measure establishes a minimum sum for "the monies to be applied by the state for the support of school districts and community college districts ...." Rather than expressly divesting the state of its traditional authority over education funds, ***1534** this provision would appear to retain state control since the moneys are to be "applied by the state." The measure does not expressly restrict the Legislature's plenary authority nor does it grant to school districts exclusive control over education funds. Had such a result been intended there are any number of linguistic formulations which could have so specified with adequate clarity. As a court, we cannot impose limitations or restrictions upon the Legislature's prerogatives in the absence of language reasonably calculated to require such a result when subjected to strict construction. (*Pacific Legal Foundation v. Brown, supra,* 29 Cal.3d at p. 180.)

Given plaintiffs' facial attack, it is enough to hold, as we do, that legislative programs which advance, and hence support, the educational mission of school districts and community college districts may constitutionally be included within the funding guarantee of Proposition 98. It cannot be said that the Child Care and Development Services Act totally and on its face fails to meet this test. [FN11] This is as far as we need go in this case. The plaintiffs asserted, and the judgment holds, that only funds allocated to and administered by school districts satisfy the requirements of Proposition 98. Such a conclusion improperly grants school districts a proprietary interest in school funds and gives them a degree of political autonomy in contravention to the Legislature's long-standing and well-established plenary authority over education in this state. Since we do not find such a fundamental governmental restructuring in Proposition 98, we must reject the reasoning of the trial court and reverse its judgment.

FN11 In reaching this conclusion we reject real parties' contention that the Legislature has impliedly defined programs under the Child Care and Development Services Act as being within the definition of "school districts." Section 41302.5 defines the agencies which are included within the phrase "school district" as used in Proposition 98. In implementing Proposition 98 the Legislature referred to that section but did not see fit to amend it to include child care and development programs. (§ 41202, subd. (f).) And in section 8203.5, subdivision (c), the Legislature included Child Care and Development Services Act funding within the Proposition 98 guarantee "whether or not those funds are allocated to school districts ...." By so providing the Legislature clearly chose not to include child care and development programs within the definition of school districts.

Summary and Conclusion

In this state, education is a matter of statewide rather than local or municipal concern. Local school districts are agencies of the state subject to the Legislature's plenary authority over education. Local school districts do not have political autonomy and have no proprietary interest in the properties or moneys they hold in trust for the state. Proposition 98 set forth minimum sums to be applied by the state for the support of school districts and community colleges. This measure does not deprive the Legislature of ***1535** its plenary authority over education and does not grant school districts political autonomy or a proprietary interest in the minimum funding to be applied by the state for support of school districts and community colleges. Accordingly, we reject the assertion that all funds within the minimum funding requirements of Proposition 98 must be allocated to, and administered by, school districts. Our opinion goes no further. While the Legislature's authority over education and education funding is broad, it is not unlimited. Our conclusion that Proposition 98 did not divest the Legislature of its traditional authority over education should not be construed to foreclose specific challenges to the Legislature's decisions based upon appropriate factual and legal showings. We hold only that the decision to include funding for the Child Care and Development Services Act within the Proposition 98 minimum funding guarantees is not in toto and on its face beyond the Legislature's constitutional authority.

Disposition

The judgment is reversed. Appellant Honig shall recover his costs on appeal.

Marler, J., and Nicholson, J., concurred.

A petition for a rehearing was denied May 27,

1992, and the petition of plaintiffs and respondents for review by the Supreme Court was denied July 30, 1992. Mosk, J., was of the opinion that the petition should be granted. ***1536**

Appendix

Proposition 98 provides in full:

Section 1. This Act shall be known as "The Classroom Instructional and Accountability Act."

Section 2. Purpose and Intent. The People of the State of California find and declare that:

(a) California schools are the fastest growing in the nation. Our schools must make room for an additional 130,000 students every year.

(b) Classes in California's schools have become so seriously overcrowded that California now has the largest classes of any state in the nation.

(c) This act will enable Californians to once again have one of the best public school systems in the nation.

(d) This act will not raise taxes.

(e) It is the intent of the People of California to ensure that our schools spend money where it is most needed. Therefore, this Act will require every local school board to prepare a School Accountability Report Card to guarantee accountability for the dollars spent.

(f) This Act will require that excess state funds be used directly for classroom instructional improvement by providing for additional instructional materials and reducing class sizes.

(g) This Act will establish a prudent state reserve to enable California to set aside funds when the economy is strong and prevent cutbacks or tax increases in times of severe need or emergency.

Section 3. Section 5.5 is hereby added to Article XIIIB as follows:

Section 5.5 Prudent State Reserve. The Legislature shall establish a prudent state reserve fund in such amount as it shall deem reasonable and necessary. Contributions to, and withdrawals from, the fund shall be subject to the provisions of Section 5 of this Article.

Section 4. Section 2 of Article XIIIB is hereby amended to read as follows:

Section 2. Revenues in Excess of Limitation. ***1537**

(a) All revenues received by the state in excess of that amount which is appropriated by the state in compliance with this Article, and which would otherwise by required, pursuant to subdivision (b) of this Section, to be returned by a revision of tax rates or fee schedules within the next two subsequent fiscal years, shall be transferred and allocated pursuant to Section 8.5 of Article XVI up to the maximum amount permitted by that section.

(b) Except as provided in subdivision (a) of this Section, revenues received by any entity of government in excess of that amount which is appropriated by such entity in compliance with this Article during the fiscal year shall be returned by a revision of tax rates or fee schedules within the next two subsequent fiscal years.

Section 5. Section 8 of Article XVI is hereby amended to read as follows:

Section 8. School Funding Priority

(a) From all state revenues there shall first be set apart the monies to be applied by the state for support of the public school system and public institutions of higher education.

(b) Commencing with the 1988-89 fiscal year, the monies to be applied by the state for the support of school districts and community college districts shall not be less than the greater of:

(1) The amount which, as a percentage of the State General Fund revenues which may be appropriated pursuant to Article XIIIB, equals the percentage of such State General Fund revenues appropriated for school districts and community college districts, respectively, in fiscal year 1986-87; or

(2) The amount required to ensure that the total allocations to school districts and community college districts from the State General Fund proceeds of taxes appropriated pursuant to Article XIIIB and allocated local proceeds of taxes shall not be less than the total amount from these sources in the prior year, adjusted for increases in enrollment, and adjusted for changes in the cost of living pursuant to the provisions of Article XIIIB.

(c) The provisions of subdivision (b) of this Section may be suspended for one year by the enactment of an urgency statute pursuant to Section 8 of Article IV, provided that no urgency statute enacted under this subdivision may be made part of or included within any bill enacted pursuant to Section 12 of Article IV. ***1538**

Section 6. Section 8.5 of Article XVI is hereby added as follows:

Section 8.5. Allocations to State School Fund

(a) In addition to the amount required to be applied for the support of school districts and community colleges pursuant to Section 8(b), the Controller shall during each fiscal year transfer and allocate all revenues available pursuant to subdivision (a) of Section 2 of Article XIIIB, up to a maximum of four percent (4%) of the total amount required pursuant to Section 8(b) of this Article, to that portion of the State School Fund restricted for elementary and high school purposes, and to that portion of the State School Fund restricted for community college purposes, respectively, in proportion to the enrollment in school districts and community college districts respectively.

(1) With respect to funds allocated to that portion of the State School Fund restricted for elementary and high school purposes, no transfer or allocation of funds pursuant to this section shall be required at any time that the Director of Finance and the Superintendent of Public Instruction mutually determine that current annual expenditures per student equal or exceed the average annual expenditure per student of the ten states with the highest annual expenditures per student for elementary and high schools, and that average clas [*sic*] size equals or is less than the average class size of the ten states with the lowest clas [*sic*] size for elementary and high schools.

(2) With respect to funds allocated to that portion of the State School Fund restricted for community college purposes, no transfer or allocation of funds pursuant to this section shall be required at any time that the Director of Finance and the Chancellor of Community Colleges mutually determine that current annual expenditures per student for community colleges in this state equal or exceed the average annual expenditure per student of the ten states with the highest annual expenditures per student for community colleges.

(b) Notwithstanding the provisions of Article XIIIB, funds allocated pursuant to this section shall not constitute appropriations subject to limitation, but appropriation limits established in Article XIIIB shall be annually increased for any such allocations made in the prior year.

(c) From any funds transferred to the State School Fund pursuant to paragraph (a) of this Section, the Controller shall each year allocate to each school district and community college district an equal amount per enrollment in school districts from the amount in that portion of the State ***1539** School Fund restricted for elementary and high school purposes and an equal amount per enrollment in community college districts from that portion of the State School Fund restricted for community college purposes.

(d) All revenues allocated pursuant to subdivision (a) of this section, together with an amount equal to the total amount of revenues allocated pursuant to subdivision (a) of this section in all prior years, as adjusted if required by Section 8(b)(2) of Article XVI, shall be expended solely for the purposes of instructional improvement and accountability as required by law.

(e) Any school district maintaining an elementary or secondary school shall develop and cause to be prepared an annual audit accounting for such funds and shall adopt a School Accountability Report Card for each school.

Section 7. Section 33126 is hereby added to Article 2 of Chapter 2 of Part 20 of Division 2 of Title 2 of the Education Code to read as follows:

5 Cal.App.4th 1513, 7 Cal.Rptr.2d 699, 74 Ed. Law Rep. 165
(Cite as: 5 Cal.App.4th 1513)

33126. School Accountability Report Card

In order to promote a model statewide standard of instructional accountability and conditions for teaching and learning, the Superintendent of Public Instruction shall by March 1, 1989, develop and present to the Board of Education for adoption a statewide model School Accountability Report Card.

(a) The model School Accountability Report Card shall include, but is not limited to, assessment of the following school conditions:

(1) Student achievement in and progress toward meeting reading, writing, arithmetic and other academic goals.

(2) Progress toward reducing drop-out rates.

(3) Estimated expenditures per student, and types of services funded.

(4) Progress toward reducing class sizes and teaching loads.

(5) Any assignment of teachers outside their subject areas of competence.

(6) Quality and currency of textbooks and other instructional materials.

(7) The availability of qualified personnel to provide counseling and other student support services. ***1540**

(8) Availability of qualified substitute teachers.

(9) Safety, cleanliness, and adequacy of school facilities.

(10) Adequacy of teacher evaluations and opportunities for professional improvement.

(11) Classroom discipline and climate for learning.

(12) Teacher and staff training, and curriculum improvement programs.

(13) Quality of school instruction and leadership.

(b) in developing the statewide model School Accountability Report, the Superintendent of Public Instruction shall consult with a Task Force on Instructional Improvement, to be appointed by the Superintendent, composed of practicing classroom teachers, school administrators, parents, school board members, classified employees, and educational research specialists, provided that the majority of the task force shall consist of practicing classroom teachers.

Section 8. Section 35256 is hereby added to Article 8 of Chapter 2 of Part 20 of Division 3 of Title 2 of the Education Code to read as follows:

35256. School Accountability Report Card

The governing board of each school district maintaining an elementary or secondary school shall by September 30, 1989, or the beginning of the school year develop and cause to be implemented for each school in the school district a School Accountability Report Card.

(a) The School Accountability Report Card shall include, but is not limited to, the conditions listed in Education Code Section 33126.

(b) Not less than triennially, the governing board of each school district shall compare the content of the school district's School Accountability Report Card to the model School Accountability Report Card adopted by the State Board of Education. Variances among school districts shall be permitted where necessary to account for local needs.

(c) The Governing Board of each school district shall annually issue a School Accountability Report Card for each school in the school district, publicize such reports, and notify parents or guardians of students that a copy will be provided upon request. ***1541**

Section 9. Section 41300.1 is hereby added to Article 1 of Chapter 3 of Part 24 of Division 3 of Title 2 of the Education Code to read as follows:

41300.1 Instructional Improvement and Accountability.

5 Cal.App.4th 1513, 7 Cal.Rptr.2d 699, 74 Ed. Law Rep. 165
(Cite as: 5 Cal.App.4th 1513)

The amount transferred to Section A of the State School Fund pursuant to Section 8.5 of Article XVI of the State Constitution shall to the maximum extent feasible be expended or encumbered during the fiscal year received and solely for the purpose of instructional improvement and accountability.

(a) For the purpose of this section, "instructional improvement and accountability" shall mean expenditures for instructional activities for school sites which directly benefit the instruction of students, and shall be limited to expenditures for the following:

(1) Lower pupil-teacher ratios until a ratio is attained of not more than 20 students per teacher providing direct instruction in any class, and until a goal is attained of total teacher loads of less than 100 total students per teacher in all secondary school classes in academic subjects as defined by the Superintendent of Public Instruction.

(2) Instructional supplies, instructional equipment, instructional materials and support services necessary to improve school conditions.

(3) Direct student services needed to ensure that each student makes academic progress necessary to be promoted to the next appropriate grade level.

(4) Staff development which improves services to students or increases the quality and effectiveness of instructional staff, designed and implemented by classroom teachers and other participating school district personnel, including the school principal, with the aid of outside personnel as necessary. Classroom teachers shall comprise the majority of any group designated to design such staff development programs for instructional personnel.

(5) Compensation of teachers.

(b) Funds transferred to each school district, pursuant to this section shall be deposited in a separate account and shall be maintained and appropriated separately from funds from all other sources. Funds appropriated pursuant to this section shall supplement other resources of each school district and shall not supplant any other funds. ***1542**

Section 10. Section 14020.1 is hereby added to Article 1 Chapter 1 of Part 9 of Division 1 of Title 1 of the Education Code to read as follows:

14020.1. Instructional Improvement and Accountability.

The amount transferred to Section B of the State School Fund pursuant to Section 8.5 of Article XVI of the State Constitution shall to the maximum extent feasible be expended or encumbered during the year received solely for the purposes of instructional improvement and accountability.

(a) For the purposes of this section, "instructional improvement and accountability" shall mean expenditures for instructional activities for college sites which directly benefit the instruction of students and shall be limited to expenditures for the following:

(1) Programs which require individual assessment and counseling of students for the purpose of designing a curriculum for each student and establishing a period of time within which to achieve the goals of that curriculum and the support services needed to achieve these goals, provided that any such program shall first have been approved by the Board of Governors of Community Colleges.

(2) Instructional supplies, instructional equipment, and instructional materials and support services necessary to improve campus conditions.

(3) Faculty development which improves instruction and increases the quality and effectiveness of instructional staff, as mutually determined by faculty and the community college district governing board.

(4) Compensation of faculty.

(b) Funds transferred to each community college district pursuant to this section shall be deposited in a separate account and shall be maintained and appropriated separately from funds from all other sources. Funds appropriated pursuant to this section shall supplement other resources of each community college district and shall not supplant funds appropriated from any other source.

Section 11. Section 14022 is added to the Educa-

tion Code to read as follows:

14022. (a) For the purposes of Section 8 and Section 8.5 of Article XVI of the California Constitution, "enrollment" shall mean: ***1543**

(1) In community college districts, full-time equivalent students receiving services, and

(2) In school districts, average daily attendance when students are counted as average daily attendance and average daily attendance equivalents for services not counted in average daily attendance.

(b) Determination of enrollment shall be based upon actual data from prior years and for the next succeeding year such enrollments shall be estimated enrollments adjusted for actual data as actual data becomes available.

Section 12. Section 41302.5 is added to the Education Code to read as follows:

41302.5. For the purposes of Section 8 and Section 8.5 of Article XVI of the California Constitution, "school districts" shall include county boards of education, county superintendents of schools and direct elementary and secondary level instructional services provided by the State of California.

Section 13. No provision of this Act may be changed except to further its purposes by a bill passed by a vote of two-thirds of the membership of both houses of the Legislature and signed by the Governor.

Section 14. Severability

If any provision of this Act, or the application of any provision of this Act to any person or circumstance, shall be held invalid, the remainder of this Act, to the extent that it can be given effect, shall not be affected thereby, and to this end the provisions of this Act are severable.

Cal.App.3.Dist.
California Teachers Assn. v. Hayes
5 Cal.App.4th 1513, 7 Cal.Rptr.2d 699, 74 Ed. Law Rep. 165

END OF DOCUMENT

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

WARD CONNERLY, Plaintiff and Appellant,
v.
STATE PERSONNEL BOARD et al., Defendants and Respondents; CALIFORNIA BUSINESS COUNCIL FOR EQUAL OPPORTUNITY et al., Real Parties in Interest and Appellants.

No. C032042.

Court of Appeal, Third District, California.
Sept. 4, 2001.

SUMMARY

The Governor brought an action challenging five statutory affirmative action programs as violative of equal protection principles and Prop. 209 (Cal. Const., art. I, § 31). The statutes in question were Gov. Code, § 8880.32 (State Lottery Commission), Gov. Code, § 16850 et seq. (sale of state bonds), Gov. Code, § 19790 et seq. (state civil service), Ed. Code, § 87100 et seq. (community colleges), and Pub. Contract Code, § 10115 et seq. (state contracting). A private citizen was permitted to join the lawsuit, and he continued the litigation after the Governor left office. The trial court found invalid a portion of the statutory scheme relating to the sale of bonds and all of the statutory scheme applicable to state contracting, but otherwise rejected plaintiff's constitutional challenges. (Superior Court of Sacramento County, No. 96CS01082, Lloyd Connelly, Judge.)

The Court of Appeal reversed and remanded to the trial court with directions to enter a judgment consistent with the Court of Appeal's conclusions. The court held that under taxpayer and citizen standing rules, the private citizen had standing to maintain the suit. It held that the statutory scheme applicable to the state lottery was invalid, and that the scheme applicable to the sale of government bonds was also invalid, but that a portion of the data collection and reporting requirements of that scheme was severable and could be upheld. The court further held that the statutory scheme applicable to the state civil service was partially invalid, but that the remainder of the scheme could be severed and upheld. The statutory scheme applicable to the community colleges was invalid, the court held, and a portion of the data collection and reporting requirements of the scheme relating to state contracting was severable from the invalid portions and could be upheld. (Opinion by Scotland, P. J., with Morrison and Callahan, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Parties § 1.2--Standing--Taxpayer and Citizen Lawsuits.

A private citizen did not lack standing to pursue an action challenging five statutory affirmative action programs on the grounds that they impermissibly established classifications and preferences based on race, ethnicity, and gender. Code Civ. Proc., § 526a, permits a taxpayer to bring an action to restrain an illegal expenditure of public money; no showing of special damage to a particular taxpayer is required. Further, citizen suits may be brought without the necessity of showing a legal or special interest in the result, where the issue is one of public right and the object is to procure the enforcement of a public duty. Statutorily enacted affirmative action programs are matters of intense public concern. Hence, a claim that such a program violates principles of equal protection and Prop. 209 (Cal. Const., art. I, § 31) is the type of claim to which citizen and taxpayer standing rules apply. Plaintiff's pursuit of the action was consistent with the purpose of a standing requirement, which is to ensure that courts address actual controversies between parties who have sufficient adverse interests to press their case with vigor.

(2) Parties § 1.2--Standing--State Rules as Compared to Federal Rules.

The California Constitution, unlike its federal counterpart, does not contain a case or controversy limitation on the judicial power. Therefore, restrictive federal rules of justiciability do not necessarily apply in state courts. In particular, there are two related rules of standing applicable in state court actions that are contrary to the rules in federal court-the right to maintain an action as a taxpayer (Code Civ. Proc., § 526a) and the right to maintain an action as a citizen.

(3) Mandamus and Prohibition § 58--Mandamus--Procedure--Parties--Standing--

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

Challenge to Affirmative Action Programs.

In an action by a private citizen challenging five statutory affirmative action programs on the grounds that they impermissibly established classifications and preferences based on race, ethnicity, and gender, plaintiff did not lack standing, even though the action was a proceeding in mandate and plaintiff had not introduced proof that defendants were in fact engaging in unconstitutional behavior. First, mandate can be used to test the constitutional validity of a legislative enactment. Second, an assertion that standing should be denied because agencies subject to the statutory schemes might perform their duties in a constitutional manner by either ignoring the statutory directives or by engaging in a strained interpretation thereof was untenable, since an administrative agency lacks the authority to cure a facially unconstitutional statute by refusing to enforce it as written.

(4) Constitutional Law § 76--Equal Protection--Nature and Scope of Equal Protection--Affirmative Action.

The California Constitution cannot permit the state to engage in conduct forbidden by the federal equal protection clause (U.S. Const., 14th Amend.), and the state equal protection guarantee (Cal. Const., art. I, § 7, subd. (a)) imposes no greater restrictions on affirmative action than are imposed by the federal Constitution. Thus, in the affirmative action context, federal and state equal protection standards are identical, and federal standards are controlling.

(5) Constitutional Law § 99--Equal Protection--Classification--Bases of Classification--Sex.

Although, in general, Cal. Const., art. I, § 7, subd. (a) (equal protection), is independent of the federal guarantee, it is applied in most instances in a manner identical with the federal guarantee. The one exception is with respect to gender. Under federal law, distinctions based on gender are subjected to heightened judicial scrutiny, but gender is not a suspect classification, as is race. Under California law, classifications based on gender are considered suspect for purposes of equal protection analysis.

(6) Constitutional Law § 84--Equal Protection--Classification--Judicial Review--Deference to Legislature.

The constitutional guarantee of equal protection applies to governmental classifications, whether they be legislative, executive, judicial, or administrative. Legislative classification is the act of specifying who will and who will not come within the operation of a particular law. A legislative classification satisfies equal protection of law so long as persons similarly situated with respect to the legitimate purpose of the law receive similar treatment. Legislative classifications generally are entitled to judicial deference, are presumptively valid, and may not be rejected by the courts unless they are palpably unreasonable. However, judicial deference does not extend to laws that employ suspect classifications such as race. Because suspect classifications are pernicious and are so rarely relevant to a legitimate governmental purpose, they are subjected to strict judicial scrutiny; i.e., they may be upheld only if they are shown to be necessary for furtherance of a compelling state interest and they address that interest through the least restrictive means available.

(7) Constitutional Law § 100--Equal Protection--Classification--Bases of Classification--Race.

The equal protection clause (U.S. Const., 14th Amend.) recognizes that distinctions between persons based solely on their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. Where the government proposes to assure participation of some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.

(8) Constitutional Law § 87.2--Equal Protection--Classification--Judicial Review--Strict Standard of Review--Particular Classifications--Race.

Because the rights guaranteed by U.S. Const., 14th Amend., are not absolute, government may be permitted, in an appropriate case, to make remedial use of racial classifications. However, under long-standing principles of equal protection, governmental distinctions based on race are considered inherently suspect and are subjected to strict scrutiny. The strict scrutiny standard of review applies regardless of whether a law is claimed to be benign or remedial, regardless of the race of those burdened or benefited by a particular classification, and regardless of whether the law may be said to benefit and burden the races equally.

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

(9) Constitutional Law § 87.2--Equal Protection--Classification--Judicial Review--Strict Standard of Review--Particular Classifications--Race--Goals and Quotas.

The strict scrutiny standard does not depend on semantic distinctions such as "goal" rather than "quota." What is constitutionally significant is that the government has drawn a line on the basis of race or has engaged in a purposeful use of racial criteria. A constitutional injury occurs whenever the government treats a person differently because of his or her race.

(10) Constitutional Law § 87.2--Equal Protection--Classification--Judicial Review--Strict Standard of Review--Particular Classifications--Race-- Constitutional Protection as Individual Right.

In applying the strict scrutiny test, the rights created by the equal protection clause (U.S. Const., 14th Amend.) are not group rights; they are personal rights that are guaranteed to the individual. Thus, where an individual is denied an opportunity or benefit or otherwise suffers a detriment as a result of a race-based governmental scheme, it is not relevant that others of his or her race secured the opportunity or benefit or avoided the detriment.

(11) Constitutional Law § 84--Equal Protection--Classification--Judicial Review--Deference to Legislature--Racial Classifications.

When a governmental scheme uses a racial classification, the action is not entitled to the presumption of constitutionality that normally accompanies governmental acts. A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists, and blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis. A racial classification is presumptively invalid, and the burden is on the government to demonstrate extraordinary justification. In order to justify a racial classification, the government must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary to the accomplishment of its purpose or the safeguarding of its interest. Judicial review focuses on whether the racial classification is justified by a compelling governmental interest and whether the means chosen are narrowly tailored to serve that interest.

(12) Constitutional Law § 87.2--Equal Protection--Classification--Judicial Review--Strict Standard of Review--Particular Classifications--Race-- Requirement of Specificity.

Under the strict scrutiny test, governmental specificity and precision are demanded. The mere recitation of a benign or legitimate purpose is entitled to little or no weight. Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice. Moreover, generalized assertions of purpose are insufficient, since they provide little or no guidance for the legislative body to narrowly tailor its use of a suspect classification and because they inhibit judicial review under the strict scrutiny test. Thus, before embarking on a program that utilizes racial classifications, a governmental entity must identify its purpose with some degree of specificity and must have convincing evidence that race-based remedial action is necessary.

(13) Constitutional Law § 87.2--Equal Protection--Classification--Judicial Review--Strict Standard of Review--Particular Classifications--Race--Connection Between Justification and Classification.

Under the strict scrutiny standard of review, once a compelling interest is shown, the inquiry focuses on the means chosen to address the interest. It is not enough that the means chosen to accomplish the purpose are reasonable or efficient. Only the most exact connection between justification and classification will suffice. The classification must appear necessary rather than convenient, and the availability of nonracial alternatives-or the failure of the legislative body to consider such alternatives-will be fatal to the classification. In addition, the use of a racial classification must be limited in scope and duration to that which is necessary to accomplish the legislative purpose.

(14) Constitutional Law § 100--Equal Protection--Classification--Bases of Classification--Race--Demonstration of Compelling State Interest.

In order to rise to the level of a compelling state interest, the use of racial classifications to remedy specific discrimination must meet two criteria. First, the discrimination must be identified with some degree of specificity. A generalized assertion that there has been discrimination in a particular industry or region is insufficient, and mere statistical anomalies, without more, do not permit a governmental entity to

employ racial classifications. Second, the institution that makes the racial distinction must have had a strong basis in evidence to conclude that race-based remedial action is necessary before it embarks on an affirmative action program. A governmental entity cannot satisfy this criterion simply by conceding past discrimination.

(15) Constitutional Law § 100--Equal Protection--Classification--Bases of Classification--Race--Creation of Remedy.

In order to be lawful, the governmental use of racial classification to redress specific discrimination must actually be remedial. The remedy must be created with the awareness that the right to be free of discrimination belongs to the individual rather than any particular group. Thus, the remedy must be designed as nearly as possible to restore the victims of specific discriminatory conduct to the position they would have occupied in the absence of such conduct. Random inclusion of racial groups without individualized consideration whether the particular groups suffered from discrimination will belie a claim of remedial motivation. The lack of any effort to limit the benefits of a remedial scheme to those who actually suffered from specific discrimination will be fatal to the scheme.

(16) Constitutional Law § 87.2--Equal Protection--Classification--Judicial Review--Strict Standard of Review--Particular Classifications--Gender.

On appeal from a judgment partially upholding and partially invalidating five state affirmative action programs as contrary to state and federal principles of equal protection and Prop. 209 (Cal. Const., art. I, § 31), strict scrutiny review was applicable, even though portions of the challenged schemes operated for the benefit of women. While the federal Constitution does not require strict scrutiny for gender classifications, and the United States Supreme Court applies a more lenient level of review (skeptical scrutiny) to gender classifications, the state Constitution mandates strict scrutiny without regard to the gender of the complaining party.

(17) Civil Rights § 1--Prohibition of Affirmative Action--Intent of Voters.

In adopting Prop. 209 (Cal. Const., art. I, § 31), the voters intended, by prohibiting the state from classifying individuals by race or gender, to reinstate the interpretation of the Civil Rights Act and equal protection that had been overturned by recent case law.

(18) Civil Rights § 1--Prohibition of Affirmative Action--Relation to Equal Protection.

Prop. 209 (Cal. Const., art. I, § 31) overlaps but is not synonymous with equal protection principles. Under equal protection principles, all state actions that rely on suspect classifications must be tested under strict scrutiny, but those actions that can meet the rigid strict scrutiny test are constitutionally permissible. Prop. 209, on the other hand, prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny. To the extent the federal Constitution would permit, but not require, the state to grant preferential treatment to suspect classes, Prop. 209 precludes such action.
[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 777B et seq.; West's Key Number Digest, Constitutional Law k. 215]

(19) Constitutional Law § 87--Equal Protection--Classification--Judicial Review--Strict Standard of Review--Shift of Burden of Proof.

A party challenging a statute as violative of equal protection principles bears the initial and ultimate burden of establishing unconstitutionality. But when the plaintiff has made a sufficient showing to trigger strict scrutiny review, the burden of justification is both demanding and entirely upon the government. If the government succeeds in establishing justification for the use of a suspect classification, the burden shifts back to the complaining party to show that the statutory scheme or its application is nevertheless unconstitutional.

(20) Constitutional Law § 87.2--Equal Protection--Classification--Judicial Review--Strict Standard of Review--Particular Classifications--Race--Express Classifications.

Laws that explicitly distinguish between individuals on racial grounds fall within the core of the prohibition of the equal protection clause (U.S. Const., 14th Amend.), and no inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute. Express racial classifications are immediately suspect, are presumptively invalid, and, without more, trigger strict scrutiny review.

(21) Constitutional Law § 85--Equal Protection--Classification--Judicial Re-

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

view--Presumptions--Facial Challenge to Racial Classification.

On appeal from a judgment partially upholding and partially invalidating five state affirmative action programs as contrary to state and federal principles of equal protection and Prop. 209 (Cal. Const., art. I, § 31), plaintiff was not, simply because he was making a facial challenge to the programs, required to demonstrate a constitutional conflict in every conceivable application. Where a statutory scheme, on its face, employs a suspect classification, the scheme is, on its face, in conflict with the core prohibition of the equal protection clause (U.S. Const., 14th Amend.). It is not entitled to a presumption of validity and is instead presumed invalid. Further, the strict scrutiny standard of review is triggered. Under that standard, specificity and precision are required. The government cannot avoid constitutional conflict simply because a racial classification is part of a statutory scheme that is so broad or amorphous that it might in some instances be employed in a race-neutral manner.

(22) Constitutional Law § 87.2--Equal Protection--Classification--Judicial Review--Strict Standard of Review--Particular Classifications--Race--Race-conscious Laws.

A law need not confer a preference before strict scrutiny applies. The ultimate goal of the equal protection clause (U.S. Const., 14th Amend.) is the complete elimination of irrelevant factors such as race from governmental decision-making. Regardless of the burdens or benefits imposed by or granted under a particular law, the use of a racial classification presents significant dangers to individuals, racial groups, and society at large, and without strict scrutiny a court cannot determine whether a racial classification truly is benign or remedial. On the other hand, a law is not subject to strict scrutiny review merely because it is race conscious. Since the guarantee of equal protection is an individual right, where the operation of the law does not differ between one individual and another based on a suspect classification, strict scrutiny is not required even though the law might mention matters such as race or gender.

(23) Constitutional Law § 26--Constitutionality of Legislation--Rules of Interpretation--Construction in Favor of Constitutionality.

If a statutory provision can, by fair and reasonable interpretation, be given a meaning consistent with the requirements of the Constitution rather than in conflict with it, the statute must be so interpreted in order to preserve its validity.

(24) Civil Rights § 1--Prohibition of Affirmative Action--Laws Aimed at Increasing Competition.

With respect to a benefit or advantage, such as admission to a school of higher education, a government job, or a public contract, the cognizable interest of a competitor is in being able to compete on an equal footing without regard to the race or gender of other competitors. A competitor does not have a constitutionally cognizable interest in limiting the pool of applicants with whom he or she must compete. Therefore, outreach or recruitment efforts that are designed to broaden the pool of potential applicants without reliance on impermissible race or gender classifications are not constitutionally forbidden.

(25) Civil Rights § 1--Prohibition of Affirmative Action--Data Collection and Reporting Programs:Constitutional Law § 76--Nature and Scope of Equal Protection--Data Collection and Reporting Programs.

State monitoring programs that collect and report data concerning the participation of women and minorities in governmental programs do not violate equal protection principles. Accurate and up-to-date information is the sine qua non of intelligent, appropriate legislative and administrative action. A monitoring program designed to collect and report accurate and up-to-date information is justified by the compelling governmental need for such information. Further, so long as the program does not discriminate against or grant a preference to an individual or group, Prop. 209 (Cal. Const., art. I, § 31) is not implicated.

(26) Civil Rights § 1--Prohibition of Affirmative Action--State Lottery Commission:Lotteries § 6--State Lottery Commission.

Gov. Code, § 8880.56, which imposes affirmative action duties on the State Lottery Commission, violates principles of equal protection and Prop. 209 (Cal. Const., art. I, § 31). Even if the statute included procedures for determining that certain White males were disadvantaged, which it does not, the fact that some individuals must prove disadvantage while others are conclusively presumed to be disadvantaged based solely on race, ethnicity, and gender, establishes impermissible race, ethnicity, and gender classifications. The provisions requiring bidders and contractors to include specific plans or arrangements to utilize

subcontracts with members of favored groups do not merely attempt to equalize the opportunity to participate, they establish a preference for doing business with members of the favored groups. Further, the statute fails to identify instances of past discrimination by the commission, it randomly includes groups without individualized consideration whether those groups suffered from discrimination, and it fails to attempt to disburse the benefits of the scheme in an evenhanded manner to those who actually suffered detriment.

(27) Civil Rights § 1--Prohibition of Affirmative Action--Professional Bond Services:Constitutional Law § 94--Equal Protection--Classification--Bases of Classification--Minority and Women Business Enterprises--Professional Bond Services.

Gov. Code, § 16850 et seq., which imposes affirmative action duties with respect to professional bond services, is, with one exception, violative of equal protection principles and Prop. 209 (Cal. Const., art. I, § 31). The provisions entitle minority and women business enterprises to special notice of the sale or intention to issue bonds, but there is no mechanism by which other businesses can ensure that they receive notice. The fact that all bidders must certify their awareness of the issuing department's goals for the participation of minority and women businesses, coupled with the imposition of a duty on providers of services to make efforts to achieve those goals, only can be intended to result in preferential treatment based on race and gender. Further, the protections of the Subletting and Subcontracting Fair Practices Act (Pub. Contract Code, § 4100 et seq.) are extended to minority and women contractors for professional bond services, but not to other subcontractors. However, the reporting requirements (Gov. Code, § 16855) serve a compelling government need, may be employed without violating equal protection principles or Prop. 209, and are functionally and grammatically severable.

(28) Civil Rights § 1--Prohibition of Affirmative Action--State Civil Service:Constitutional Law § 94--Equal Protection--Classification--Bases of Classification--Race and Gender of State Civil Service Employees.

The state civil service affirmative action provisions (Gov. Code, § 19790 et seq.) are, with two exceptions, violative of equal protection principles and Prop. 209 (Cal. Const., art. I, § 31). The requirement that state agencies and departments establish, and make efforts to achieve, goals and timetables to overcome any identified underutilization of minorities and women in state agencies and departments is invalid either as an attempt to impose a specified percentage of a particular group, or as the establishment of a conclusive presumption of prior discrimination based on statistical disparities, without underlying proof. However, the portions of the scheme which provide for data collection and reporting are valid, because a determination of the underutilization of minorities and women in state service can serve legitimate and important purposes. Further, Gov. Code, § 19798, which authorizes the State Personnel Board, when it finds the existence of past discriminatory hiring practices, to adopt a process that alters layoff and reemployment procedures in order to maintain the racial and gender composition of the affected work force, is not invalid on its face, although any such process would be subject to the strictest scrutiny.

(29) Civil Rights § 1--Prohibition of Affirmative Action--Community Colleges:Constitutional Law § 94--Equal Protection--Classification--Bases of Classification--Race and Gender of Community College Employees.

Ed. Code, § 87100 et seq., which imposes affirmative action duties on public community colleges, violates principles of equal protection and Prop. 209 (Cal. Const., art. I, § 31). The establishment of overall and continuing hiring goals is an invalid preferential hiring scheme; the goal of assuring participation by some specified percentage of a particular group merely because of its race or gender is discrimination for its own sake and is facially invalid; and the requirement to create timetables to seek, hire, and promote minorities and women and to make reasonable progress in doing so, establishes impermissible racial and gender preferences. Further, the data collection and reporting aspects of the scheme, which might otherwise be upheld, are entirely bound and intermixed with the success of the preferential hiring scheme, and thus are not severable.

(30) Civil Rights § 1--Prohibition of Affirmative Action--Public Contracts--Reporting Provisions:Public Works and Contracts § 2--Contracts-- Affirmative Action Program--Reporting Requirements.

Pub. Contract Code, § 10115.5, which contains the reporting requirements of the affirmative action

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

provisions relating to public contracts (Pub. Contract Code, § 10115 et seq.), is functionally severable from the other portions of the scheme, and thus is valid and enforceable, even though the remainder of the scheme violates equal protection principles and Prop. 209 (Cal. Const., art. I., § 31).

COUNSEL

Pacific Legal Foundation, Anthony T. Caso and Sharon L. Browne for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Manuel M. Medeiros and Linda A. Cabatic, Assistant Attorneys General, Catherine M. Van Aken and Paul H. Dobson, Deputy Attorneys General, for Defendants and Respondents California State Treasurer and California State Lottery Commission.

Elise S. Rose, and Dorothy Bacskai Egel for Defendant and Respondent California State Personnel Board.

Office of Legal Services and Jeff Marschner for Defendant and Respondent General Services.

Ralph D. Black for Defendants and Respondents Thomas Nussbaum as Chancellor, etc., and Board of Governors of the California Community Colleges. ***27**

Munger, Tolles & Olson, Bradley S. Phillips, Fred A. Rowley, Jr., Elizabeth Earle Beske, Steven B. Weisburd, Jeffrey L. Bleich; ACLU Foundation of Southern California, Mark Rosenbaum; Mexican American Legal Defense and Educational Fund, Theresa Fay-Bustillos, Thomas A. Saenz; Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Eva J. Paterson, Oren M. Sellstrom, Michael Harris, Nancy Stuart; California Women's Law Center, Abby J. Leibman and Paula Pearlman; Employment Law Center, William McNeil and Julian Gross; Equal Rights Advocates, Inc., Beth Parker; Loyola Law School, Karl Manheim; ACLU Foundation of Northern California and Edward Chen for Real Parties in Interest and Appellants.

Louise H. Renne, City Attorney (San Francisco), Randy Riddel and Teresa L. Stricker, Deputy City Attorneys, for Local Public Entities as Amici Curiae on behalf of Real Parties in Interest and Appellants.

Michelle M. Yoshida for Mary Frances Berry, Christopher Edley, Jr., Yvonne Y. Lee, Elsie Meeks and Cruz Reynoso as Amici Curiae on behalf of Real Parties in Interest and Appellants.

SCOTLAND, P. J.

In this case, we consider whether five statutory programs that fall within the general rubric of "affirmative action" violate state and federal principles of equal protection and are contrary to article I, section 31, of our state Constitution, added by the adoption of Proposition 209 at the November 1996 General Election (hereafter Proposition 209).

The litigation, commenced by Governor Pete Wilson in his official capacity as Governor, challenges the statutory schemes on the ground that they impermissibly establish classifications and preferences based on race, ethnicity, and gender. The statutes at issue are Government Code section 8880.56, applicable to the State Lottery Commission; Government Code sections 16850 through 16857, applicable to the sale of state bonds; Government Code sections 19790 through 19799, applicable to the state civil service; Education Code sections 87100 through 87107, applicable to the California Community Colleges; and Public Contract Code sections 10115 through 10115.15, applicable to state contracting.

Plaintiff Ward Connerly (hereafter plaintiff) was later permitted to join the lawsuit as a taxpayer litigant, and he continued the litigation after Governor Wilson left office.

The trial court found invalid a portion of the statutory scheme applicable to the sale of government bonds and all of the statutory scheme applicable to state contracting, but otherwise rejected plaintiff's constitutional objections. ***28**

Plaintiff appeals from the judgment to the extent that it rejects his constitutional challenge to the statutory schemes. The real parties in interest cross-appeal, asserting that the data collection and reporting requirements applicable to state contracting may be severed from the remainder of the statutory scheme and upheld. In addition, respondent California Community Colleges raises the initial question whether plaintiff has standing to pursue this action.

We conclude (1) plaintiff has standing to maintain this litigation; (2) the statutory scheme applicable to the state lottery is invalid; (3) the statutory scheme applicable to the sale of government bonds is invalid, but a portion of the data collection and reporting requirements of the scheme may be severed and upheld; (4) the statutory scheme applicable to the state civil service is partially invalid, but the remainder of the scheme may be severed and upheld; (5) the statutory scheme applicable to the community colleges is invalid; and (6) a portion of the data collection and reporting requirements of the statutory scheme applicable to state contracting may be severed from the invalid portions of the scheme and upheld.

As we will explain, the statutory schemes at issue here were enacted over many years, some more than 20 years ago, during a time when the manner of applying equal protection principles to affirmative action programs was not settled. It has now been held that all racial classifications imposed by a governmental entity must be analyzed using the strict scrutiny standard of review. And, under our state Constitution, strict scrutiny applies to gender classifications. In addition, Proposition 209 imposes additional restrictions against racial and gender preferences and discriminatory actions.

Insofar as the challenged statutory schemes utilize race and gender classifications, we have reviewed them under strict scrutiny and Proposition 209, with the results that we have detailed above. Because our conclusion differs in some respects from the trial court's rulings, we shall reverse the judgment and remand with directions to enter a new judgment consistent with this opinion.

Discussion

I

(1a) We begin by rejecting the claim that plaintiff lacks standing to pursue this litigation. According to the California Community Colleges, the decision in *Cornelius v. Los Angeles County etc. Authority* (1996) 49 Cal.App.4th 1761 [57 Cal.Rptr.2d 618] "suggests that [plaintiff's] state ***29** taxpayer status should not permit him to proceed; this challenge should be deferred in favor of persons with an actual injury." We disagree.

(2) California's Constitution, unlike its federal counterpart, does not contain a "case or controversy" limitation on the judicial power. (*National Paint & Coatings Assn. v. State of California* (1997) 58 Cal.App.4th 753, 761 [68 Cal.Rptr.2d 360]; see *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560 [112 S.Ct. 2130, 2136, 119 L.Ed.2d 351, 364] [among other things, to establish a case or controversy under federal law, a plaintiff must have suffered an " 'injury in fact' " that is "concrete," "particularized," and " 'actual or imminent, not "conjectural" or "hypothetical" ' "].) Therefore, restrictive federal rules of justiciability do not necessarily apply in state courts. (*White v. Davis* (1975) 13 Cal.3d 757, 763 [120 Cal.Rptr. 94, 533 P.2d 222].) In particular, there are two related rules of standing applicable in state court actions that are contrary to the rules in federal courts-the right to maintain an action as a taxpayer, and the right to maintain an action as a citizen.

(1b) Code of Civil Procedure section 526a permits a taxpayer to bring an action to restrain or prevent an illegal expenditure of public money. No showing of special damage to a particular taxpayer is required as a requisite for bringing a taxpayer suit. (*White v. Davis, supra*, 13 Cal.3d at p. 764.) Rather, taxpayer suits provide a general citizen remedy for controlling illegal governmental activity. (*Id.* at p. 763.)

Citizen suits may be brought without the necessity of showing a legal or special interest in the result where the issue is one of public right and the object is to procure the enforcement of a public duty. (*Green v. Obledo* (1981) 29 Cal.3d 126, 144 [172 Cal.Rptr. 206, 624 P.2d 256].) Citizen suits promote the policy of guaranteeing citizens the opportunity to ensure that governmental bodies do not impair or defeat public rights. (*Ibid.*)

Taxpayer suits and citizen suits are closely related concepts of standing. (See *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439 [261 Cal.Rptr. 574, 777 P.2d 610].) The chief difference is a taxpayer suit seeks preventative relief, to restrain an illegal expenditure, while a citizen suit seeks affirmative relief, to compel the performance of a public duty. (*Ibid.*) Where standing appears under either rule, the action may proceed regardless of the label applied by the plaintiff. (*Ibid.*)

Statutorily enacted affirmative action programs are matters of intense public concern. (*Department of*

Corrections v. State Personnel Bd. (1997) 59 Cal.App.4th 131, 143 [69 Cal.Rptr.2d 34].) Hence, a claim that such a program violates principles of equal protection and Proposition 209 is ***30** precisely the type of claim to which citizen and taxpayer standing rules apply.

Moreover, plaintiff's pursuit of this litigation is consistent with the purpose of a standing requirement, which is to ensure that courts address actual controversies between parties who have sufficient adverse interests to press their case with vigor. (*Common Cause v. Board of Supervisors, supra*, 49 Cal.3d at p. 439.) This case has been litigated intensely, and there is no danger here that the court will be misled by the failure of the parties to adequately explore and argue the issues. (*Van Atta v. Scott* (1980) 27 Cal.3d 424, 450 [166 Cal.Rptr. 149, 613 P.2d 210].)

The California Community Colleges suggest that we should deny standing to plaintiff because application of the challenged statutory schemes will produce potential plaintiffs with personal beneficial interests in the matter who will be entitled to pursue their own actions. However, "[n]umerous decisions have affirmed a taxpayer's standing to sue despite the existence of potential plaintiffs who might also have had standing to challenge the subject actions or statutes." (*Van Atta v. Scott, supra*, 27 Cal.3d at pp. 447-448, fn. omitted.)

Citing the decision in *Cornelius v. Los Angeles County etc. Authority, supra*, 49 Cal.App.4th 1761, 1774-1779, the California Community Colleges argue that we should apply a restrictive definition of "taxpayer" in order to deny taxpayer standing to plaintiff. But that case involved an action against a local government entity by a person who lacked standing as an individual, who was not a resident of the county and did not pay property taxes to the county, and whose state taxes bore only a tangential relationship to the challenged program. Whatever might be the merits of indulging in a restrictive definition of "taxpayer" in such circumstances, the decision is inapposite.

(3) At oral argument, respondents added to their argument on the issue of standing. They assert that this proceeding is in mandate, that mandate addresses conduct rather than the validity of legislation, and that plaintiff cannot proceed in mandate without introducing proof that respondents are in fact engaging in unconstitutional behavior. We reject this contention for three separate reasons. First, it was raised for the first time at oral argument. (*Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1138, fn. 6 [269 Cal.Rptr. 844].) Second, mandate can be used to test the constitutional validity of a legislative enactment. (*Floresta, Inc. v. City Council* (1961) 190 Cal.App.2d 599, 612 [12 Cal.Rptr. 182]; see, e.g., *Hollman v. Warren* (1948) 32 Cal.2d 351, 357, 360 [196 P.2d 562]; ***31***Driving Sch. Assn. of Cal. v. San Mateo Union High Sch. Dist.* (1992) 11 Cal.App.4th 1513, 1517, 1521-1525 [14 Cal.Rptr.2d 908].) Third, to the extent respondents suggest that we should deny plaintiff standing to challenge the statutory schemes because agencies subject to those schemes may perform their duties in a constitutional manner by either ignoring the statutory directives or by engaging in a strained interpretation thereof, the argument overlooks a critical principle of law. As we will explain more fully in subsequent portions of this opinion, an administrative agency lacks the authority to cure a facially unconstitutional statute by refusing to enforce it as written.

Here, plaintiff challenges statutory schemes enacted by the Legislature for application throughout the state and which as written, and unless restrained, will result in the expenditure of state funds consistent with their application. Plaintiff's status as a state taxpayer is sufficient to confer taxpayer standing in these circumstances.

II

Before we decide whether the statutory programs challenged by plaintiff violate state and federal principles of equal protection and are contrary to Proposition 209, it is helpful to provide, at the outset, an overview of the rules of law that we must apply in addressing plaintiff's attack on the statutes.

A

The equal protection clause of the Fourteenth Amendment to the United States Constitution is succinct: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." California's Constitution is equally terse: "A person may not be ... denied equal protection of the laws." (Cal. Const., art. I, § 7, subd. (a).)

(4)**(See fn. 1.)**, (5) Although our state constitutional guarantee is independent of the federal guar-

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

antee, in the context of this case it is, with one exception, applied in a manner identical with the federal guarantee. (*DeRonde v. Regents of University of California* (1981) 28 Cal.3d 875, 889-890 [172 Cal.Rptr. 677, 625 P.2d 220].) [FN1] The one exception is with respect to gender. Under federal law, distinctions based on gender are ***32** subjected to heightened judicial scrutiny, but gender is not a suspect classification, as is race. (See *United States v. Virginia* (1996) 518 U.S. 515, 532 [116 S.Ct. 2264, 2275, 135 L.Ed.2d 735, 751].) Under California law, classifications based on gender are considered suspect for purposes of equal protection analysis. (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 37 [219 Cal.Rptr. 133, 707 P.2d 195]; *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 20 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351].)

FN1 The California Supreme Court considered equal protection challenges to affirmative action programs in *Bakke v. Regents of University of California* (1976) 18 Cal.3d 34 [132 Cal.Rptr. 680, 553 P.2d 1152] (hereafter *Bakke I*), *Price v. Civil Service Com.* (1980) 26 Cal.3d 257 [161 Cal.Rptr. 475, 604 P.2d 1365] (hereafter *Price*), and *DeRonde v. Regents of University of California*, *supra*, 28 Cal.3d 875 (hereafter *DeRonde*). Those decisions were issued prior to the United States Supreme Court's development of applicable constitutional principles in opinions that we will discuss. Thus, when *Bakke I*, *Price*, and *DeRonde* were decided, it had not been established, as it now has, that strict scrutiny review applies to every racial classification regardless of whether it may be described as benign or remedial. Also, the California Supreme Court did not apply strict scrutiny in *Price* and *DeRonde* and, to that extent, those decisions are inconsistent with current equal protection jurisprudence. It is axiomatic that California's Constitution cannot permit the state to engage in conduct forbidden by the federal equal protection clause, and in *Price* (26 Cal.3d at pp. 284-285) and *DeRonde* (28 Cal.3d at p. 890), the court said that our state equal protection guarantee imposes no greater restrictions on affirmative action than are imposed by the federal Constitution. It follows that, in this context, federal and state equal protection standards are identical and federal standards are controlling here.

Following its adoption, the federal equal protection clause "was relegated to decades of relative desuetude" while the courts adjudicated rights under notions of substantive due process. (*University of California Regents v. Bakke* (1978) 438 U.S. 265, 291 [98 S.Ct. 2733, 2743-2744, 57 L.Ed.2d 750, 772], lead opn. of Powell J. (hereafter *Bakke II*).) With the demise of "the era of substantive due process," the equal protection clause began to attain a "measure of vitality." (*Id.* at pp. 291-292 [98 S.Ct. at p. 2749, 57 L.Ed.2d at p. 772].) In the early development of principles of equal protection, the landmark decisions arose in response to actions that discriminated against minorities, most often African-Americans. (*Id.* at p. 294 [98 S.Ct. at p. 2750, 57 L.Ed.2d at p. 773].)

(6) Development of equal protection jurisprudence established that the constitutional guarantee applies to governmental classifications, whether they be legislative, executive, judicial, or administrative. Legislative classification is the act of specifying who will and who will not come within the operation of a particular law. (*Dare v. Bd. of Medical Examiners* (1943) 21 Cal.2d 790, 802 [136 P.2d 304]; *In re Cardinal* (1915) 170 Cal. 519, 521 [150 P. 348]; *County of Los Angeles v. Hurlbut* (1941) 44 Cal.App.2d 88, 93 [111 P.2d 963].)

A legislative classification satisfies equal protection of law so long as persons similarly situated with respect to the legitimate purpose of the law receive like treatment. (*Brown v. Merlo* (1973) 8 Cal.3d 855, 861 [106 Cal.Rptr. 388, 506 P.2d 212, 66 A.L.R.3d 505].) ***33**

Legislative classifications generally are entitled to judicial deference, are presumptively valid, and may not be rejected by the courts unless they are palpably unreasonable. (*Asbury Hospital v. Cass County* (1945) 326 U.S. 207, 215 [66 S.Ct. 61, 65, 90 L.Ed. 6, 13]; *County of L.A. v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 392 [196 P.2d 773].) However, judicial deference does not extend to laws that employ suspect classifications, such as race. Because suspect classifications are pernicious and are so rarely relevant to a legitimate governmental purpose (*Richmond v. J. A. Croson Co.* (1989) 488 U.S. 469, 505 [109 S.Ct. 706, 727-728, 102 L.Ed.2d 854, 889] (hereafter *Croson*)), they are subjected to strict judicial scrutiny; i.e., they may be upheld only if they are shown to be ne-

cessary for furtherance of a compelling state interest and they address that interest through the least restrictive means available. (*Bernal v. Fainter* (1984) 467 U.S. 216, 219-220 [104 S.Ct. 2312, 2315-2316, 81 L.Ed.2d 175, 179-180]; *Weber v. City Council* (1973) 9 Cal.3d 950, 958 [109 Cal.Rptr. 553, 513 P.2d 601].)

With the advent of affirmative action programs, it was inevitable that so-called reverse discrimination cases would come before the courts. In a series of cases, the United States Supreme Court has addressed the question.

In *Bakke II*, *supra*, 438 U.S. 265 [98 S.Ct. 2733, 57 L.Ed.2d 750], the court affirmed a decision of the California Supreme Court (*Bakke I*, *supra*, 18 Cal.3d 34), insofar as it held a race-based admissions program unlawful, but reversed insofar as it precluded the school from giving any consideration to race in the admissions process.

In *Wygant v. Jackson Board of Education* (1986) 476 U.S. 267 [106 S.Ct. 1842, 90 L.Ed.2d 260] (hereafter *Wygant*), the court invalidated a public school layoff scheme under which nonminority teachers were laid off while minority teachers with less seniority, including probationary teachers, were retained.

In *Croson, supra*, 488 U.S. 469 [109 S.Ct. 706, 102 L.Ed.2d 854], the court invalidated a city contract scheme that provided a "set-aside" for minority business enterprises.

In *Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200 [115 S.Ct. 2097, 132 L.Ed.2d 158] (hereafter *Adarand*), the court held that, pursuant to the equal protection component of the Fifth Amendment, a federal contracting scheme that employed race-based presumptions must be judged under the same strict scrutiny standards applicable to state and local governments.

Then, in a series of cases following the 1990 census, the court found various race-based congressional reapportionment schemes to be invalid. ***34** (*Shaw v. Hunt* (1996) 517 U.S. 899 [116 S.Ct. 1894, 135 L.Ed.2d 207]; *Shaw v. Reno* (1993) 509 U.S. 630 [113 S.Ct. 2816, 125 L.Ed.2d 511]; see also *Hunt v. Cromartie* (1999) 526 U.S. 541 [119 S.Ct. 1545, 143 L.Ed.2d 731]; *Bush v. Vera* (1996) 517 U.S. 952 [116 S.Ct. 1941, 135 L.Ed.2d 248]; *Miller v. Johnson* (1995) 515 U.S. 900 [115 S.Ct. 2475, 132 L.Ed.2d 762].)

The opinions filed in those cases demonstrate the difficulty that the United States Supreme Court has had in applying equal protection principles to affirmative action programs. The cases generally have resulted in multiple opinions from the justices. Although the court has not upheld any of the programs under consideration in those cases, the various opinions indicate that race-based governmental programs are not per se invalid but that, to be constitutionally valid, they must withstand the stringent test of strict judicial scrutiny.

From those opinions, we can distill certain principles that have been endorsed by a majority of the United States Supreme Court and must guide our consideration of the validity of the statutory schemes involved here. [FN2]

FN2 In providing citations for the principles we derive from the decisions of the United States Supreme Court, we will indicate whether the particular point is drawn from a majority opinion, plurality opinion, lead opinion, or a concurring or dissenting opinion. In some instances, the court's decision was announced through a lead opinion that obtained a concurrence of a majority in part but with portions representing a plurality. We indicate the portion of the opinion from which the point is taken.

(7) The equal protection clause recognizes that distinctions between persons based solely upon their ancestry " 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' [Citation.]" (*Shaw v. Reno*, *supra*, 509 U.S. at p. 643 [113 S.Ct. at p. 2824, 125 L.Ed.2d at p. 526] (maj. opn.); *Bakke II*, *supra*, 438 U.S. at pp. 290-291 [98 S.Ct. at pp. 2748-2749, 57 L.Ed.2d at p. 771] (lead opn.).) Accordingly, the core purpose of the equal protection clause is to eliminate governmentally sanctioned racial distinctions. (*Croson, supra*, 488 U.S. at p. 495 [109 S.Ct. at pp. 722-723, 102 L.Ed.2d at p. 883] (plur. opn.); *Wygant, supra*, 476 U.S. at p. 277 [106 S.Ct. at pp. 1848-1849, 90 L.Ed.2d at p. 270] (plur. opn.).) Where the government proposes to assure participation of "some specified percentage of a

particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." (*Bakke II, supra,* at p. 307 [98 S.Ct. at p. 2757, 57 L.Ed.2d at p. 782] (lead opn.); see also *Croson, supra,* at p. 497 [109 S.Ct. at pp. 723-724, 102 L.Ed.2d at p. 884] (plur. opn.).)

The duty of governmental entities to "eliminate every vestige of racial segregation and discrimination," and their ultimate duty to " 'do away with ***35** all governmentally imposed discriminations based on race,' " are not always harmonious. (*Wygant, supra,* 476 U.S. at p. 277 [106 S.Ct. at p. 1848, 90 L.Ed.2d at p. 270] (plur. opn.).) (8) Because the rights guaranteed by the Fourteenth Amendment are not absolute, government may be permitted, in an appropriate case, to make remedial use of racial classifications. (*Adarand, supra,* 515 U.S. at p. 237 [115 S.Ct. at pp. 2117-2118, 132 L.Ed.2d at p. 188] (maj. opn.).) However, under long-standing principles of equal protection, governmental distinctions based on race are considered inherently suspect and are subjected to strict scrutiny. (*Adarand, supra,* 515 U.S. at pp. 223, 227 [115 S.Ct. at pp. 2110-2111, 2112-2113, 132 L.Ed.2d at pp. 179, 182] (maj. opn.); *Shaw v. Reno, supra,* 509 U.S. at pp. 643-644 [113 S.Ct. at pp. 2824-2825, 125 L.Ed.2d at p. 526] (maj. opn.); *Croson, supra,* 488 U.S. at p. 494 [109 S.Ct. at p. 722, 102 L.Ed.2d at p. 882] (plur. opn.).)

The strict scrutiny standard of review applies regardless of whether a law is claimed to be benign or remedial (see *Shaw v. Reno, supra,* at p. 653 [113 S.Ct. at p. 2830, 125 L.Ed.2d at p. 533] (maj. opn.); *Adarand, supra,* at p. 226 [115 S.Ct. at p. 2112, 132 L.Ed.2d at p. 181] (maj. opn.)), regardless of the race of those burdened or benefited by a particular classification (*Shaw v. Reno, supra,* at pp. 650-651 [113 S.Ct. at pp. 2828-2829, 125 L.Ed.2d at p. 531] (maj. opn.); *Croson, supra,* at p. 494 [109 S.Ct. at p. 722, 102 L.Ed.2d at p. 882] (plur. opn.)), and regardless of whether the law may be said to benefit and burden the races equally (*Shaw v. Reno, supra,* at p. 651 [113 S.Ct. at p. 2829, 125 L.Ed.2d at p. 531] (maj. opn.)).

(9) And the strict scrutiny standard of review does not depend on semantic distinctions, such as "goal" rather than "quota." What is constitutionally significant is that the government has drawn a line on the basis of race or has engaged in a purposeful use of racial criteria. (*Bakke II, supra,* 438 U.S. at p. 289, & fn. 27 [98 S.Ct. at p. 2747, 57 L.Ed.2d at p. 770] (lead opn.).) A constitutional injury occurs whenever the government treats a person differently because of his or her race. (*Adarand, supra,* 515 U.S. at pp. 211, 229-230 [115 S.Ct. at pp. 2104, 2105, 2113-2114, 132 L.Ed.2d at pp. 171, 183] (maj. opn.).)

(10) In applying the strict scrutiny test, it must be remembered that the rights created by the equal protection clause are not group rights; they are personal rights which are guaranteed to the individual. (*Adarand, supra,* 515 U.S. at p. 227 [115 S.Ct. at pp. 2112-2113, 132 L.Ed.2d at p. 182] (maj. opn.); *Bakke II, supra,* 438 U.S. at p. 289 [98 S.Ct. at pp. 2747-2748, 57 L.Ed.2d at p. 770] (lead opn.).) Thus, where an individual is denied an opportunity or benefit or otherwise suffers a detriment as a result of a race-based governmental scheme, it is no answer that others of his or her race secured the opportunity or benefit or avoided the detriment. ***36**

(11) When a governmental scheme uses a racial classification, the action is not entitled to the presumption of constitutionality which normally accompanies governmental acts. (*Croson, supra,* 488 U.S. at p. 500 [109 S.Ct. at p. 725, 102 L.Ed.2d at p. 886] (maj. opn.).) "A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists," and "blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." (*Id.* at pp. 500-501 [109 S.Ct. at p. 725, 102 L.Ed.2d at p. 886] (maj. opn.).)

A racial classification is presumptively invalid, and the burden is on the government to demonstrate extraordinary justification. (*Shaw v. Reno, supra,* 509 U.S. at pp. 643-644 [113 S.Ct. at p. 2824-2825, 125 L.Ed.2d at p. 526]. (maj. opn.); *Bakke II, supra,* 438 U.S. at pp. 305, 311 [98 S.Ct. at pp. 2756, 2759, 57 L.Ed.2d at pp. 781, 784] (lead opn.).) In order to justify a racial classification, the government " 'must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary ... to the accomplishment" of its purpose or the safeguarding of its interest.' [Citations.]" (*Bakke II, supra,* at p. 305 [98 S.Ct. at p. 2756, 57 L.Ed.2d at p. 781] (lead opn.).)

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

Judicial review focuses on whether the racial classification is justified by a compelling governmental interest and whether the means chosen are narrowly tailored to serve that interest. (*Wygant, supra*, 476 U.S. at p. 274 [106 S.Ct. at p. 1847, 90 L.Ed.2d at p. 268] (lead opn.).)

(12) Under the strict scrutiny test, governmental specificity and precision are demanded. The mere recitation of a benign or legitimate purpose is entitled to little or no weight. (*Croson, supra*, 488 U.S. at p. 500 [109 S.Ct. at p. 725, 102 L.Ed.2d at p. 886] (maj. opn.).) "Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." (*Id.* at p. 500 [109 S.Ct. at p. 725, 102 L.Ed.2d at p. 886] (maj. opn.).) Moreover, generalized assertions of purpose are insufficient since they provide little or no guidance for the legislative body to narrowly tailor its use of a suspect classification and because they inhibit judicial review under the strict scrutiny test. (*Id.* at p. 498 [109 S.Ct. at p. 724, 102 L.Ed.2d at p. 885] (maj. opn.).) Because racial distinctions " 'so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.' [Citation.]" (*Id.* at p. 505 [109 S.Ct. at pp. 727-728, 102 L.Ed.2d at p. 889] (maj. opn.).)

Accordingly, before embarking upon a program that utilizes racial classifications, a governmental entity must identify its purpose with some degree ***37** of specificity (*Croson, supra*, 488 U.S. at p. 504 [109 S.Ct. at p. 727, 102 L.Ed.2d at p. 889] (maj. opn.)) and must have convincing evidence that race-based remedial action is necessary. (*Shaw v. Hunt, supra*, 517 U.S. at p. 910 [116 S.Ct. at p. 1903, 135 L.Ed.2d at p. 222] (maj. opn.); *Wygant, supra*, 476 U.S. at pp. 277-278 [106 S.Ct. at pp. 1848-1849, 90 L.Ed.2d at p. 271] (plur. opn.).) Absent a prior determination of necessity, supported by convincing evidence, the governmental entity will be unable to narrowly tailor the remedy, and a reviewing court will be unable to determine whether the race-based action is justified. (*Croson, supra*, at p. 510 [109 S.Ct. at pp. 730-731, 102 L.Ed.2d at p. 893] (plur. opn.); *Wygant, supra*, at p. 278 [106 S.Ct. at p. 1849, 90 L.Ed.2d at p. 271] (plur. opn.).)

(13) Once a compelling interest is shown, the inquiry focuses on the means chosen to address the interest. It is not enough that the means chosen to accomplish the purpose are reasonable or efficient. (*Wygant, supra*, 476 U.S. at p. 279 [106 S.Ct. at pp. 1849-1850, 90 L.Ed.2d at p. 272] (plur. opn.).) Only the most exact connection between justification and classification will suffice. (*Adarand, supra*, 515 U.S. at p. 236 [115 S.Ct. at p. 2117, 132 L.Ed.2d at p. 188] (maj. opn.); *Wygant, supra*, at p. 280 [106 S.Ct. at p. 1850, 90 L.Ed.2d at p. 273] (plur. opn.).) The classification must appear necessary rather than convenient, and the availability of nonracial alternatives-or the failure of the legislative body to consider such alternatives-will be fatal to the classification. (*Croson, supra*, 488 U.S. at p. 507 [109 S.Ct. at p. 729, 102 L.Ed.2d at p. 891] (maj. opn.).) In addition, the use of a racial classification must be limited in scope and duration to that which is necessary to accomplish the legislative purpose. (*Croson, supra*, at p. 510 [109 S.Ct. at pp. 730-731, 102 L.Ed.2d at p. 893] (plur. opn.).) For example, in *Wygant*, it was asserted that a school board's interest in providing role models for its minority students could justify a race-based layoff scheme. The plurality opinion noted that nondiscriminatory hiring practices would in time achieve the desired result, while discriminatory practices based upon the role model theory would have no logical stopping point and could even lead to the thoroughly discredited separate-but-equal educational system. (*Wygant, supra*, at pp. 274-276 [106 S.Ct. at pp. 1847-1848, 90 L.Ed.2d at pp. 269-270] (plur. opn.).)

"A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." (*Shaw v. Hunt, supra*, 517 U.S. at p. 909 [116 S.Ct. at p. 1902, 135 L.Ed.2d at p. 221] (maj. opn.).) (14) However, it bears repeating that, in order to rise to the level of a compelling state interest, the use of racial classifications to remedy specific discrimination must meet two criteria. ***38**

First, the discrimination must be identified with some degree of specificity. (*Shaw v. Hunt, supra*, 517 U.S. at p. 909 [116 S.Ct. at pp. 1902-1903, 135 L.Ed.2d at p. 221] (maj. opn.).) A generalized assertion that there has been discrimination in a particular industry or region is insufficient (*ibid.*; *Croson, supra*, 488 U.S. at pp. 498-499 [109 S.Ct. at pp.

724-725, 102 L.Ed.2d at p. 885] (maj. opn.)), and mere statistical anomalies, without more, do not permit a governmental entity to employ racial classifications. (*Croson, supra*, at pp. 501-503 [109 S.Ct. at pp. 725-727, 102 L.Ed.2d at pp. 887-888] (maj. opn.).) "[T]he sorry history of both private and public discrimination in this country" (*id.* at p. 499 [109 S.Ct. at p. 724, 102 L.Ed.2d at p. 885] (maj. opn.)) does not justify an effort by government to alleviate, by use of racial distinctions, the effects of societal discrimination generally. (*Ibid.*; *Shaw v. Hunt, supra*, at p. 909 [116 S.Ct. at pp. 1902-1903, 135 L.Ed.2d at p. 221] (maj. opn.).) And "a racial classification cannot withstand strict scrutiny based upon speculation about what 'may have motivated' the legislature.... [T]he State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification ...." (*Shaw v. Hunt, supra*, at p. 908, fn. 4 [116 S.Ct. at p. 1902, 135 L.Ed.2d at p. 221] (maj. opn.).)

Second, "the institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that [race-based] remedial action was necessary, '*before* it embarks on an affirmative-action program,' [citation]." (*Shaw v. Hunt, supra*, 517 U.S. at p. 910 [116 S.Ct. at p. 1903, 135 L.Ed.2d at p. 222] (maj. opn.), original italics; *Croson, supra*, 488 U.S. at p. 504 [109 S.Ct. at p. 727, 102 L.Ed.2d at p. 889] (maj. opn.).) A governmental entity cannot satisfy this criterion simply by conceding past discrimination. (*Wygant, supra*, 476 U.S. at p. 278, fn. 5 [106 S.Ct. at p. 1849, 90 L.Ed.2d at pp. 271-272] (plur. opn.).) While in an appropriate case, statistical analysis may be valuable evidence, governmental entities do not have "license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor." (*Croson, supra*, at p. 499 [109 S.Ct. at p. 725, 102 L.Ed.2d at p. 885] (maj. opn.).)

(15) Moreover, in order to be lawful, the governmental use of racial classification to redress specific discrimination must *actually* be remedial. (*Shaw v. Hunt, supra*, 517 U.S. at p. 915 [116 S.Ct. at p. 1905, 135 L.Ed.2d at p. 225] (maj. opn.).) In this respect, the remedy must be created with the awareness that the right to be free of discrimination belongs to the individual rather than any particular group. (*Id.* at p. 917 [116 S.Ct. at p. 1906, 135 L.Ed.2d at p. 226] (maj. opn.).) Thus, the remedy must be designed as nearly as possible to restore the victims of specific discriminatory conduct to the position they would have occupied in the absence of such conduct. ***39**(*Id.* at p. 915 [116 S.Ct. at p. 1905, 135 L.Ed.2d at p. 225] (maj. opn.).) Random inclusion of racial groups without individualized consideration whether the particular groups suffered from discrimination will belie a claim of remedial motivation. (*Croson, supra*, 488 U.S. at p. 506 [109 S.Ct. at p. 728, 102 L.Ed.2d at p. 890] (maj. opn.); *Wygant, supra*, 476 U.S. at p. 284, fn. 13 [106 S.Ct. at p. 1852, 90 L.Ed.2d at p. 275] (plur. opn.).) The lack of any effort to limit the benefits of a remedial scheme to those who actually suffered from specific discrimination will be fatal to the scheme. (*Croson, supra*, at p. 508 [109 S.Ct. at pp. 729-730, 102 L.Ed.2d at p. 891] (maj. opn.).)

B

(16) Respondent California Community Colleges argues that, insofar as the challenged statutory schemes operate for the benefit of women, they are subject to intermediate scrutiny rather than the strict scrutiny applicable to racial classifications.

The United States Supreme Court has not held gender to be a suspect classification, like race or national origin. Instead, the court applies "skeptical scrutiny" to gender classifications. (*United States v. Virginia, supra*, 518 U.S. at p. 531 [116 S.Ct. at pp. 2274-2275, 135 L.Ed.2d at p. 750].) The linguistic formulation of skeptical scrutiny closely parallels that of strict scrutiny. Thus, there is a strong presumption that gender classifications are invalid and they must be carefully inspected by the courts. (*Id.* at pp. 532-533 [116 S.Ct. at pp. 2275-2276, 135 L.Ed.2d at p. 751].) The burden of justification is demanding, is entirely upon the government, and must be exceedingly persuasive. (*Ibid.*) The government must show that the challenged classification serves important governmental objectives and that the means employed are substantially related to the achievement of those objectives. (*Id.* at p. 533 [116 S.Ct. at pp. 2275-2276, 135 L.Ed.2d at p. 751].) "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation," and "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." (*Ibid.*) While this standard is similar to the strict scrutiny standard applicable to racial classifications, it is recognized as a somewhat more lenient standard of review. (See *Bakke II, supra*, 438 U.S. at pp. 302-303 [98 S.Ct. at

pp. 2754-2755, 57 L.Ed.2d at p. 779] (lead opn.).)

However, our state Supreme Court has concluded that, under the equal protection guarantee of California's Constitution, gender is a suspect classification subject to strict scrutiny review. (*Koire v. Metro Car Wash, supra,* 40 Cal.3d at p. 37; *Sail'er Inn, Inc. v. Kirby, supra,* 5 Cal.3d at p. 20.)

In view of the difference between state and federal equal protection principles in this respect, respondent California Community Colleges would ***40** have us establish a two-level system of equal protection review, with the level of scrutiny dependent upon the gender of the complaining party. But to do so would ignore the guarantee of equal protection that applies to judicial actions as well as to those of the legislative and executive branches. (See *J. E. B. v. Alabama ex rel. T. B.* (1994) 511 U.S. 127, 129, 140 [114 S.Ct. 1419, 1421-1422, 1426-1427, 128 L.Ed.2d 89, 97, 104].)

The United States Supreme Court consistently has rejected the notion that the degree of equal protection accorded an individual can be based upon the person's race or gender. As Justice Powell explained, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to [another] .... If both are not accorded the same protection, then it is not equal." (*Bakke II, supra,* 438 U.S. at pp. 289-290 [98 S.Ct. at p. 2748, 57 L.Ed.2d at pp. 770-771] (lead opn.).) The fact that a statutory scheme "discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review." (*Mississippi University for Women v. Hogan* (1982) 458 U.S. 718, 723 [102 S.Ct. 3331, 3335-3336, 73 L.Ed.2d 1090, 1097-1098]; see also *J. E. B. v. Alabama ex rel. T. B., supra,* 511 U.S. at p. 141 [114 S.Ct. at pp. 1427-1428, 128 L.Ed.2d at pp. 104-105].)

We cannot establish different levels of equal protection for men and women out of gender prejudice and/or gender paternalism. No justification for a two-level, gender-based standard of review has been offered, and we perceive none. In fact, in rejecting a claim that it is permissible to offer promotional discounts which favor women, the California Supreme Court concluded "public policy in California mandates the *equal* treatment of men and women." (*Koire v. Metro Car Wash, supra,* 40 Cal.3d at p. 37, original italics.) [FN3]

FN3 *Koire v. Metro Car Wash, supra,* 40 Cal.3d 24, was not a constitutional case. It involved a claim by a male that "Ladies' Day" promotions by private businesses violate the statutory Unruh Civil Rights Act (Civ. Code, § 51). Nevertheless, an exceedingly persuasive justification for unequal treatment based upon gender would have to be derived from public policy, and the decision in *Koire v. Metro Car Wash* forecloses the possibility of a state public policy supporting unequal treatment of men and women.

Consequently, we conclude that, while the federal Constitution does not require strict scrutiny for gender classifications, our state Constitution mandates strict scrutiny without regard to the gender of the complaining party.

C

In addition to equal protection principles, we must apply the dictates of Proposition 209. ***41**

Article I, section 31, subdivision (a) of the Constitution of our state provides: "The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Subdivision (f) provides that, "[f]or the purposes of this section, 'State' shall include, but not necessarily be limited to, the State itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the State." [FN4]

FN4 The remaining portions of article I, section 31 of our state Constitution are:

"(b) This section shall apply only to action taken after the section's effective date.

"(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

> to the normal operation of public employment, public education, or public contracting.
>
> "(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.
>
> "(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State. [¶] ... [¶]
>
> "(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.
>
> "(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section."

In *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537 [101 Cal.Rptr.2d 653, 12 P.3d 1068] (hereafter *Hi-Voltage*), the California Supreme Court construed Proposition 209 in accordance with the ordinary meaning of its words. (*Id.* at p. 559.) To discriminate means " 'to make distinctions in treatment; show partiality (*in favor of*) or prejudice (*against*)' [citation] ...." (*Id.* at pp. 559-560.) Giving preferential treatment "means giving 'preference,' which is 'a giving of priority or advantage to one person ... over others.' [Citation.]" (*Id.* at p. 560, fn. omitted.)

(17) In adopting Proposition 209, the voters "intended to reinstitute the interpretation of the Civil Rights Act and equal protection that predated [the decisions in *Steelworkers v. Weber* (1979) 443 U.S. 193 [99 S.Ct. 2721, 61 L.Ed.2d 480], *Price*, *supra*, 26 Cal.3d 257, and other cases]," by prohibiting the state from classifying individuals by race or gender. (*Hi-Voltage*, *supra*, 24 Cal.4th at p. 561.)

The court in *Hi-Voltage* addressed the city's minority business enterprise and women business enterprise (MBE/WBE) contracting scheme. Under that ***42** plan, a contractor bidding to do business with the city was required to either achieve a certain MBE/WBE subcontractor participation level or show that it complied with certain outreach requirements. The court noted: "The outreach component requires contractors to treat MBE/WBE subcontractors more advantageously by providing them notice of bidding opportunities, soliciting their participation, and negotiating for their services, none of which they must do for non-MBE's/WBE's. The fact prime contractors are not precluded from contacting non-MBE's/WBE's is irrelevant. The relevant constitutional consideration is that they are compelled to contact MBE's/WBE's, which are thus accorded preferential treatment within the meaning of section 31." (*Hi-Voltage*, *supra*, 24 Cal.4th at p. 562.)

In holding the program to be invalid, the court observed: "The participation component authorizes or encourages what amounts to discriminatory quotas or set-asides, or at least raceand sex-conscious numerical goals. [Citations.] A participation goal differs from a quota or set-aside only in degree; by whatever label, it remains 'a line drawn on the basis of race and ethnic status' as well as sex." (*Hi-Voltage*, *supra*, 24 Cal.4th at pp. 562-563.)

Although finding the city's outreach program unconstitutional under Proposition 209, the court acknowledged "that outreach may assume many forms, not all of which would be unlawful." (*Hi-Voltage*, *supra*, 24 Cal.4th at p. 565.) "Plainly, the voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification." (*Ibid.*) However, the court expressed "no opinion regarding the permissible parameters of such efforts." (*Ibid.*)

(18) It can be seen that Proposition 209 overlaps, but is not synonymous with, the principles of equal protection that we have described in part II. A., *ante*. Under equal protection principles, all state actions that rely upon suspect classifications must be tested under strict scrutiny, but those actions which can meet the

rigid strict scrutiny test are constitutionally permissible. Proposition 209, on the other hand, prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny.

In this respect, the distinction between what the federal Constitution permits and what it requires becomes particularly relevant. (See *Shaw v. Reno*, *supra*, 509 U.S. at p. 654 [113 S.Ct. at pp. 2830-2831, 125 L.Ed.2d at p. 533] (maj. opn.).) To the extent the federal Constitution would permit, but not require, the state to grant preferential treatment to suspect classes, ***43** Proposition 209 precludes such action. (*Hi-Voltage*, *supra*, 24 Cal.4th at p. 567 [Prop. 209 contains no compelling state interest exception].) [FN5]

FN5 The trial court indicated that where federal equal protection principles permit a state entity to utilize race and gender classifications, Proposition 209 must yield. This confuses what the federal Constitution permits with what it requires. Proposition 209 yields where federal law requires the state to engage in particular action, but not where it would merely permit such action.

D

(19) The complaining party bears the initial and ultimate burden of establishing unconstitutionality. (*Wygant*, *supra*, 476 U.S. at pp. 277-278 [106 S.Ct. at pp. 1848-1849, 90 L.Ed.2d at p. 271] (plur. opn.).) But when the plaintiff has made a sufficient showing to trigger strict scrutiny review, the burden of justification is both demanding and entirely upon the government. (*Bakke II*, *supra*, 438 U.S. at p. 306 [98 S.Ct. at pp. 2756-2757, 57 L.Ed.2d at p. 781] (lead opn.); *Sail'er Inn, Inc. v. Kirby*, *supra*, 5 Cal.3d at pp. 16-17; see also *United States v. Virginia*, *supra*, 518 U.S. at p. 533 [116 S.Ct. at p. 2275, 135 L.Ed.2d at p. 751] [under intermediate scrutiny applicable under federal law to gender classifications, "[t]he burden of justification is demanding and it rests entirely on the State"].) If the government succeeds in establishing justification for the use of a suspect classification, the burden shifts back to the complaining party to show that the statutory scheme or its application is nevertheless unconstitutional. [FN6]

FN6 We are not here concerned with the showing that might be required of the complaining party in such an instance because plaintiff has gone no further than to assert that the statutory schemes, on their face, entail unjustified use of racial and gender classifications.

In this case, plaintiff employs the easiest means by which strict scrutiny is triggered. (20) Laws that explicitly distinguish between individuals on racial grounds fall within the core of the prohibition of the equal protection clause and "[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute." (*Shaw v. Reno*, *supra*, 509 U.S. at p. 642 [113 S.Ct. at p. 2824, 125 L.Ed.2d at p. 525] (maj. opn.).) Express racial classifications are immediately suspect, are presumptively invalid, and, without more, trigger strict scrutiny review. (*Id.* at pp. 642-644 [113 S.Ct. at pp. 2824-2825, 125 L.Ed.2d at pp. 525-526] (maj. opn.); see also *Adarand*, *supra*, 515 U.S. at p. 227 [115 S.Ct. at pp. 2112-2113, 132 L.Ed.2d at p. 182] (maj. opn.); *Bakke II*, *supra*, 438 U.S. at p. 289 [98 S.Ct. at pp. 2747-2848, 57 L.Ed.2d at p. 770] (lead opn.).)

To the extent the statutory schemes challenged by plaintiff employ express racial and gender classifications, he has met his initial burden by pointing that out. ***44**

(21) Respondents assert that, because plaintiff makes a facial attack on the constitutionality of the statutory schemes at issue, the statutes are presumed constitutional and must be upheld unless plaintiff demonstrates constitutional conflict in every conceivable application. We disagree. (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 345-348 [66 Cal.Rptr.2d 210, 940 P.2d 797].)

Where a statutory scheme, on its face, employs a suspect classification, the scheme is, on its face, in conflict with the core prohibition of the equal protection clause. (*Shaw v. Reno*, *supra*, 509 U.S. at p. 642 [113 S.Ct. at p. 2824, 125 L.Ed.2d at p. 525] (maj. opn.).) It is not entitled to a presumption of validity and is instead presumed invalid. (*Id.* at pp. 643-644 [113 S.Ct. at pp. 2824-2825, 125 L.Ed.2d at p. 526] (maj. opn.); *Croson*, *supra*, 488 U.S. at p. 500 [109 S.Ct. at p. 725, 102 L.Ed.2d at p. 886] (maj. opn.).) And the express use of suspect classifications in a statutory scheme immediately triggers strict scrutiny

review. (*Shaw v. Reno, supra*, at pp. 642-644 [113 S.Ct. at pp. 2824-2825, 125 L.Ed.2d at pp. 525-526] (maj. opn.).)

Under the strict scrutiny test, specificity and precision are required. (*Croson, supra*, 488 U.S. at pp. 500, 505 [109 S.Ct. at pp. 725, 727-728, 102 L.Ed.2d at pp. 886, 889] (maj. opn.).) The government cannot avoid constitutional conflict simply because a racial classification is part of a statutory scheme which is so broad and/or amorphous that it might in some instances be employed in a race-neutral manner. If the racial classification is not necessary to the statutory scheme, it may not be employed. (*Shaw v. Hunt, supra*, 517 U.S. at p. 910 [116 S.Ct. at p. 1903, 135 L.Ed.2d at p. 222] (maj. opn.); *Croson, supra*, at p. 507 [109 S.Ct. at p. 729, 102 L.Ed.2d at p. 891] (maj. opn.).) If the racial classification is necessary to the statutory scheme, it must be justified by a compelling governmental interest, and its use must be narrowly tailored to serve that interest. (*Wygant, supra*, 476 U.S. at p. 274 [106 S.Ct. at p. 1847, 90 L.Ed.2d at p. 268] (plur. opn.).)

E

In respondents' view, strict scrutiny applies only where legislation grants a preference based upon race, and not where the legislation is merely "race conscious."

(22) We do not agree that a law must confer a preference before strict scrutiny applies. The United States Supreme Court could not be more certain on this point. The ultimate goal of the equal protection clause is the complete elimination of irrelevant factors such as race from governmental decisionmaking. (***45***Croson, supra*, 488 U.S. at p. 495 [109 S.Ct. at pp. 722-723, 102 L.Ed.2d at p. 883] (plur. opn.).) Regardless of the burdens or benefits imposed by or granted under a particular law, the use of a racial classification presents significant dangers to individuals, racial groups, and society at large. (*Croson, supra*, at pp. 493-494 [109 S.Ct. at pp. 721-722, 102 L.Ed.2d at p. 882] (plur. opn.).) "Racial classifications of any sort pose the risk of lasting harm to our society." (*Shaw v. Reno, supra*, 509 U.S. at p. 657 [113 S.Ct. at p. 2832, 125 L.Ed.2d at p. 535] (maj. opn.).) And without strict scrutiny, a court cannot determine whether a racial classification truly is benign or remedial. (*Id.* at p. 653 [113 S.Ct. at p. 2830, 125 L.Ed.2d at p. 533] (maj. opn.); *Adarand, supra*, 515 U.S. at p. 226 [115 S.Ct. at p. 2112, 132 L.Ed.2d at p. 181] (maj. opn.).) What is significant under the equal protection clause is that the government has drawn a line on the basis of race or ethnic status (*Bakke II, supra*, 438 U.S. at p. 289 [98 S.Ct. at pp. 2747-2748, 57 L.Ed.2d at p. 770] (lead opn.)), and laws that do so are immediately suspect. (*Shaw v. Reno, supra*, 509 U.S. at p. 642 [113 S.Ct. at p. 2824, 125 L.Ed.2d at p. 525] (maj. opn.).)

Nevertheless, we agree that a law is not subject to strict scrutiny review merely because it is "race conscious." (See *Shaw v. Reno, supra*, 509 U.S. at p. 642 [113 S.Ct. at p. 2824, 125 L.Ed.2d at p. 525] (maj. opn.).) Since the guarantee of equal protection is an individual right, where the operation of the law does not differ between one individual and another based upon a suspect classification, strict scrutiny is not required even though the law might mention matters such as race or gender. Accordingly, to use respondent California Community Colleges' example, a law prohibiting discrimination on the basis of race or gender would be race and gender conscious but would not invite strict scrutiny. FN7

FN7 Facially neutral but race-conscious legislation is not immune from strict scrutiny, but strict scrutiny is not required until the challenger makes a more detailed showing than is required for legislation that employs racial classifications. (See *Shaw v. Hunt, supra*, 517 U.S. at p. 907 [116 S.Ct. at pp. 1901-1902, 135 L.Ed.2d at p. 220] (maj. opn.); *Adarand, supra*, 515 U.S. at p. 213 [115 S.Ct. at pp. 2105-2106, 132 L.Ed.2d at p. 172] (maj. opn.).)

(23) In this respect, we agree with respondents that if a statutory provision can, by fair and reasonable interpretation, be given a meaning consistent with the requirements of the Constitution rather than in conflict with it, we must so interpret the statute in order to preserve its validity. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 371 [285 Cal.Rptr. 231, 815 P.2d 304]; *People v. Davenport* (1985) 41 Cal.3d 247, 264 [221 Cal.Rptr. 794, 710 P.2d 861].)

However, as we shall explain, for the most part the statutory schemes at issue in this case, which employ express racial and gender classifications, cannot be interpreted to preserve their validity. ***46**

F

Several respondents assert that statutory schemes which may be denominated as outreach, recruitment, or inclusive measures do not violate principles of equal protection or Proposition 209.

(24) With respect to a benefit or advantage, such as admission to a school of higher education, a government job, or a public contract, the cognizable interest of a competitor is in being able to compete on an equal footing without regard to the race or gender of other competitors. (*Adarand, supra*, 515 U.S. at p. 211 [115 S.Ct. at pp. 2104-2105, 132 L.Ed.2d at p. 171] (maj. opn.).) A competitor does not have a constitutionally cognizable interest in limiting the pool of applicants with whom he or she must compete. (See *Alabama Power Co. v. Ickes* (1938) 302 U.S. 464, 479-480 [58 S.Ct. 300, 303-304, 82 L.Ed. 374, 378].) Therefore, outreach or recruitment efforts which are designed to broaden the pool of potential applicants without reliance on an impermissible race or gender classification are not constitutionally forbidden. (See *Hi-Voltage, supra*, 24 Cal.4th at p. 565.)

But if the statutory scheme relies upon race or gender classifications, it must, for equal protection analysis, be subjected to strict judicial scrutiny. And if it discriminates against or grants preference to individuals or groups based upon race or gender, it is prohibited by Proposition 209.

G

(25) Respondents contend that monitoring programs which collect and report data concerning the participation of women and minorities in governmental programs do not violate equal protection principles. We agree.

Throughout the various opinions filed in the United States Supreme Court's affirmative action cases, no justice has suggested that discrimination is a thing of the past which need not concern governmental entities. Governmental entities remain under a duty to eliminate the vestiges of segregation and discrimination. (*Wygant, supra*, 476 U.S. at p. 277 [106 S.Ct. at pp. 1848-1849, 90 L.Ed.2d at p. 270] (plur. opn.).) All of the justices agree that governmental entities may use raceand gender-neutral methods of fostering equal opportunity and that, in some instances, even raceand gender-specific remedies may be employed. Accurate and up-to-date information is the sine qua non of intelligent, appropriate legislative and administrative action. Assuming that strict scrutiny is required, a monitoring program designed to collect and report accurate and up-to-date information is justified by the compelling governmental need for such information. So long as such a ***47** program does not discriminate against or grant a preference to an individual or group, Proposition 209 is not implicated.

III

With all of the aforesaid principles in mind, we proceed to consider the specific statutory schemes challenged in this proceeding.

State Lottery

The statutory provision applicable to the state lottery that plaintiff challenges is contained in Government Code section 8880.56, which is set forth in full in appendix A, *post*. (Further section references are to the Government Code unless otherwise specified.) (26) At issue is subdivision (b)(5), which was added by the Legislature in 1986. (Stats. 1986, ch. 55, § 17, pp. 158-160, eff. Apr. 16, 1986.) [FN8] As we will explain, that subdivision violates principles of equal protection and Proposition 209.

FN8 At the time this litigation arose, the relevant provision was subdivision (b)(4). It has subsequently been renumbered (b)(5), without substantive change. (Stats. 2000, ch. 509, § 2.)

With respect to the advertising or awarding of any contract for the procurement of goods and services exceeding $500,000, section 8880.56, subdivision (b)(5) imposes upon the California State Lottery Commission (the commission) and its director an "affirmative duty" of maximizing the level of participation of "socially and economically disadvantaged small business concerns" in the commission's procurement programs. The commission is required to "adopt proposal evaluation procedures, criteria, and contract terms which ... will achieve the most feasible and practicable level of participation by socially and economically disadvantaged small business concerns ...." And bidders and contractors are required "to include specific plans or arrangements to utilize subcontracts with socially and economically disadvantaged small business concerns."

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

Economic disadvantage is a criterion that may be determined through application of race-neutral and gender-neutral financial factors. Social disadvantage is a more amorphous concept that certainly invites reliance on racial and gender classifications. But we do not have to guess as to legislative intent because the fourth paragraph of section 8880.56, subdivision (b)(5) expressly incorporates racial, ethnic, and gender classifications into the statutory meaning of "socially and economically disadvantaged." Individuals from a list of racial and ethnic backgrounds and women are conclusively presumed to be socially and economically disadvantaged regardless of their actual affluence. Persons from the excluded group, apparently only ***48** White males, may be included if found by the commission to be disadvantaged, but the statute provides no definitional criteria, no application procedures, and no procedures for review of the commission's determination.

Even if such procedures were included in the statute, the fact that some individuals must prove disadvantage while others are conclusively presumed to be disadvantaged based solely on race, ethnicity, and gender, establishes impermissible race, ethnicity, and gender classifications. (See *Stanley v. Illinois* (1972) 405 U.S. 645, 657-658 [92 S.Ct. 1208, 1215-1216, 31 L.Ed.2d 551, 562].)

The challenged provision does more than use race, ethnicity, and gender classifications; it establishes preferences for persons from the favored groups. The commission and director are assigned the affirmative duty of maximizing participation by such persons. Selection procedures and criteria are required to accomplish that objective. And bidders and contractors are required to include specific plans or arrangements to utilize subcontracts with members of the favored groups. These provisions do not merely attempt to equalize the opportunity to participate, they establish a preference for doing business with members of the favored groups.

Section 8880.56, subdivision (b)(5) cannot even arguably withstand strict scrutiny. The absence of any identification of past discrimination by the California State Lottery, the random inclusion of groups without individualized consideration whether particular groups suffered from discrimination, the absence of any attempt to measure the recovery by the extent of the injury, the absence of any attempt to disburse the benefits of the scheme in an evenhanded manner to those who actually suffered detriment, and the absence of any geographic or temporal limits to the scheme, all serve to condemn it.

The commission and director do not attempt to justify the statute as written, but argue that they have implemented it in a constitutional manner. Specifically, they assert they have implemented it as a small business outreach statute, using the definition of small business from the Small Business Procurement and Contract Act (§ 14835 et seq.), which does not employ racial and gender classifications. They contend that, as implemented, bidders and contractors are required to make good faith efforts to reach out to minority-owned and women-owned small business concerns, but that no preference or advantage in contracting or subcontracting based on race or gender is applied.

The difficulty with this position is that the commission and director lack the authority to cure a facially unconstitutional statute by refusing to enforce ***49** it as written. (Cal. Const., art. III, § 3.5; *Reese v. Kizer* (1988) 46 Cal.3d 996, 1002 [251 Cal.Rptr. 299, 760 P.2d 495].) We do not deal here with an ambiguous statutory provision that can be interpreted in a constitutional manner; rather, it is a statute that cannot be implemented both constitutionally and in accordance with its express terms. However well intentioned, to the extent that the commission and the director refuse to employ racial and gender preferences in implementing section 8880.56, subdivision (b)(5), they do so in disregard of express statutory requirements. While administrative interpretation may save an ambiguous statute, it cannot cure a facially invalid statute.

Professional Bond Services

(27) The statutory provisions applicable to professional bond services that plaintiff challenges are contained in sections 16850 through 16857, which are set forth in full in appendix B, *post*. For reasons which follow, we conclude that, with one exception, the challenged provisions violate principles of equal protection and Proposition 209.

Government bonds may be issued for a variety of purposes and on behalf of a variety of state departments and agencies. The bonds must be issued in accordance with the dictates of the particular authorizing act, enacted by the electorate or by a legislative

body with authority to provide for the issuance of bonds. (*Golden Gate Bridge etc. Dist. v. Filmer* (1933) 217 Cal. 754, 757-758 [21 P.2d 112, 91 A.L.R. 1].) Matters that are not governed specifically by the authorizing act or otherwise required by law are left to the broad discretion of the issuing department, agency, or officer. (*Ibid.*; see also *Kennedy v. McInturff* (1933) 217 Cal. 509, 514-515 [20 P.2d 315].)

With respect to issuance of state bonds, the State Treasurer is the sole agent for offering and selling bonds. (§ 5702.) In selling bonds on behalf of any state agency or department, the State Treasurer is required to schedule the sale of the bonds so as to coordinate the sale with the program of the department or agency necessitating the sale of the bonds. (*Ibid.*)

In the issuance of government bonds, the state may contract for the services of financial advisers, bond counsel, underwriters, underwriter's counsel, financial printers, feasibility consultants, and other professionals. (§ 16851, subd. (j).) Underwriters essentially serve as transfer agents. The State Treasurer may, in some instances, select an underwriting team without competitive bidding (§ 5703); in those situations, the State Treasurer negotiates a contract with the underwriters, and the underwriters negotiate the sale of bonds to the public. In other instances, bond underwriters are chosen ***50** through competitive bidding; in those situations, the bonds are sold to the underwriter who submits the most favorable bid, and the underwriter then resells the bonds to the investing public.

Sections 16850 through 16857 establish minority and women business "participation goals" for professional bond service contracts. The statutory scheme establishes and utilizes racial and gender classifications. For purposes of the scheme, "minority" is defined to mean "an ethnic person of color ...." (§ 16851, subd. (h).) Minority business enterprises and women business enterprises are defined by reference to majority ownership and control in minorities and/or women. (§ 16851, subds. (i) & (k).) To be a minority business enterprise or a women business enterprise, a business must be at least 51 percent owned and controlled by one or more minorities or women, respectively. (§ 16851, subds. (i) & (k).) A business owned and controlled 50 percent by minorities and 50 percent by women may be counted as either but not both. (§ 16851, subd. (*l*).)

With respect to contracts awarded without competitive bidding, section 16850, subdivision (a) establishes statewide participation goals of 15 percent for MBE's and 5 percent for WBE's. The trial court found that this portion of the statutory scheme is invalid, and it is not at issue in this appeal.

With respect to contracts awarded through competitive bidding, section 16850, subdivision (a) requires each awarding department to establish minority business and women business participation goals. A "goal" is "a numerically expressed objective that awarding departments and providers of professional bond services are required to make efforts to achieve." (§ 16851, subd. (f).) The goals "apply to the overall dollar amount expended by the awarding department with respect to the contracts for professional bond services relating to the issuance of bonds by the awarding department including amounts spent as underwriter's discounts." (§ 16850, subd. (a).) These provisions establish a state preference, at least to the extent of the established goals, for doing business with individuals based upon their race and gender.

When the services of an underwriter are to be obtained by competitive bidding, the awarding department is required to, "at a minimum," (1) "[d]eliver the notice of sale[,] or other notification of intention to the [*sic*] issue the bonds[,] to all minority and women business enterprises that have listed their names with the awarding department for the purpose of this notice and [to] other qualified minority and women business enterprises known to the awarding department," (2) state in all notices that "minority and women business enterprises are encouraged to respond," and (3) require ***51** all submitting bidders "to certify their awareness of the goals of the awarding department [for awarding contracts to minority business enterprises and women business enterprises]." (§ 16852.)

Thus, these statutory provisions entitle minority business enterprises and women business enterprises to special notice of the sale or intention to issue bonds. The State Treasurer disagrees, suggesting that section 16852 does not require special notice to such enterprises, but includes them only in the notice that is otherwise required under 16754. We are not persuaded. The State Treasurer has considerable discretion in the sale of government bonds, and section 16754 permits the sale of bonds upon such notice as

the Treasurer may deem advisable. For purposes of equal protection analysis, we must view the law from the standpoint of the individual. Under the existing statutory scheme, minority businesses and women businesses may ensure that they receive notice by listing their names with the department and, if they have not done so, will receive notice so long as they are known to the department. There is no mechanism by which other businesses can ensure that they receive notice, and there is no requirement that the notice deemed advisable by the State Treasurer be such that any reasonably alert potential bidder will receive it.

Accordingly, this portion of the statutory scheme contravenes Proposition 209's prohibition against the selective dissemination of information. (*Hi-Voltage, supra*, 24 Cal.4th at pp. 562, 564.)

Moreover, the fact that all bidders are required to certify their awareness of the department's goals for the participation of minority businesses and women businesses, coupled with the imposition of a duty on providers of services to make efforts to achieve those goals, only can be intended to result in preferential treatment based upon race and gender. (See *Hi-Voltage, supra*, 24 Cal.4th at p. 562.)

With respect to contracts to be awarded through competitive bidding, the awarding department must require each bidder to identify the minority business enterprises and women business enterprises which will be used to fulfill minority and women participation goals, and to state the portion or the work to be done by each such subcontractor. (§ 16852.5, subd. (a).) And section 16852.5, subdivision (b) makes applicable to those subcontractors the Subletting and Subcontracting Fair Practices Act (Pub. Contract Code, § 4100 et seq.), which requires prime contractors to identify, in their bids, the subcontractors who will perform work under the contract, and prohibits the prime contractor from thereafter substituting any person for the subcontractor unless a statutory exception is established. (Pub. Contract Code, §§ 4104, 4107.) ***52**

Extending protections of the Subletting and Subcontracting Fair Practices Act to minority and women subcontractors for professional bond services, but not to other subcontractors, is itself a suspect classification for purposes of equal protection analysis and an impermissible preference under Proposition 209.

In addition, the statutory scheme requires an awarding department to establish a method of monitoring adherence to its minority and women participation goals, including requiring a follow-up report from all contractors upon completion of any sale of bonds. (§ 16853, subd. (a).) Each awarding department is required to file an annual report with the Governor and the Legislature stating the level of participation of minority and women businesses in professional bond service contracts and, if the department's participation goals are not met, stating the reasons for its inability to achieve the goals and the steps that will be taken in an effort to achieve the goals. (§ 16855.)

The State Treasurer claims that this portion of the statutory scheme should not be subject to strict scrutiny because there is no penalty for a failure to achieve participation goals. According to this argument, competitively bid contracts are awarded to the lowest responsible bidder without consideration of the race or gender of the bidder or of the bidder's subcontractors, and thus minority and women participation goals are irrelevant to the selection process itself. We reject this argument for two reasons.

First, the statutory scheme requires that bidders certify their awareness of participation goals and imposes upon them a duty to make efforts to achieve those goals. (§§ 16851, subd. (f), 16852, subd. (c).) Government contractors are required to act in good faith and, in assessing the validity of a statutory scheme, we cannot presume they will not do so. (Civ. Code, §§ 3529, 3548.) Regardless of whether the statutory scheme imposes a penalty for the failure to comply with the duty that it imposes, it establishes racial and gender preferences.

Second, the economic realities of the statutory scheme inevitably compel bidders to give preferences based on racial and gender classifications. Except for the special minority business enterprise and women business enterprise notice requirements, the State Treasurer and awarding departments have broad discretion in providing notice to potential bidders. While some contracts are awarded through competitive bidding, others are not. A bidder who wishes to be ensured of notice for future competitively awarded contracts, and to be considered for negotiated contracts,

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

will know that a demonstrated ability to meet or exceed participation goals inevitably will be ***53** a factor in the notice and selection processes. (See, e.g., § 5703, subd. (a).) Therefore, while an isolated competitive bid contract may be obtained without complying with the duty to make efforts to achieve participation goals, a bidder's hopes for future business inevitably will cause it to employ racial and gender preferences.

The statutory scheme does not arguably withstand strict scrutiny. No justification has been shown. There was no specific finding of identified prior discrimination in the contracting for professional bond services. There was no effort to measure the remedy against the consequences of identified discrimination. There was no effort to limit recovery to those who actually suffered from prior discrimination. There was no showing that non-race-based and non-gender-based remedies would be inadequate or were even considered. The scheme is unlimited in duration. And, except for its limitation to citizens and lawfully admitted aliens, the scheme is unlimited in reach.

It remains to be determined whether reporting requirements of the statutory scheme (§ 16855) may be severed and upheld. We already have decided that monitoring and reporting requirements serve a compelling government need and may be employed without violating principles of equal protection or Proposition 209. The requirement in the first sentence of section 16855, that each awarding department make an annual report "to the Governor and the Legislature on the level of participation by minority and women business enterprises in contracts as identified in this chapter," may be severed functionally and grammatically from the remainder of the statutory scheme. The consistency with which the Legislature has imposed monitoring and reporting duties on state agencies with respect to the participation of minorities and women in various programs, and the importance of such information to the Legislature, convinces us that the Legislature intended to impose this requirement regardless of the validity of the remainder of the statutory scheme. Hence, we sever and uphold this portion of the reporting requirement.

State Civil Service

(28) The state civil service affirmative action provisions that plaintiff challenges are contained in sections 19790 through 19799, which are set forth in full in appendix C, *post*. We find that, with two exceptions, those provisions facially violate principles of equal protection and Proposition 209.

Pursuant to the challenged statutory scheme, each agency and department "is responsible for establishing an effective affirmative action program." ***54** (§ 19790.) The director of each department, in cooperation with the State Personnel Board, has "the major responsibility for monitoring the effectiveness of the affirmative action program of the department." (§ 19794.) The secretary of each agency and the director of each department each is required to appoint an "affirmative action officer" with responsibility over the agency's and the department's programs. (§ 19795, subd. (a).) Bureau and division chiefs "[are] accountable to the department director for the effectiveness and results of the program within their division or bureau." (§ 19796.) All management levels, including first-line supervisors, must "provide program support and take all positive action necessary to ensure and advance equal employment opportunity at their respective levels." (§ 19796.)

An affirmative action program includes, on an annual basis, the establishment of "goals and timetables designed to overcome any identified underutilization of minorities and women in their [agency or department]." (§ 19790.) At a minimum, each agency and department must annually "identify the areas of underutilization of minorities and women within [the agency or department] by job category and level," perform "an equal employment opportunity analysis of all job categories and levels within the hiring jurisdiction," and provide "an explanation and specific actions for improving the representation of minorities and women." (§ 19797.)

For purposes of the statutory scheme, a goal is a projected level of achievement, specific to the smallest reasonable hiring unit, for correcting underutilization of minorities and women. (§ 19791, subd. (a).) A timetable is an estimate of the time required to meet specific goals. (§ 19791, subd. (b).) " 'Underutilization' means having fewer persons of a particular group in an occupation or at a level in a department than would reasonably be expected by their availability." (§ 19791, subd. (c).)

The State Personnel Board (hereafter the board) is "responsible for providing statewide advocacy, coor-

dination, enforcement, and monitoring of [agency and department affirmative action] programs." (§§ 19790, 19792.) Among other things, the board must review and approve agency and departmental affirmative action goals and timetables. (§§ 19790, 19792, subd. (d).) The board is required to make an annual report to the Governor, the Legislature, and the Department of Finance on the accomplishment of each agency and department in meeting its goals for the past year. (§ 19793.) The Legislature must then "evaluate the equal employment opportunity efforts and affirmative action progress of state agencies during its evaluation of the Budget Bill." (§ 19793.) ***55**

And section 19798 provides that, "[i]n establishing order and subdivisions of layoff and reemployment, the board, when it finds past discriminatory hiring practices, shall by rule, adopt a process that provides that the composition of the affected work force will be the same after the completion of a layoff, as it was before the layoff procedure was implemented."

In 1995, Governor Wilson issued Executive Order No. W-124-95, which directed state agencies to eliminate employment practices based on racial and gender preferences. Thereafter, the board revised its recommended procedures in an effort to comply with the executive order. The trial court held the statutory scheme is valid because, in light of the executive order, it appears that the statutory scheme can be implemented reasonably without racial and gender preferences.

We conclude, however, that the statutory requirements for the establishment of goals and timetables to overcome identified underutilization of minorities and women violate principles of equal protection and Proposition 209.

As the California Supreme Court noted in *Hi-Voltage*, *supra*, 24 Cal.4th at page 563, a participation goal differs from a quota or set-aside only in degree; it remains a line drawn on the basis of race and gender. And when the government chooses to rely upon racial and gender distinctions, the scheme is presumptively invalid; we cannot defer to legislative pronouncements, and the burden is on the government to justify the use of the distinction. (*Croson*, *supra*, 488 U.S. at pp. 500-501 [109 SCt. at pp. 725-726, 102 L.Ed.2d at p. 886] (maj. opn.).)

Pursuant to the statutory scheme, the board must establish requirements for improvement or corrective action to eliminate underutilization of minorities and women. (§ 19792, subd. (e).) In each agency and department, a duty is imposed on every managerial employee, from first line supervisors on up, to attempt to achieve the agency or departmental goals. (§§ 19794-19796.) Such an establishment of specific hiring goals necessarily is, in itself, the establishment of hiring preferences for purposes of equal protection and Proposition 209.

Under equal protection principles, the use of statistical underutilization to establish hiring goals suffers from a fatal flaw. The scheme can be viewed in only two ways. It may represent a decision to assure participation of "some specified percentage of a particular group" merely because of race or gender, which would be impermissible discrimination. (*Bakke II*, *supra*, ***56**438 U.S. at p. 307 [98 S.Ct. at p. 2757, 57 L.Ed.2d at p. 782] (lead opn.); see also *Croson*, *supra*, 488 U.S. at p. 497 [109 S.Ct. at pp. 723-724, 102 L.Ed.2d at p. 884] (plur. opn.).) Or the use of statistical underutilization to establish hiring goals may be viewed as the establishment of a conclusive presumption of prior discrimination based upon statistical disparity. The problem with this is that, while statistical underutilization may serve as significant evidence of prior discriminatory hiring practices, it is not conclusive and is not, in itself, proof of discrimination. (*Hazelwood School District v. United States* (1977) 433 U.S. 299, 312-313 [97 S.Ct. 2736, 2743-2744, 53 L.Ed.2d 768, 780].) There may be explanations other than discrimination for statistical variations, and detailed consideration of past hiring practices may rebut the inference suggested by statistical evidence. (*Ibid.*) Constitutional rights cannot be foreclosed through the use of presumptions rather than proof. (*Stanley v. Illinois*, *supra*, 405 U.S. at pp. 657-658 [92 S.Ct. at pp. 1215-1216, 31 L.Ed.2d at p. 562].) Accordingly, statistical anomalies, without more, do not give a governmental entity the legal authority to employ racial and gender classifications. (*Croson*, *supra*, 488 U.S. at pp. 499, 501-503 [109 S.Ct. at pp. 725-727, 102 L.Ed.2d at pp. 885, 887-888] (maj. opn.).)

These constitutional objections may be eliminated by severing and invalidating the requirement that state agencies and departments establish, and

make efforts to achieve, goals and timetables to overcome any identified underutilization of minorities and women in state agencies and departments.

In other words, portions of the statutory scheme that provide for data collection and reporting do not suffer a constitutional defect because a determination of the underutilization of minorities and women in state service can serve legitimate and important purposes. Such a determination may indicate the need for further inquiry to ascertain whether there has been specific, prior discrimination in hiring practices. It may indicate the need to evaluate applicable hiring criteria to ensure that they are reasonably job-related and do not arbitrarily exclude members of the underutilized group. And it may indicate the need for inclusive outreach efforts to ensure that members of the underutilized group have equal opportunity to seek employment with the affected department.

One other provision of the statutory scheme requires separate discussion. Section 19798 authorizes the board, when it finds the existence of past discriminatory hiring practices, to adopt a process that alters layoff and reemployment procedures in order to maintain the racial and gender composition of the affected work force. ***57**

The burdens imposed by such a process are not diffused throughout the general population and do not affect mere hopes or expectations. Rather, they interfere with the established employment rights of specific individuals based upon race and/or gender. They are among the most severe race and gender based remedies that might be postulated. (See *Wygant, supra*, 476 U.S. at pp. 294-295 [106 S.Ct. at pp. 1857-1858, 90 L.Ed.2d at p. 282] (conc. opn. of White, J.).) Therefore, the use of such a remedy would require the most compelling justification.

Equal protection jurisprudence of the United States Supreme Court has not disapproved the possibility that such a remedy might be appropriate in some circumstance. While utilization of the authority conferred on the board by section 19798 would be subject to strict judicial scrutiny, the statute is not facially invalid under equal protection principles.

Proposition 209 is more restrictive. Alteration of layoff and reemployment schemes in order to maintain the racial and/or gender composition of the work force unquestionably would discriminate against some individuals and grant preferences to others on the basis of race and/or gender. Proposition 209 generally forbids such action. But there are exceptions to the rule established by Proposition 209. If the failure to employ the scheme authorized by section 19798 would result in ineligibility for a federal program with a loss of federal funds, or if federal law or the United States Constitution required, rather than merely permitted, the use of the scheme, Proposition 209 would not preclude it. (Cal. Const., art. I, § 31, subds. (e), (h).)

While any attempt by the board to implement an altered layoff and reemployment scheme pursuant to section 19798 would be subject to the restrictions of Proposition 209 and to strict judicial scrutiny for equal protection purposes, the granting of authority to the board to utilize such a scheme, should appropriate circumstances arise, is not invalid on its face.

Community Colleges

(29) The community college provisions that plaintiff challenges are contained in Education Code sections 87100 through 87107, which are set forth in full in appendix D, *post*. As will become apparent, they violate principles of equal protection and Proposition 209.

Community colleges are two-year secondary schools that are part of the state public school system. (Ed. Code, §§ 66010.4, 66700.) The community college system is divided into districts. (Ed. Code, § 74000.) Each district is ***58** under the immediate control of a board of trustees (Ed. Code, § 70902), while statewide management, administration, and control over community colleges are vested in a board of governors. (Ed. Code, § 71020 et seq.)

The statutory scheme in question declares that it is "educationally sound" for (1) "the minority student attending a racially impacted school to have available the positive image provided by minority classified and academic employees," (2) "the student from the majority group to have positive experiences with minority people," and (3) "students to observe that women as well as men can assume responsible and diverse roles in society." (Ed. Code, § 87100, subd. (b).) It is further declared that "[l]essons concerning democratic principles and the richness which racial diversity brings to our national heritage can be best taught by the presence of staffs of mixed races and ethnic groups

working toward a common goal." (Ed. Code, § 87100, subd. (d).)

To this end, the Legislature intended "to promote the total realization of equal employment opportunity through a continuing affirmative action employment program" with the intent "to require educational agencies to adopt and implement plans for increasing the numbers of women and minority persons at all levels of responsibility." (Ed. Code, § 87100, subd. (d).)

For purposes of this statutory scheme, an "affirmative action employment program" means "planned activities designed to seek, hire, and promote persons who are underrepresented in the work force compared to their number in the population, including handicapped persons, women, and persons of minority racial and ethnic backgrounds." It requires employers "to make additional efforts to recruit, employ, and promote members of groups formerly excluded at the various levels of responsibility who meet statewide minimum qualifications, if any, and who, relative to local qualifications beyond the statewide minimum qualifications, are qualified or may become qualified through appropriate training or experience within a reasonable length of time." The program "should be designed to remedy the exclusion, whatever its cause." (Ed. Code, § 87101, subd. (a).)

Each community college district is required to have a plan which ensures that district personnel participate in, and are committed to, the affirmative action employment program. The plan must include hiring goals and timetables for its implementation. (Ed. Code, § 87102, subd. (a).) "Goals and timetables" mean "projected new levels of employment of women and minority racial and ethnic groups to be attained on an annual schedule...." (Ed. Code, § 87101, subd. (b).) The plan must include steps to be ***59** taken "in meeting and improving hiring goals for both full-time faculty and part-time faculty" and "the development of the plan shall be a condition for receipt of allowances [for program improvement]." (Ed. Code, § 87102, subd. (a).)

The governing board of each community college district is accountable for the success or failure of its program. (Ed. Code, § 87102, subd. (a).) The governing board must periodically submit to the board of governors "an affirmation of compliance." (Ed. Code, § 87102, subd. (a).) And the board of governors has the authority to impose conditions necessary to assure reasonable progress of affirmative action, including program improvement allowances and moneys from the Faculty and Staff Diversity Fund. (Ed. Code, § 87104, subd. (a).)

The Faculty and Staff Diversity Fund is available to the board of governors for the purpose of enabling community colleges as a system to meet "the goal that by the year 2005 the system's work force will reflect proportionately the adult population of the state." (Ed. Code, § 87107, subd. (a).) The Legislature expressed the intent that, by fiscal year 1992-1993, 30 percent of all new hires in the system would be ethnic minorities. (Ed. Code, § 87107, subd. (a).) The board of governors is to use the fund for, among other things, providing for extended outreach and recruitment of underrepresented groups, providing incentives to hire members of underrepresented groups, and for in-service training and other related staff diversity programs. (Ed. Code, § 87107, subd. (d).) In administering the Faculty and Staff Diversity Fund, it is the intent that boards of governors "give funding priority and shall afford flexibility and discretion in the use of these funds to districts which have made or are making reasonable progress in contributing to the achievement of the goals of this fund." (Ed. Code, § 87107, subd. (e).)

This statutory scheme suffers from multiple constitutional faults. The establishment of an overall and continuing hiring goal-by fiscal year 1992-1993, 30 percent of new hires will be ethnic minorities and by the year 2005, the work force will proportionately reflect the adult population of the state-is, unquestionably, a preferential hiring scheme in violation of Proposition 209. Moreover, a goal of assuring participation by some specified percentage of a particular group merely because of its race or gender is "discrimination for its own sake" and must be rejected as facially invalid under equal protection principles. (*Bakke II, supra,* 438 U.S. at p. 307 [98 S.Ct. at p. 2757, 57 L.Ed.2d at p. 782] (lead opn.); see also *Croson, supra,* 488 U.S. at p. 497 [109 S.Ct. at pp. 723-724, 102 L.Ed.2d at p. 884] (plur. opn.).) And the requirement to create timetables to seek, hire, and promote minorities and women and to make reasonable progress in doing so-with ***60** financial incentives for success and financial detriment for failure-establishes impermissible racial and gender pre-

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

ferences. (*Hi-Voltage, supra,* 24 Cal.4th at p. 563.)

One stated justification for the preferential hiring scheme-the role model theory (Ed. Code, § 87100, subd. (d))-has been rejected by the United States Supreme Court. (*Wygant, supra,* 476 U.S. at pp. 274-276 [106 S.Ct. at pp. 1847-8148, 90 L.Ed.2d at pp. 269-270] (plur. opn.).) The other stated justification is the belief that "[l]essons concerning democratic principles and the richness which racial diversity brings to our national heritage can be best taught by the presence of staffs of mixed races and ethnic groups ...." (Ed. Code, § 87100, subd. (d).) This, too, does not justify the establishment of racial and gender preferences. Lessons concerning democratic principles must include the fundamental rule of law, embodied in our state and federal Constitutions, that individuals should not be classified for different treatment based upon their race or gender.

The statutory scheme is not, as the community colleges state, an "equal employment opportunity" scheme. It says nothing about making inclusive outreach efforts to assure equal opportunity; instead, it requires efforts to seek, hire, and promote minorities and women. Success must be achieved, and underrepresentation must be eliminated. Nor, as the community colleges suggest, is it an attempt to redress specific prior discrimination; under the scheme, underrepresentation must be eliminated regardless of its cause.

And, contrary to the community colleges' claim, regulations adopted to implement the statutory scheme do not make the statutory scheme consistent with constitutional requirements. As we already have noted, administrative implementation cannot save a facially invalid statutory scheme. (Cal. Const., art. III, § 3.5; *Reese v. Kizer, supra,* 46 Cal.3d at p. 1002.)

In any event, the board of governors' regulations do not come close to implementing the scheme in a constitutional manner.

Among other things, the regulations proceed with hiring goals and timetables and require that districts achieve success in reaching numerical workforce parity of women and minorities. (Cal. Code Regs., tit. 5, §§ 53001, subds. (a), (b), (f), (o), (p), 53003, subd. (c)(10), 53020, subd. (a), 53030, subd. (b)(3).) This is invalid discrimination for its own sake.

Although inclusive outreach efforts may be designed and carried out in a manner that does not require strict scrutiny or violate Proposition 209, ***61** calling a scheme an outreach effort does not save it from strict scrutiny or constitutional invalidity if it in fact utilizes suspect classifications. The board's regulations do so. Recruitment must include "focused outreach" to women and minorities, and in-house or promotional only recruitment may not be used unless women and minorities have reached numerical parity in the pool of eligible employees. (Cal. Code Regs., tit. 5, § 53021, subds. (a), (b).) If members of the favored groups have not applied in sufficient numbers by the time the application period has closed, steps must be taken that include reopening the application process for additional focused recruitment. (Cal. Code Regs., tit. 5, § 53023, subd. (b).) And, after applications are screened for eligibility, the regulations specify that the process may have to be reopened again, and local qualifications may have to be abandoned, in order to ensure sufficient applicants from the favored groups. (*Ibid.*) In fact, a requirement that the process be reopened or redone may occur throughout the selection process whenever necessary to ensure there are sufficient applicants from the favored groups. (Cal. Code Regs., tit. 5, §§ 53023-53024.) This is not an inclusive outreach scheme, it is a preferential recruitment and selection process.

In addition, if the preferential recruitment and selection process has not achieved numerical parity in a reasonable time, defined in most circumstances as three years, then additional steps must be taken that include consideration of the race or gender of applicants in the selection process and the inclusion, in the applicant pool, of members of the favored groups who were previously screened out for failure to meet locally established desirable or preferred qualifications. (Cal. Code Regs., tit. 5, § 53006.) By any reckoning, this constitutes the use of hiring preferences.

Moreover, the regulations require the use of racial and gender hiring preferences without a finding of specific discrimination, without evidence that would support such a finding, and in contravention of Proposition 209.

For all of these reasons, the regulations do not save the statutory scheme.

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

Although we uphold the data collection and reporting aspects of other statutory schemes, we cannot do so with the community college statutes. Since their data collection and reporting requirements are entirely bound up and intermixed with the success of the preferential hiring scheme, they cannot be severed functionally and grammatically from the remainder of the statutory scheme.

State Contracting

Public Contract Code sections 10115 through 10115.15 concern minority business and women business participation goals for state contracts. In ***62** *Monterey Mechanical Co. v. Wilson* (9th Cir. 1997) 125 F.3d 702 (hereafter *Monterey Mechanical*), the federal court of appeals held this statutory scheme was invalid under principles of equal protection. So, too, did the trial court in this case.

The federal court in *Monterey Mechanical* did not address whether the reporting requirements in the statutory scheme (Pub. Contract Code, § 10115.5) may be severed and upheld. [FN9] The trial court in this case found they may not. Real parties in interest have cross-appealed, asserting that the reporting requirements should be severed and upheld.

> FN9 Public Contract Code section 10115.5, subdivision (a) states: "Notwithstanding Section 7550.5 of the Government Code [since repealed by its own terms (Stats. 1996, ch. 970, § 1)], on January 1 of each year, each awarding department shall report to the Governor and the Legislature on the level of participation by minority, women, and disabled veteran business enterprises in contracts as identified in this article for the fiscal year beginning July 1 and ending June 30. In addition, the report shall contain the levels of participation by minority, women, and disabled veteran business enterprises for the following categories of contracts: [¶] (1) Construction. [¶] (2) Purchases of materials, supplies, and equipment. [¶] (3) Professional services. [¶] (4) All contracts for a dollar amount of less than twenty-five thousand dollars ($25,000)." Subdivision (b) of the statute states: "If the established goals are not being met, the awarding department shall report the reasons for its inability to achieve the standards and identify remedial steps it shall take."

Division One of the Court of Appeal, First Appellate District, addressed this issue in *Barlow v. Davis* (1999) 72 Cal.App.4th 1258 [85 Cal.Rptr.2d 752]. (30) The appellate court held that, although the reporting requirements may be severed mechanically and grammatically from the invalid portions of the statutory scheme, and although the scheme includes a severability clause (Pub. Contract Code, § 10115.8), the reporting requirements find efficacy only when they are correlated with the invalidated portions of the statutory scheme and thus cannot be functionally separated. (*Barlow v. Davis, supra*, 72 Cal.App.4th at p. 1266.) We disagree.

The Legislature's right to obtain accurate and up-to-date information on matters of public concern cannot be disputed. "The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." (*Barenblatt v. United States* (1959) 360 U.S. 109, 111 [79 S.Ct. 1081, 1085, 3 L.Ed.2d 1115, 1120].)

The broad nature of the power of inquiry and the importance thereof have been recognized under state law. "[I]n many instances, in order to the ***63** preparation of wise and timely laws the necessity of investigation of some sort must exist as an indispensable incident and auxiliary to the proper exercise of legislative power." (*In re Battelle* (1929) 207 Cal. 227, 241 [277 P. 725, 65 A.L.R. 1497]; see also *Special Assembly Int. Com. v. Southard* (1939) 13 Cal.2d 497, 503 [90 P.2d 304].)

In our tripartite system of government, legislative function is limited to declaring the law and providing the ways and means of its accomplishment. (*California Radioactive Materials Management Forum v. Department of Health Services* (1993) 15 Cal.App.4th 841, 870-871 [19 Cal.Rptr.2d 357], disapproved on another ground in *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 305, fn. 5 [105 Cal.Rptr.2d 636, 20 P.3d 533].) The Legislature

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

cannot exercise direct supervisorial control over the execution of the laws. (*Id.* at p. 872.) In this light, the statutory provisions that require data to be collected and reported to the Legislature cannot be intended as some sort of supervisorial device; they can be intended only as the basis for future legislative consideration, within the power of inquiry, with respect to the need for future legislative action.

Irrespective of the substantive elements of the statutory scheme, information concerning the participation of minority and women business enterprises in state contracts can serve a number of important and valid legislative purposes. As we have noted earlier, it may indicate the need for further inquiry to determine whether specific discrimination is occurring. It may aid the Legislature in determining whether race-neutral and gender-neutral remedies are needed. It may aid the Legislature in determining whether a scheme that does not employ suspect classifications, such as an inclusive outreach scheme, is warranted. It also may satisfy the Legislature that no further legislative action is necessary.

In these respects, the reporting requirements of the statutory scheme applicable to state contracting can serve a legislative interest separate from the substantive provisions of the scheme. The Legislature determined that the enactment of the substantive elements of the statutory scheme would not eliminate the need for further legislative inquiry, and neither will invalidation of the substantive elements of the scheme.

The reporting requirements contained in Public Contract Code section 10115.5, subdivision (a) can be severed mechanically and grammatically from the invalid portions of the act and, we conclude, may be severed functionally. Accordingly, we find the reporting provisions are valid and may be enforced separate from the invalid portions of the statutory scheme. ***64**

Disposition

The judgment is reversed, and the cause is remanded to the trial court with directions to enter a judgment consistent with the conclusions in this opinion.

Morrison, J., and Callahan, J., concurred. ***65**

A

State Lottery

The statutory provision challenged with respect to the state lottery is Government Code section 8880.56, which provides:

"(a) Notwithstanding other provisions of law, the director may purchase or lease goods and services as are necessary for effectuating the purposes of this chapter. The director may not contract with any private party for the operation and administration of the California State Lottery, created by this chapter. However, this section does not preclude procurements which integrate functions such as game design, supply, advertising, and public relations. In all procurement decisions, the director shall, subject to the approval of the commission, award contracts to the responsible supplier submitting the lowest and best proposal that maximizes the benefits to the state in relation to the areas of security, competence, experience, and timely performance, shall take into account the particularly sensitive nature of the California State Lottery and shall act to promote and ensure integrity, security, honesty, and fairness in the operation and administration of the lottery and the objective of raising net revenues for the benefit of the public purpose described in this chapter.

"(b) Notwithstanding any other provision of this chapter, the following shall apply to contracts or procurement by the lottery:

"(1) To ensure the fullest competition, the commission shall adopt and publish competitive bidding procedures for the award of any procurement or contract involving an expenditure of more than one hundred thousand dollars ($100,000). The competitive bidding procedures shall include, but not be limited to, requirements for submission of bids and accompanying documentation, guidelines for the use of requests for proposals, invitations to bid, or other methods of bidding, and a bid protest procedure. The director shall determine whether the goods or services subject to this paragraph are available through existing contracts or price schedules of the Department of General Services.

"(2) The contracting standards, procedures, and rules contained in this subdivision shall also apply with respect to any subcontract involving an expenditure of more than one hundred thousand dollars ($100,000). The commission shall establish, as part of

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

its bidding procedures for general contracts, subcontracting guidelines that implement this requirement.

"(3) The provisions of Article 1 (commencing with Section 11250) of Chapter 3 of Part 1 of Division 3 apply to the commission. ***66**

"(4) The commission is subject to the Small Business Procurement and Contract Act, as provided in Chapter 6.5 (commencing with Section 14835) of Part 5.5 of Division 3.

"(5) In advertising or awarding any general contract for the procurement of goods and services exceeding five hundred thousand dollars ($500,000), the commission and the director shall require all bidders or contractors, or both, to include specific plans or arrangements to utilize subcontracts with socially and economically disadvantaged small business concerns. The subcontracting plans shall delineate the nature and extent of the services to be utilized, and those concerns or individuals identified for subcontracting if known.

"It is the intention of the Legislature in enacting this section to establish as an objective of the utmost importance the advancement of business opportunities for these small business concerns in the private business activities created by the California State Lottery. In that regard, the commission and the director shall have an affirmative duty to achieve the most feasible and practicable level of participation by socially and economically disadvantaged small business concerns in its procurement programs.

"By July 1, 1986, the commission shall adopt proposal evaluation procedures, criteria, and contract terms which are consistent with the advancement of business opportunities for small business concerns in the private business activities created by the California State Lottery and which will achieve the most feasible and practicable level of participation by socially and economically disadvantaged small business concerns in its procurement programs. The proposal evaluation procedures, criteria, and contract terms adopted shall be reported in writing to both houses of the Legislature on or before July 1, 1986.

"For the purposes of this section, socially and economically disadvantaged persons include women, Black Americans, Hispanic Americans, Native Americans (including American Indians, Eskimos, Aleuts, and Native Hawaiians), Asian-Pacific Americans (including persons whose origins are from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the United States Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, and Taiwan), and other minorities or any other natural persons found by the commission to be disadvantaged.

"The commission shall report to the Legislature by July 1, 1987, and by each July 1 thereafter, on the level of participation of small businesses, socially and economically disadvantaged businesses, and California businesses in all contracts awarded by the commission. ***67**

"(6) The commission shall prepare and submit to the Legislature by October 1 of each year a report detailing the lottery's purchase of goods and services through the Department of General Services. The report shall also include a listing of contracts awarded for more than one hundred thousand dollars ($100,000), the name of the contractor, amount and term of the contract, and the basis upon which the contract was awarded.

"The lottery shall fully comply with the requirements of paragraphs (2) to (5), inclusive, except that any function or role which is otherwise the responsibility of the Department of Finance or the Department of General Services shall instead, for purposes of this subdivision, be the sole responsibility of the lottery, which shall have the sole authority to perform that function or role." ***68**

B

Professional Bond Services

The following sections of the Government Code concern affirmative action with respect to professional bond services. The portions of the statutory scheme found to be invalid by the trial court are in italics:

Section 16850: "(a) *Notwithstanding any other provision of law, each awarding department shall have annual statewide participation goals of not less than 15 percent for minority business enterprises and 5 percent for women business enterprises for contracts entered into by the awarding department during the year for each of the professional bond services. This section shall not apply if a contract for professional bond services of an underwriter is to be ob-*

tained by competitive bid. However, each awarding department shall establish goals for contracts to be obtained by competitive bid for professional bond services, as defined in Section 16851.

"These goals shall apply to the overall dollar amount expended by the awarding department with respect to the contracts for professional bond services relating to the issuance of bonds by the awarding department including amounts spent as underwriter's discounts.

"*(b) In attempting to meet the goals set forth in subdivision (a), the awarding department shall consider establishing cocounsel, joint venture, and subcontracting relationships including minority business enterprises and women business enterprises in all contracts for bonds awarded by the awarding department. However, nothing in this article shall preclude the awarding department from achieving the goals set forth in this section without requiring joint ventures, cocounsel, or subcontracting arrangements.*

"*(c) This section shall not limit the ability of any awarding department to meet a goal higher than those set forth in subdivision (a) for participation by minority and women business enterprises in contracts awarded by the awarding department.*

"(d) Nothing in this chapter shall be construed to authorize any awarding department to discriminate in the awarding of any contract on the basis of race, color, sex, ethnic origin, or ancestry."

Section 16851: "As used in this chapter, the following definitions apply:

"(a) 'Awarding department' means any agency, department, constitutional officer, governmental entity, or other officer or entity of the state empowered by law to issue bonds on behalf of the State of California. ***69**

"(b) 'Bonds' means bonds, notes, warrants, certificates of participation, and other evidences of indebtedness issued by or on behalf of the State of California.

"(c) 'Contract' includes any contract, agreement, or joint agreement to provide professional bond services to the State of California or an awarding department.

"(d) 'Contractor' means any provider of professional bond services who enters into a contract with an awarding department.

"(e) 'Foreign corporation,' 'foreign firm,' or 'foreign-based business' means a business entity that is incorporated or has its principal headquarters located outside the United States.

"(f) 'Goal' means a numerically expressed objective that awarding departments and providers of professional bond services are required to make efforts to achieve.

"(g) 'Management and control' means effective and demonstrable management of the business entity.

"(h) 'Minority' means an ethnic person of color including American Indians, Asians (including, but not limited to, Chinese, Japanese, Koreans, Pacific Islanders, Samoans, and Southeast Asians), Blacks, Filipinos, and Hispanics. A minority must be a citizen of the United States or a lawfully admitted permanent resident as defined in Title 8 U.S.C. 1101(a)(20).

"(i) 'Minority business enterprise' means a business concern that meets all of the following requirements:

"(1) A sole proprietorship owned by a minority; a firm or partnership, at least 51 percent of the voting stock or partnership interests of which are owned by one or more minorities; a subsidiary which is wholly owned by a parent corporation but only if at least 51 percent of the voting stock of the parent corporation is owned by one or more minorities; or a joint venture in which at least 51 percent of the joint venture's management of the joint venture business and at least 51 percent of the joint venture's earnings are controlled or retained by the minority participants in the joint venture.

"(2) Management and control of daily business operations by one or more minorities although not necessarily the same minorities who are owners of the business. ***70**

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

"(3) A sole proprietorship, corporation, joint venture, or partnership with its home office located in the United States, which is not a branch or subsidiary of a foreign corporation, foreign firm, or other foreign-based business.

"(j) 'Professional bond services' include services as financial advisers, bond counsel, underwriters in negotiated transactions, underwriter's counsel, financial printers, feasibility consultants, and other professional services related to the issuance and sale of bonds.

"(k) A woman owner of a women business enterprise must be a citizen of the United States or a lawfully admitted permanent resident as defined in Title 8 U.S.C. 1101(a)(20).

" 'Women business enterprise' means a business concern that is all of the following:

"(1) A sole proprietorship owned by a woman; a firm or partnership, at least 51 percent of the voting stock or partnership interests of which are owned by one or more women; a subsidiary which is wholly owned by a parent corporation but only if at least 51 percent of the voting stock of the parent corporation is owned by one or more women; or a joint venture in which at least 51 percent of the joint venture's management of the joint venture business and at least 51 percent of the joint venture's earnings are controlled or retained by the women participants in the joint venture.

"(2) Management and control of daily business operations by one or more women although not necessarily the same women who are the owners of the business.

"(3) A sole proprietorship, corporation, joint venture, or partnership with its home office located in the United States, which is not a branch or subsidiary of a foreign corporation, foreign firm, or other foreign-based business.

"(*l*) 'Minority business enterprise' and 'women business enterprise,' include an enterprise of which 50 percent is owned and controlled by one or more minorities and the other 50 percent is owned and controlled by one or more women, or, in the case of a publicly owned business, 50 percent of the stock of which is owned and controlled by one or more minorities and the other 50 percent is owned and controlled by one or more women. Any business enterprise so defined may be counted as either a minority business enterprise or a women business enterprise for purposes of meeting the ***71** participation goals, but no one such business enterprise shall be counted as meeting the participation goals in both categories."

Section 16852: "Notwithstanding Section 16850, if a contract for professional bond services of an underwriter is to be obtained by competitive bid, the awarding department shall, at a minimum, take all of the following actions:

"(a) Deliver the notice of sale or other notification of intention to the [*sic*] issue the bonds to all minority and women business enterprises that have listed their names with the awarding department for the purpose of this notice and other qualified minority and women business enterprises known to the awarding department.

"(b) State in all notices of sale and other notifications of intention to issue bonds that minority and women business enterprises are encouraged to respond.

"(c) Require all submitting bidders to certify their awareness of the goals of the awarding department in accordance with this chapter.

"(d) Nothing in this section shall be construed to authorize any awarding department to discriminate in the solicitation of bids or in the awarding of contracts on the basis of race, color, sex, ethnic origin, or ancestry."

Section 16852.5: "(a) Any awarding department taking bids in connection with the award of any contract shall provide, in the general conditions under which bids will be received, that any person making a bid or offer to perform a contract shall, in his or her bid or offer, set forth the following information:

"(1) The name and the location of the place of business of each subcontractor certified as a minority, women, or disabled veteran business enterprise who will perform work or labor or render service to the

prime contractor in connection with the performance of the contract and who will be used by the prime contractor to fulfill minority, women, and disabled veteran business enterprise participation goals.

"(2) The portion of work that will be done by each subcontractor under paragraph (1). The prime contractor shall list only one subcontractor for each portion of work as is defined by the prime contractor in his or her bid or offer.

"(b) The Subletting and Subcontracting Fair Practices Act (Chapter 4 (commencing with Section 4100) of Part 1 of Division 2 of the Public ***72** Contract Code) shall apply to the information required by subdivision (a) relating to subcontractors certified as minority, women, and disabled veteran business enterprises.

"(c) For purposes of this section, 'subcontractor' and 'prime contractor' shall have the same meaning as those terms are defined in Section 4113 of the Public Contract Code."

Section 16853: "(a) The awarding department shall establish a method of monitoring adherence to the goals specified in Section 16850, including requiring a followup report from all contractors upon the completion of any sale of bonds.

"(b) The awarding department shall adopt rules and regulations for the purpose of implementing this section. Emergency regulations consistent with this section may be adopted."

Section 16854: "In implementing this chapter, the awarding department shall utilize existing resources such as the Office of Small and Minority Business."

Section 16855: "Beginning July 1, 1989, and on January 1, 1990, and on January 1 of each year thereafter, each awarding department shall report to the Governor and the Legislature on the level of participation by minority and women business enterprises in contracts as identified in this chapter. If the established goals are not met, the awarding department shall report the reasons for its inability to achieve the goals and identify steps it shall take in an effort to achieve the goals."

Section 16856: "(a) Notwithstanding anything in this chapter to the contrary, the validity or enforceability of any bonds to which this chapter applies shall not be affected in any way by the failure of an awarding department to meet the goals established under this chapter.

"(b) No action may be maintained to enjoin the issuance of any bonds to which this chapter applies or the enforcement of any contract for professional bond services based on an awarding department's failure to meet the goals set forth in Section 16850."

Section 16857: "(a) It shall be unlawful for a person to:

"(1) Knowingly and with intent to defraud, fraudulently obtain, retain, attempt to obtain or retain, or aid another in fraudulently obtaining or ***73** retaining or attempting to obtain or retain, acceptance or certification as a minority, women, or disabled veteran business enterprise, for the purposes of this chapter.

"(2) Willfully and knowingly make a false statement with the intent to defraud, whether by affidavit, report, or other representation, to a state official or employee for the purpose of influencing the acceptance or certification or denial of acceptance or certification of any entity as a minority, women, or disabled veteran business enterprise.

"(3) Willfully and knowingly obstruct, impede, or attempt to obstruct or impede, any state official or employee who is investigating the qualifications of a business entity which has requested acceptance or certification as a minority, women, or disabled veteran business enterprise.

"(4) Knowingly and with intent to defraud, fraudulently obtain, attempt to obtain, or aid another person in fraudulently obtaining or attempting to obtain, public moneys to which the person or firm is not entitled under this chapter.

"(5) Establish, or cooperate in the establishment of, or exercise control over, a firm found to have violated any of paragraphs (1) to (4), inclusive. Any person or firm who violates this paragraph is guilty of a misdemeanor and shall be liable for a civil penalty not to exceed fifty thousand dollars ($50,000) for the

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

first violation, and a civil penalty not to exceed two hundred thousand dollars ($200,000) for each additional or subsequent violation.

"(6) This section shall not apply to minority and women business enterprise programs conducted by public utility companies pursuant to the California Public Utilities Commission's General Order 156.

"(b) Any person who violates paragraphs (1) to (4), inclusive, of subdivision (a) is guilty of a misdemeanor and shall be liable for a civil penalty not to exceed five thousand dollars ($5,000) for the first violation, and a civil penalty not to exceed twenty thousand dollars ($20,000) for each additional or subsequent violation.

"(c) Any person or firm that violates subdivision (a) shall, in addition to the penalties provided for in subdivision (b), be suspended from bidding on, or participating as either a contractor or subcontractor in, any contract awarded by the state for a period of not less than 30 days nor more than one year. However, for an additional or subsequent violation, the period of ***74** suspension shall be extended for a period of up to three years. Any person or firm that fails to satisfy the penalties imposed pursuant to subdivisions (b) and (c) shall be prohibited from further contracting with the state until the penalties are satisfied.

"(d) The awarding department shall report all alleged violations of this section to the Office of Small and Minority Business. The office shall subsequently report all alleged violations to the Attorney General who shall determine whether to bring a civil action against any person or firm for violation of this section.

"(e) The office shall monitor the status of all reported violations and shall maintain and make available to all state departments a central listing of all firms and persons who have been determined to have committed violations resulting in suspension.

"(f) No awarding department shall enter into any contract with any person or firm suspended for violating this section during the period of the person's or firm's suspension. No awarding department shall award a contract to any contractor utilizing the services of any person or firm as a subcontractor suspended for violating this section during the period of the person's or firm's suspension.

"(g) The awarding department shall check the central listing provided by the office to verify that the person, firm, or contractor to whom the contract is being awarded, or any person, or firm, being utilized as a subcontractor by that person, firm, or contractor, is not under suspension for violating this section." ***75**

C

The State Civil Service

The following Government Code provisions apply to affirmative action in the state civil service:

Section 19790: "Each agency and department is responsible for establishing an effective affirmative action program. The State Personnel Board shall be responsible for providing statewide advocacy, coordination, enforcement, and monitoring of these programs.

"Each agency and department shall establish goals and timetables designed to overcome any identified underutilization of minorities and women in their respective organizations. Agencies and departments shall determine their annual goals and timetables by June 1 of each year beginning in 1978. These goals and timetables shall be made available to the public upon request. All goals and timetables shall then be submitted to the board for review and approval or modification no later than July 1 of each year."

Section 19791: "As used in this chapter:

"(a) 'Goal' means a projected level of achievement resulting from an analysis by the employer of its deficiencies in utilizing minorities and women and what reasonable remedy is available to correct such underutilization. Goals shall be specific by the smallest reasonable hiring unit, and shall be established separately for minorities and women.

"(b) 'Timetable' means an estimate of the time required to meet specific goals.

"(c) 'Underutilization' means having fewer persons of a particular group in an occupation or at a level in a department than would reasonably be expected by their availability."

Section 19792: "The State Personnel Board shall:

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

"(a) Provide statewide leadership designed to achieve positive and continuing affirmative action programs in the state civil service.

"(b) Develop, implement, and maintain affirmative action and equal employment opportunity guidelines.

"(c) Provide technical assistance to state departments in the development and implementation of their affirmative action programs. ***76**

"(d) Review and evaluate departmental affirmative action programs to insure that they comply with federal statutes and regulations.

"(e) Establish requirements for improvement or corrective action to eliminate the underutilization of minorities and women.

"(f) Provide statewide training to departmental affirmative action officers who will conduct supervisory training on affirmative action.

"(g) Review, examine the validity of, and update qualifications standards, selection devices, including oral appraisal panels and career advancement programs.

"(h) Maintain a statistical information system designed to yield the data and the analysis necessary for the evaluation of progress in affirmative action and equal employment opportunity within the state civil service. Such statistical information shall include specific data to determine the underutilization of minorities and women. The statistical information shall be made available during normal working hours to all interested persons. Data generated on a regular basis shall include, but not be limited to, the following:

"(1) Current state civil service work force composition by race, sex, age, department, salary level, occupation, and attrition rates by occupation.

"(2) Current local and regional work force and population data of women and minorities.

"(i) Data analysis shall include, but not be limited to, the following:

"(1) Data relating to the utilization by department of minorities and women compared to their availability in the labor force.

"(2) Turnover data by department and occupation.

"(3) Data relating to salary administration, such as average salaries by race and sex, and comparisons of salaries within state service and comparable state employment.

"(4) Data on employee age, and salary level compared among races and sexes.

"(5) Data on the number of women and minorities recruited for, participating in and passing state civil service examinations. Such data shall be analyzed pursuant to the provisions of Sections 19704 and 19705. ***77**

"(6) Data on the job classifications, geographic locations, separations, salaries, and other conditions of employment which provide additional information about the composition of the state civil service work force."

Section 19792.5: "(a) In order to permit the public to track the 'glass ceiling' patterns affecting women and minorities in state civil service, the State Personnel Board shall annually track, by incremental levels of ten thousand dollars ($10,000), the salaries of women and minorities in state civil service up to the level of one hundred thousand dollars ($100,000). For purposes of this subdivision, 'glass ceiling' means the artificial barrier caused by discriminatory employment practices that prevents or hinders the advancement of women and minorities to better paying and higher level positions.

"(b) The board shall report salary data collected pursuant to subdivision (a) to the Governor and the Legislature in its Annual Census of State Employees and Affirmative Action Report, and shall include in this report information regarding the progress of women and minorities in attaining high level positions in state employment and affirmative action efforts made in this regard. The salary data shall be reported in annual increments of ten thousand dollars ($10,000) by job category, minority group, and gender in a

format easily understandable by the public."

Section 19793: "By November 15 of each year beginning in 1978, the State Personnel Board shall report to the Governor, the Legislature, and the Department of Finance on the accomplishment of each state agency and department in meeting its stated affirmative action goals for the past fiscal year. The report shall include information to the Legislature of laws which discriminate or have the effect of discrimination on the basis of race, color, religion, national origin, political affiliation, sex, age, or marital status. The Legislature shall evaluate the equal employment opportunity efforts and affirmative action progress of state agencies during its evaluation of the Budget Bill."

Section 19794: "In cooperation with the State Personnel Board, the director of each department shall have the major responsibility for monitoring the effectiveness of the affirmative action program of the department."

Section 19795: "(a) The secretary of each state agency and the director of each state department shall appoint an affirmative action officer, other than the personnel officer, except in a department with less than 500 employees the affirmative action officer may be the personnel officer who shall report directly, and be under the supervision of, the director of the department, to ***78** develop, implement, coordinate, and monitor the agency or departmental affirmative action program. The departmental or agency affirmative action officer shall, among other duties, analyze and report on appointments of employees, request appropriate action of the departmental director or agency secretary, submit an evaluation of the effectiveness of the total affirmative action program to the State Personnel Board annually, monitor the composition of oral panels in departmental examinations, and perform other duties necessary for the effective implementation of the departmental and agency affirmative action plans.

"(b) Each state agency shall establish a committee of employees who are individuals with a disability to advise the head of the agency on matters relating to the formulation and implementation of the plan to overcome and correct any underrepresentation determined pursuant to Section 19234."

Section 19796: "Bureau or division chiefs within a department or agency shall be accountable to the department director for the effectiveness and results of the program within their division or bureau. Each bureau or division may assign an administrator to assist the departmental affirmative action officer.

"All management levels, including firstline supervisors, shall provide program support and take all positive action necessary to ensure and advance equal employment opportunity at their respective levels."

Section 19797: "Each state agency and department shall develop, update annually, and implement an affirmative action plan which shall at least identify the areas of underutilization of minorities and women within each department by job category and level, contain an equal employment opportunity analysis of all job categories and levels within the hiring jurisdiction, and include an explanation and specific actions for improving the representation of minorities and women."

Section 19798: "In establishing order and subdivisions of layoff and reemployment, the board, when it finds past discriminatory hiring practices, shall by rule, adopt a process that provides that the composition of the affected work force will be the same after the completion of a layoff, as it was before the layoff procedure was implemented. This section does not apply to state employees in State Bargaining Unit 5, 6, or 8."

Section 19799: "When any state agency conducts any survey as to the ancestry or ethnic origin of state civil service employees, or maintains any statistical tabulation of minority group employees, it shall use separate ***79** collection categories for each major Asian and Pacific Islander group, including, but not limited to, Chinese, Japanese, Filipino, Korean, Vietnamese, Asian Indian, Hawaiian, Guamanian, Samoan, Laotian, and Cambodian in the survey or tabulation." ***80**

D

Community Colleges

The following sections of the Education Code are applicable to community colleges:

Section 87100: "The Legislature finds and declares that:

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

"(a) Generally, California Community Colleges employ a disproportionately low number of racial and ethnic minority classified employees and faculty and a disproportionately low number of women and members of racial and ethnic minorities in administrative positions.

"(b) It is educationally sound for the minority student attending a racially impacted school to have available the positive image provided by minority classified and academic employees. It is likewise educationally sound for the student from the majority group to have positive experiences with minority people which can be provided, in part, by having minority classified and academic employees at schools where the enrollment is largely made up of majority group students. It is also educationally important for students to observe that women as well as men can assume responsible and diverse roles in society.

"(c) Past employment practices created artificial barriers and past efforts to promote additional action in the recruitment, employment, and promotion of women and minorities have not resulted in a substantial increase in employment opportunities for such persons.

"(d) Lessons concerning democratic principles and the richness which racial diversity brings to our national heritage can be best taught by the presence of staffs of mixed races and ethnic groups working toward a common goal.

"It is the intent of the Legislature to establish and maintain a policy of equal opportunity in employment for all persons and to prohibit discrimination based on race, sex, color, religion, age, handicap, ancestry, or national origin in every aspect of personnel policy and practice in employment, development, advancement, and treatment of persons employed in the public school system, and to promote the total realization of equal employment opportunity through a continuing affirmative action employment program.

"The Legislature recognizes that it is not enough to proclaim that public employers do not discriminate in employment but that effort must also be ***81** made to build a community in which opportunity is equalized. It is the intent of the Legislature to require educational agencies to adopt and implement plans for increasing the numbers of women and minority persons at all levels of responsibility."

Section 87101: "For the purposes of this article:

"(a) 'Affirmative action employment program' means planned activities designed to seek, hire, and promote persons who are underrepresented in the work force compared to their number in the population, including handicapped persons, women, and persons of minority racial and ethnic backgrounds. It is a conscious, deliberate step taken by a hiring authority to assure equal employment opportunity for all staff, both academic and classified. These programs require the employer to make additional efforts to recruit, employ, and promote members of groups formerly excluded at the various levels of responsibility who meet statewide minimum qualifications, if any, and who, relative to local qualifications beyond the statewide minimum qualifications, are qualified or may become qualified through appropriate training or experience within a reasonable length of time. The programs should be designed to remedy the exclusion, whatever its cause. Affirmative action requires imaginative, energetic, and sustained action by each employer to devise recruiting, training, and career advancement opportunities which will result in an equitable representation of women and minorities in relation to all employees of the employer.

"(b) 'Goals and timetables' means projected new levels of employment of women and minority racial and ethnic groups to be attained on an annual schedule, given the expected turnover in the work force and the availability of persons who are, relative to local qualifications beyond the statewide minimum qualifications, qualified or may become qualified through appropriate training or experience within a reasonable length of time. Goals are not quotas or rigid proportions. They should relate both to the qualitative and quantitative needs of the employer.

"(c) 'Public education agency' means the office of the chancellor and the governing board of each community college district in California."

Section 87102: "(a) The governing board of each community college district shall periodically submit, to the Board of Governors of the California Community Colleges an affirmation of compliance with the

provisions of this article. The affirmative action employment program shall have goals that ensure participation in, and commitment to, the program by district personnel, and timetables, for its implementation. The affirmative action ***82** plan shall include steps that the district will take in meeting and improving hiring goals for both full-time faculty and part-time faculty pursuant to Section 87482.6, and the development of the plan shall be a condition for receipt of allowances pursuant to that section.

"The governing board of each community college district shall be held accountable pursuant to this article and other applicable provisions of law for the success or failure of its affirmative action employment program. The plans shall be a public record within the meaning of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code).

"(b) The governing board of each community college district shall publish and distribute a record of the success rate of measurable progress, with respect to its goals and timetables, in hiring employees through its affirmative action employment program. This publication shall be a public record within the meaning of the California Public Records Act, and shall include data and information specified by the board of governors."

Section 87103: "The office of the Chancellor of the California Community Colleges shall render assistance in developing and implementing affirmative action employment programs to community college districts under its jurisdiction."

Section 87104: "(a) The Board of Governors of the California Community Colleges, out of funds appropriated for these purposes, (1) shall provide assistance to local community colleges in adopting and maintaining high-quality affirmative action programs; (2) report to the Legislature regarding the number of districts which have adopted and are maintaining affirmative action programs, including the effectiveness of the programs in meeting the intent of this article; (3) develop and disseminate to public community college districts guidelines to assist these agencies in developing and implementing affirmative action employment programs; and (4) shall establish a technical assistance team to review the affirmative action plan of each community college district which fails to make measurable progress in meeting the goals and timetables of its adopted plan. The technical assistance team shall recommend appropriate actions to assure reasonable progress in improving success rates. The board of governors shall prescribe those conditions necessary to assure reasonable progress and otherwise meet the legal requirements of affirmative action. The conditions may include the withholding of allowances made pursuant to Sections 87482.6 and 87107.

"(b) The board of governors shall establish, by July 1, 1989, within the chancellor's office or through other means as deemed necessary, a major ***83** service function to assist community college districts in identifying, locating, and recruiting qualified members of underrepresented groups, and in establishing and maintaining effective affirmative action hiring procedures.

"(c) The board of governors shall, by March 15, 1989, develop and adopt a systemwide plan for strengthening faculty and staff affirmative action policies and programs in the California Community Colleges."

Section 87105: "The Board of Governors of the California Community Colleges shall adopt all necessary rules and regulations to carry out the intent of this article."

Section 87106: "Any activities undertaken pursuant to this article shall be subject to the provisions of Title VII of the Federal Civil Rights Act of 1964, and amendments thereto."

Section 87107: "(a) There is hereby created in the State Treasury a fund which shall be known as the Faculty and Staff Diversity Fund. The money in the fund shall be available to the board of governors upon appropriation by the Legislature for the purpose of enabling the California Community Colleges as a system to address the goal that by the year 2005 the system's work force will reflect proportionately the adult population of the state. For the purpose of administering this fund, the board of governors shall develop and apply availability data and factors for measuring district progress in contributing to this goal for the system. Also for the purpose of administering this fund, it is the intent of the Legislature that the board of governors take the steps which are necessary

92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541
(Cite as: 92 Cal.App.4th 16)

to reach the goal that by fiscal year 1992-93, 30 percent of all new hires in the California Community Colleges as a system will be ethnic minorities.

"(b) By December 1, 1993, the board of governors shall report upon and assess the extent to which the California Community Colleges as a system have met or begun to meet the goals specified in this section. The report shall include conclusions regarding any necessary revisions to these goals. Unless provided otherwise by the Legislature by statute, the board of governors may, on or after September 30, 1994, adopt regulations to revise these goals.

"(c) The board of governors shall utilize up to 25 percent of the fund to do all of the following:

"(1) Reimburse districts for the costs of publishing, distributing, and reporting affirmative action success rates as provided in Section 87102. ***84**

"(2) Reimburse districts for the cost of preparing and updating affirmative action plans.

"(3) Carry out the assistance, service, monitoring, and compliance functions specified in Section 87104.

"(d) The remainder of the fund shall be allocated to districts, in accordance with regulations of the board of governors, to provide for extended outreach and recruitment of underrepresented groups, for incentives to hire members of underrepresented groups, for in-service training and for other related staff diversity programs.

"(e) It is the intent of the Legislature that the board of governors, in administering this fund, shall, pursuant to the provisions of this article, give funding priority and shall afford flexibility and discretion in the use of these funds to districts which have made or are making reasonable progress in contributing to the achievement of the goals of this fund." ***85**

Cal.App.3.Dist.
Connerly v. State Personnel Bd.
92 Cal.App.4th 16, 112 Cal.Rptr.2d 5, 86 Fair Empl.Prac.Cas. (BNA) 1048, 156 Ed. Law Rep. 1190, 01 Cal. Daily Op. Serv. 7754, 2001 Daily Journal D.A.R. 9541

END OF DOCUMENT

248 F.Supp.2d 936, 175 Ed. Law Rep. 260
(Cite as: 248 F.Supp.2d 936)

H

United States District Court,
C.D. California,
Western Division.
GOLETA UNION ELEMENTARY SCHOOL DISTRICT; et al., Plaintiffs,
v.
Andrew ORDWAY; et al., Defendants,
And Related Counter–Claim.

No. CV 99–07745 DDP.
Dec. 6, 2002.

School district brought action challenging adverse administrative determination in Individuals with Disabilities Education Act (IDEA) suit. Student's parent assert various counterclaims against district official. On cross-motions for summary judgment on counterclaims, the District Court, Pregerson, J., held that: (1) parent was not required to file claim under California's Tort Claims Act before asserting state law claims based on school district's alleged IDEA violations; (2) violation of IDEA, even if merely negligent, is sufficient to subject school district official to personal liability under § 1983; and (3) district official was liable, under § 1983, for IDEA violation which she personally committed.

Motions granted in part and denied in part.

See also 166 F.Supp.2d 1287.

West Headnotes

[1] Federal Civil Procedure 170A 928

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(I) Motions in General
170Ak928 k. Determination. Most Cited Cases

Court would not reconsider its prior ruling, declining to dismiss complaint for failure to state claim, absent raising of new issues of fact or law, or pointing out of any issue which court had manifestly failed to consider.

[2] Municipal Corporations 268 741.15

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k741 Notice or Presentation of Claims for Injury
268k741.15 k. Necessity and purpose. Most Cited Cases

Purpose of California's Tort Claims Act is to provide governmental agencies with notice of claims against them and provide them with sufficient information to investigate and settle claims, if appropriate, without expense of litigation. West's Ann.Cal.Gov.Code § 900 et seq.

[3] Municipal Corporations 268 741.25

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k741 Notice or Presentation of Claims for Injury
268k741.25 k. Applicability in particular cases. Most Cited Cases

There is no requirement to file claim under California's Tort Claims Act where statute in question prescribes different claims filing procedures. West's Ann.Cal.Gov.Code § 900 et seq.

[4] Schools 345 112.6

345 Schools
345II Public Schools
345II(I) Claims Against District
345k112.5 Notice, Demand, or Presentation of Claim
345k112.6 k. In general. Most Cited Cases
(Formerly 345k112)

248 F.Supp.2d 936, 175 Ed. Law Rep. 260
(Cite as: 248 F.Supp.2d 936)

Schools 345 155.5(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k155.5 Handicapped Children, Proceedings to Enforce Rights
345k155.5(1) k. In general. Most Cited Cases

Parent of special education student, who had followed state law requirements for administratively pursuing IDEA claims, was not additionally required to file claim under California's Tort Claims Act before asserting state law claims based on school district's alleged IDEA violations. Individuals with Disabilities Education Act, § 615, as amended, 20 U.S.C.A. § 1415; West's Ann.Cal.Educ.Code §§ 56500-56507; West's Ann.Cal.Gov.Code § 900 et seq.

[5] Civil Rights 78 1356

78 Civil Rights
78III Federal Remedies in General
78k1353 Liability of Public Officials
78k1356 k. Education. Most Cited Cases
(Formerly 78k207(1))

Violation of IDEA, even if merely negligent, is sufficient to subject school district official to personal liability under § 1983. Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.; 42 U.S.C.A. § 1983.

[6] Civil Rights 78 1069

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled students. Most Cited Cases
(Formerly 78k1060, 78k127.1)

Civil Rights 78 1332(2)

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1332 Third Party Rights; Decedents
78k1332(2) k. Education. Most Cited Cases
(Formerly 78k202)

Parents may sue under § 1983 for any violations of IDEA; there are no IDEA rights enforceable exclusively by children. Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.; 42 U.S.C.A. § 1983.

[7] Civil Rights 78 1027

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1026 Rights Protected
78k1027 k. In general. Most Cited Cases
(Formerly 78k108.1)

Test for determining whether statutory provision creates enforceable right under § 1983 asks whether: (1) plaintiff is intended beneficiary of statute; (2) plaintiff's asserted interests are not so vague and amorphous as to be beyond competence of judiciary to enforce; and (3) statute imposes binding obligation on state. 42 U.S.C.A. § 1983.

[8] Schools 345 148(2.1)

345 Schools
345II Public Schools
345II(L) Pupils
345k148 Nature of Right to Instruction in General
345k148(2) Handicapped Children and Special Services Therefor
345k148(2.1) k. In general. Most Cited Cases

School district policy cannot serve as defense to district official's failure to meet her responsibilities under IDEA. Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.

[9] Civil Rights 78 1356

78 Civil Rights
78III Federal Remedies in General

248 F.Supp.2d 936, 175 Ed. Law Rep. 260
(Cite as: 248 F.Supp.2d 936)

78k1353 Liability of Public Officials
78k1356 k. Education. Most Cited Cases
(Formerly 78k207(1))

School district official, who violated IDEA by transferring special education student to different school within district, per parental request, without first assessing appropriateness of transfer, was individually liable to parent under § 1983. Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.; 42 U.S.C.A. § 1983.

[10] Civil Rights 78 1356

78 Civil Rights
78III Federal Remedies in General
78k1353 Liability of Public Officials
78k1356 k. Education. Most Cited Cases
(Formerly 78k207(1))

School district official could not be held personally liable, under § 1983, for district's alleged violations of IDEA, absent showing that she had personally committed alleged violations. Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.; 42 U.S.C.A. § 1983.

***937** Sharon A Watt, Andrew V Arczynski, Filarsky & Watt, Ojai, CA, for Goleta Union Elementary School District, Hope Elementary School District, Santa Barbara High School District, Santa Barbara County Special Education Local Plan Area, Santa Barbara County Office of Education, plaintiffs.

Marcy J K Tiffany, Marcy J K Tiffany Law Offices, Rancho Palos Verdes, CA, for Andrew Ordway, defendant.

Steven M Wyner, Steven M Wyner Law Offices, Manhattan Beach, CA, for Cynthia Ordway, defendant.

Marsha A Bedwell, Department of Education, Sacramento, CA, Joyce O Eckrem, Joyce D Eckrem Law Offices, Gardnerville, NV, for California Special Education Hearing Office, California Department of Education, defendants.

ORDER GRANTING IN PART AND DENYING IN PART THE CROSS–MOTIONS FOR SUMMARY JUDGMENT BY CROSS–CLAIMANT AND COUNTER–DEFENDANT DIANA RIGBY

PREGERSON, District Judge.

This matter comes before the Court on the counter-claimant and counter-defendant cross-motions for summary judgment. Having considered the materials submitted by the parties, the matters raised at oral argument and the issues raised thereby, the Court adopts the following order.

I. Background

This action stems from an administrative hearing appeal regarding alleged violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq. ("IDEA"). The defendants are Andrew Ordway ("Andrew"), and his mother, Cynthia Ordway. Andrew has been a special education student since 1993. (Counter-***938** claimant's Statement of Genuine Issues, p. 1.)

The plaintiffs and counter-defendants filed this action on July 27, 1999, appealing the April 30, 1999 decision of a California Special Education Hearing Officer (the "Hearing Officer"). The Hearing Officer found, *inter alia*, that the plaintiffs failed to offer Andrew a free and appropriate public education ("FAPE") as required by IDEA, and that one or more of the plaintiffs should be required to reimburse Cynthia Ordway for Andrew's residential placement. (*See* Compl., Ex. 1 at 19–21.) The plaintiffs sought to set aside the Hearing Officer's findings, as well as additional declaratory relief and attorney's fees. (*See* Compl. at 13–15.)

On September 24, 1999, defendants California Department of Education and California Special Education Hearing Office answered the complaint. On October 18, 1999, defendant Cynthia Ordway filed an answer and a counter-claim. The counter-claim named the plaintiffs as counter-defendants, as well as Marcia McClish, both individually and as the director of SELPA, and Diana Rigby, both individually and as the Director of Student Services for the SBHSD. The counter-claim included the following allegations and causes of action: (1) the counter-defendants violated Ms. Ordway's rights under IDEA; (2) the counter-defendants violated Ms. Ordway's rights under Section 504 of the Rehabilitation Act; (3) the counter-defendants "acted in bad faith in denying Counterclaimant [sic] her statutory rights under IDEA, and

thereby violated Section 1983"; (4) the counter-defendants "acted with intentional disregard for Counterclaimant's [sic] statutory rights under IDEA, and thereby violated Section 1983"; (5) the counter-defendants "acted in bad faith in denying Counterclaimant [sic] her statutory rights under Section 504 [of the Rehabilitation Act] and thereby violated Section 1983"; and (6) the counter-defendants "acted with intentional disregard for Counterclaimant's [sic] statutory rights under Section 504 [of the Rehabilitation Act] and thereby violated Section 1983." (Counter–Compl. at ¶¶ 97–108.) Subsequently, Ms. Ordway agreed to dismiss her second, fifth, and sixth counter-claims. (*See* Opp. to Mot. to Dismiss at 8–9.)

On August 10, 2001, the Court affirmed the Hearing Officer's findings in favor of defendants/counter-claimants on all grounds, with the exception of the finding that the AB 3632 assessment was completed in a timely manner. The Court reversed the Hearing Officer's decision regarding the assessment, and found in favor of the Ordways on that issue. The Court affirmed the Hearing Officer's monetary award and granted SEHO's and the Department of Educations' motions for summary judgment. The Court affirmed the hearing officer's decision that Andrew Ordway's rights secured by the IDEA were violated.

The counter-defendant then filed a motion for summary judgment on the issues of: (1) whether a civil rights action under § 1983 could be maintained based on a violation of IDEA; (2) whether the 11th Amendment barred the action against Rigby in her official capacity; and (3) whether Rigby was entitled to qualified immunity to the extent she is sued in her individual capacity. This Court denied the motion on August 8, 2001.

In the instant motion for summary judgment, the cross-defendant, Ms. Rigby, asks the Court to (1) reconsider its ruling that a civil rights action under § 1983 can be based on a violation of IDEA; (2) find that the counter-claim based on California Law is barred by the Tort Claims Act; (3) interpret the previous orders in this case to constitute a ruling on the third and fourth counter-claims in that negligence is ***939** insufficient to sustain a claim under § 1983 for a violation of IDEA; (4) deny Cynthia Ordway's claims under IDEA inasmuch as they are based on rights held by her son Andrew; (5) find that the transfer of Andrew was not actionable conduct; and (6) read the "open enrollment" requirement of California law as a defense to Ms. Rigby's conduct.

The counter-claimant, Ms. Ordway, in her cross-motion, moves for summary judgment on the question of whether Ms. Rigby is liable under § 1983 for committing the following violations of IDEA: (1) transferring Andrew to La Colina Jr. High without assessing whether it was an appropriate placement; (2) transferring Andrew without developing goals and objectives pursuant to an Individualized education Plan ("IEP"); (3) denying Ms. Ordway's right to meaningfully participate in the IEP; (4) failing to convene an IEP meeting to develop an assessment plan and implement a behavioral intervention plan and conduct a timely manifestation determination; (5) failing to conduct a behavioral assessment and develop a behavior intervention plan; and (6) failing to timely refer Andrew for an AB 3632 placement.

II. *Legal Standard*

Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Thus, the "mere existence of a scintilla of evidence" in support of the nonmoving party's claim is insufficient to defeat summary judgment. *Id.* at 252, 106 S.Ct. 2505. In determining a motion for summary judgment, all reasonable inferences from the evidence must be drawn in favor of the nonmoving party. *Id.* at 242, 106 S.Ct. 2505.

III. Analysis

A. *The Motion for Reconsideration is Denied*

[1] The counter-defendant, Ms. Rigby, first requests the Court to reconsider its previous ruling that a § 1983 claim can be based on a violation of IDEA. This, the Court declines to do. The cases cited by the counter-defendant neither raise new issues of fact or law, nor point to any issue that the Court has manifestly failed to consider. There has been, contrary to the counter-defendant's assertion, no Ninth Circuit

case denying recovery under § 1983 for violations of IDEA decided since Congress amended IDEA's predecessor law in 1986. 20 U.S.C. § 1415(f). This Court's determination that a plaintiff can recover under § 1983 for violations of IDEA is founded on the Congressional intent evidenced by this amendment. Therefore, the counter-defendant offers no binding authority to support her position. The motion for reconsideration is denied.

B. *Counter-claims Based on California Law*

The counter-defendant moves for summary judgment on the counter-claims brought under the California Education Code § 56000 *et seq.*, arguing that the action is untimely under the Tort Claims Act.[FN1]

> FN1. The Court is confused by the counter-defendant's assertion that a plaintiff cannot simultaneously maintain an action for violation of state and federal law where both apply. The counter-defendant cites no case to support this argument and, without more, the Court declines to rule on it.

***940** [2][3] The Court finds that the Tort Claims Act is inapplicable under these circumstances. The purpose of the Tort Claims Act is to provide governmental agencies with notice of the claims against them and provide them with sufficient information to investigate and settle claims, if appropriate, without the expense of litigation. *City of San Jose v. Superior Ct.*, 12 Cal.3d 447, 455, 115 Cal.Rptr. 797, 525 P.2d 701 (1974). There is no requirement to file a claim under the Act where the statute in question prescribes different claims filing procedures. Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* ¶ 1:660 (The Rutter Group 2001). For example, in *Snipes v. City of Bakersfield*, 145 Cal.App.3d 861, 865, 193 Cal.Rptr. 760 (1983), the court held that claims under the Fair Employment and Housing Act ("FEHA") do not implicate the Tort Claims Act as the FEHA contains its own claims filing procedures, insuring adequate notice. Likewise, where parties requesting monies from a state created fund were required to first file a claim with the fund, the Tort Claims Act was found inapplicable. *Becerra v. Gonzales*, 32 Cal.App.4th 584, 592, 38 Cal.Rptr.2d 248 (1995).

[4] California enacted §§ 56500–56507 of the Education Code to comply *with the exhaustion requirement of IDEA.* 20 U.S.C. § 1415; *Porter v. Board of Tr.*, 307 F.3d 1064, 1068 (9th Cir.2002). The cross-claimants followed the procedures outlined in California law, including participating in a full hearing before a Special Education Hearing Officer. The Hearing Officer is under contract with the California Department of Education to provide due process hearings for claims under California Education Code § 56000 *et seq.* The State and its employees, therefore, were on notice of the claims before the filing of the instant action and the Tort Claims Act is inapplicable.

C. *A § 1983 Claim for Violation of IDEA Does Not Require a Showing of Heightened Culpability*

[5] The counter-defendant moves for summary judgment on the counter-claims maintaining that she cannot be held personally liable under § 1983 for violation of IDEA because mere negligence on the part of a government official is insufficient to support such a claim. The counter-defendant interprets this Court's previous ruling to be definitive on the subject of her culpability. This Court found that the counter-claimant failed to create a triable issue of fact as to whether Ms. Rigby acted with reckless or callous disregard for the rights of others. (10/15/01 Order.)

The language of § 1983 does not contain a state-of-mind requirement. The Supreme Court, however, has explored the issue of what level of culpability, if any, is required to establish a § 1983 violation where the claim was predicated on a violation of a constitutional right. In *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), the Court explicitly held that the negligent acts of a government official could not sustain a due process claim under § 1983. The Court reasoned that § 1983 does not create or establish any right but, instead, provides only a remedy for the violation of federal rights created by another source. As such, "in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim." *Id.* at 330, 106 S.Ct. 662; *see also Pink v. Lester*, 52 F.3d 73, 74 (4th Cir.1995) ("the requisite intent in a given [§ 1983] case turns upon the standard necessary to establish a violation of the underlying constitutional or statutory right"). Considering the source of the constitutional right at issue, the due process***941** clause of the Fourteenth Amendment, the Supreme Court found that negligent conduct could not support a § 1983 claim. *Id.* at 332, 106 S.Ct. 662.[FN2]

FN2. Ninth Circuit case law also requires a showing of heightened culpability to sustain a § 1983 claim based on a constitutional violation. *Stevenson v. Koskey*, 877 F.2d 1435 (9th Cir.1989) (holding that an officer's handling of an inmate's mail was at most negligent and, thus, did not reach the level of culpability necessary to permit a finding of personal liability under § 1983); *Woodrum v. Woodward County*, 866 F.2d 1121 (9th Cir.1989).

In contrast to *Daniels*, the underlying right at issue here is not constitutional, but statutory. The proper approach, therefore, is to look to IDEA. A showing of heightened culpability is not required to establish a violation of IDEA. Thus, all that is required to establish a § 1983 claim is proof of a violation of IDEA under color of law.

D. *Parents May Sue Under § 1983 For All Violations Of IDEA*

[6] The counter-defendant moves for summary judgment on the majority of the counter-claims, asserting that Ms. Ordway cannot maintain a cause of action under § 1983 for violations of IDEA that do not specifically implicate the enumerated rights granted to a parent.[FN3] This approach requires dissecting IDEA into categories of rights, some of which belong to the parents and some of which belong to the child.

FN3. The Court notes that this issue could be easily avoided by adding Andrew as a party to the counter-claim and questions why this has not been done.

Under § 1983 "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage ..., subjects, or causes to be subjected any citizen of the United States ... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured." *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 58 (1st Cir.2002). The key question is whether the actions of the party deprived the plaintiff of a federally secured right. *Id.* This Court has already ruled that § 1983 can support an IDEA claim. However, the approach used to determine whether a specific statutory scheme supports § 1983 claims is instructive in answering the question presented here.

[7] The Supreme Court has used a three factor test to determine whether or not a statutory provision creates an enforceable right (1) whether the plaintiff is an intended beneficiary of the statute; (2) whether the plaintiff's asserted interests are not so vague and amorphous as to be beyond the competence of the judiciary to enforce; and (3) whether the statute imposes a binding obligation on the state. *See Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). In *Suter v. Artist M.*, 503 U.S. 347, 357, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992), the Supreme Court again addressed whether a statute created a right that could form the basis of a § 1983 claim and held that the statute in question must unambiguously conferred upon the intended beneficiaries a right to enforce the provisions of the statute. To determine the intended beneficiaries, one looks to the statutory language to see whether it is " 'phrased in terms of the persons benefitted.' " *Victorian v. Miller*, 813 F.2d 718, 720–21 (5th Cir.1987) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 692 n. 13, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)).

The IDEA statement of purpose recognizes that the goal of the statute is "to ensure that the rights of children with disabilities *and parents of such children* are protected." 20 U.S.C. § 1400(d)(1)(B) (emphasis added). Moreover, IDEA unambiguously***942** confers upon the parent beneficiaries of the statute an enforceable right to the procedural mechanisms that secure their disabled children a free and appropriate public education.[FN4] Courts have consistently recognized the importance of parents to the proper functioning of IDEA. *Porter v. Board of Tr. of Manhattan Beach*, 307 F.3d 1064 (9th Cir.2002); *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir.2001). The IDEA, therefore, intends to protect and benefit not only disabled children, but their parents, by recognizing that there is a unity of interest between the parent and the child in obtaining a free and appropriate education.

FN4. Ms. Rigby makes much of the requirement that § 1983 rights be "personal", citing to numerous cases wherein a parent was unable to bring a claim for violation of a child's civil rights. These cases, however, do not address § 1983 claims based on statutory violations. In the context of an alleged violation of a right guaranteed by federal law,

> the Supreme Court has looked to the language of the statute to determine the statute's intended beneficiaries.

Moreover, the Court can find no precedent to support a parsing of IDEA into separate rights for parents and children. In contrast, the Supreme Court, analyzing the National Labor Relations Act ("NLRA") in the context of § 1983, held that the NLRA created rights in both labor and management. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989). Next, the Court found that the petitioner, a taxi cab franchise owner, was an intended beneficiary "of a *statutory scheme* that prevents governmental interference with the collective-bargaining process..." *Id.* (emphasis added). The enforcement mechanism of IDEA evidences an intent to create a comprehensive statutory scheme benefitting both parents and children without distinction.

The IDEA gives parents the right to "present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). Parents are not limited to enforcing those procedures which directly address parental participation but can enforce any matter that relates to the provision of an appropriate education to their child. It was "[t]o ensure that the parents would not be silenced by the very forces that had once excluded disabled children from public education, [that] Congress granted parents the right to seek review of their child's IEP." *Heldman v. Sobol*, 962 F.2d 148, 151 (2d Cir.1992). It is the parents, then, who are specifically granted the right to an impartial due process administrative hearing. 34 C.F.R. § 300.506; *Radcliffe v. School Bd. of Hillsborough County*, 38 F.Supp.2d 994, 998 (M.D.Fla.1999). Upon the competition of the administrative process, "any party aggrieved by the findings and decision ... shall have the right to bring a civil action with respect to the complaint." 20 U.S.C. § 1415(i)(2). Parents, therefore, have standing under IDEA to assert violations of any matter relating to their child's receipt of a free and appropriate public education.

Finally, to deny parents a free standing right to enforce all of the procedures of IDEA would be inconsistent with the structure and format of IDEA. Although IDEA is designed to provide disabled children with a "free and appropriate public education," Congress did not choose to establish precise substantive rights; instead, it created numerous procedures to ensure and protect that right. 20 U.S.C. § 1400(c).

> ***943** IDEA's procedural guarantees, however, serve not only to guarantee the substantive rights accorded by the Act; the procedural rights, in and of themselves, form the substance of the IDEA.... The central role of the IDEA process rights bears witness that Congress intended to create procedural rights the violation of which would constitute an injury in fact.

Heldman, 962 F.2d at 155. The parents are the critical component in these procedures, and it is through their participation that the process is successful. To separate out each procedure as a right granted individually to one beneficiary or the other belies the intent to create a system of procedures, that, when functioning properly, secures to disabled children, and the parents responsible for them, a free and appropriate public education.

E. *The Specific Liability of Counter–Defendant Rigby*

The remainder of the counter-defendant's claims, and all of the counter-claimant's requests for summary judgment, require specific findings regarding Ms. Rigby's liability to Ms. Ordway.[FN5]

> FN5. The counter-defendant makes separate evidentiary objections protesting any assertions by the counter-claimant that this Court's previous orders resulted in findings of fact. The Court may have found that there was no genuine issue of material fact, but these are not "findings" of fact. The counter-defendant further takes exception to any reliance of the SEHO order or evidence presented in support thereof as inadmissible hearsay. The counter-defendant is correct that this Court's review of the SEHO's decision essentially functioned as determination of cross-motions for summary judgment. In that sense, it does not contain findings of fact, but may have determined that no material issue of fact remained. (Order 8/13/01 at 1.)

1. *Andrew's Placement at La Colina*

[8][9] The counter-defendant argues that there can be no judgment against her for the placement of Andrew in La Colina Junior High, because a transfer within the district does not require an IEP under IDEA.[FN6]

> FN6. The counter-defendant also maintains that the "open enrollment" requirement of California law, which is translated into a school district policy granting parents permission to request an intra-district transfer, required her to honor Ms. Ordway's request for a transfer to La Colina without question. The Court finds no merit in this argument. The policy of a school district cannot serve as a defense to Ms. Rigby's failure to meet her responsibilities under IDEA.

This Court has twice now stated that "SBHSD should have assessed independently the causes of Andrew's behavior and whether moving him to La Colina would be an appropriate placement." (Order 10/15/01 at 26 n.11 (quoting Order 8/13/01 at 19:11–13).) There is, therefore, no need to revisit whether or not an assessment of the appropriateness of the transfer was required. Moreover, this Court held that the only conduct for which Ms. Rigby could be held personally liable under § 1983 was failing to investigate whether La Colina would be an appropriate placement for Andrew. (Order 10/15/01 at 24.) [FN7] Further, the Hearing ***944** Officer found, and this Court affirmed, that the plaintiffs, including Ms. Rigby, denied Andrew a FAPE by, inter alia, failing to offer him an appropriate placement. (Order 8/13/01 at 19.) It was evidence of Ms. Rigby's actions that supported this finding. Thus, the Hearing Officer, in a determination affirmed by this Court, already implicitly found that Ms. Rigby's conduct constituted a violation of IDEA.

> FN7. The counter-defendant would have the Court leave open the issue of qualified immunity for Ms. Rigby, claiming that the previous order denying summary judgment was not dispositive. As the counter-defendant offers nothing to refute the evidence offered by the counter-claimant in support of the initial order denying summary judgment or the current motion requesting it, she fails to create a triable issue of fact on this question. Summary judgment is therefore granted based on this Court's previous order, and the unrefuted evidence presented in support thereof, that Ms. Rigby is not entitled to the defense of qualified immunity for her failure to investigate the propriety of Andrew's placement. (Order 10/15/01 at 19–30.)

As well, this Court has already noted, twice, that "Ms. Rigby testified that she moved Andrew to La Colina at the request of Ms. Ordway. Ms. Rigby did this without investigating whether La Colina would be an appropriate placement because she 'honor[s]' parental requests." (10/15/01 Order at 22 n.9 (quoting 8/10/01 Order at 19).) The counter-defendant offers no evidence to create a triable issue of fact as to whether or not Ms. Rigby actually conducted an investigation into the appropriateness of La Colina as a placement of Andrew. As there can be no dispute that Ms. Rigby acted under the "color of law," the Court finds that the counter-claimant is entitled to summary judgment on the § 1983 claim against Ms. Rigby in her individual capacity for failing to investigate the appropriateness of Andrew's placement at La Colina.

2. *The Remainder of the Claims Against Ms. Rigby are Denied*

[10] The counter-claimant moves for summary judgment against Ms. Rigby, claiming that she was personally responsible for overseeing a variety of procedures required by IDEA in Andrew's case. The counter-claimant's request for summary judgment is based on the Hearing Officer's determination regarding SBHSD's responsibilities and duties. This Court has already held that Ms. Rigby's liability *under § 1983 cannot be premised on a theory* of *respondeat superior*. (Order 10/15/01 at 24.) Further, this Court held the Hearing Officer's findings implicating SBHSD's cannot be translated into a finding of personal liability against Ms. Rigby. (*Id.* ("Any findings on the part of the Hearing Officer or this Court relating to the conduct of SBHSD may not be attributed to Rigby herself.").) This Court *specifically* found that the sole action that could be attributed to Ms. Rigby was the failure to investigate the appropriateness of the placement of Andrew in La Colina. (*Id.*) Summary judgment based on qualified immunity is therefore granted to the counter-defendant on all of the counter-claimants remaining claims.

IV. Conclusion

In light of the upcoming trial, the parties are or-

dered to meet and confer and prepare a joint statement summarizing any remaining issues in this case. The statement shall be submitted within two weeks of the date of this order.

A. *Counter–Claimant's Motion for Summary Judgment*

For the reasons above, summary judgment is granted for the counter-claimant on the question of Ms. Rigby's liability in her individual capacity for failing to investigate Andrew's placement at La Colina. Summary judgment is granted to counter-defendant Ms. Rigby for the remaining claims against her.

B. *Counter–Defendant's Motion for Summary Judgment*

For the reasons above, counter-defendant's motion for reconsideration is denied. Summary judgment is denied on the California Education Code § 56000 *et seq.* cause of action. Summary judgment is granted on all issues of liability beyond ***945** Ms. Rigby's failure to investigate the La Colina placement.

IT IS SO ORDERED.

C.D.Cal.,2002.
Goleta Union Elementary School Dist. v. Ordway
248 F.Supp.2d 936, 175 Ed. Law Rep. 260

END OF DOCUMENT

GUY HALL, Respondent,
v.
THE CITY OF TAFT et al., Appellants.

L. A. No. 24244.

Supreme Court of California
Oct. 19, 1956.

HEADNOTES

(1) Schools § 2--Legislative Control.

The public schools are a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the Constitution, and the Legislature is given plenary powers in relation thereto, subject only to constitutional restrictions.

See **Cal.Jur.,** Schools, § 4 et seq.; **Am.Jur.,** Schools, § 7 et seq.

(2) Schools § 2--Legislative Control.

The public school system is of statewide supervision and concern, and legislative enactments thereon control over attempted regulation by local government units.

(3) Schools § 10--School Districts.

School districts are agencies of the state for local operation of the state school system.

(4) Schools § 52--School Property.

The beneficial ownership of property of public schools is in the state.

(5) Schools § 60--School Property--Buildings and Construction.

While a large degree of autonomy is granted school districts by the Legislature, no statute or constitutional provision expressly makes school buildings or their construction any more amenable to regulation by a municipal corporation than structures built and maintained by the state generally for its use.

See **Cal.Jur.,** Schools, § 70 et seq.; **Am.Jur.,** Schools, § 71 et seq.

(6) Municipal Corporations § 237--Local Regulations--Conflicts With Statute.

When the state engages in such sovereign activities as construction and maintenance of its buildings as differentiated from enacting laws for conduct of the public at large, it is not subject to local regulations unless the Constitution says it is or the Legislature has consented to such regulation; neither Const., art. XI, § 11, relating to police power of cities and other local subdivisions, nor Gov. Code, §§ 38601, 38660, empowering a city to regulate the construction of buildings within its limits, should be considered as conferring such powers on local government agencies.

See **Cal.Jur.2d,** Buildings, § 6; **Am.Jur.,** Municipal Corporations, § 287.

(7) Schools § 60--School Property--Buildings and Construction.

Construction of school buildings by school districts is not subject to building regulations of a municipal corporation in which the building is constructed, because the state has completely occupied the field by general laws and such regulations conflict with such laws.

(8) Municipal Corporations § 237--Local Regulations--Conflicts With Statute.

A city may not enact ordinances which conflict with general laws on statewide matters.

(9) Schools § 60--School Property--Buildings and Construction.

The Health and Safety Code provisions relating to structural design aimed at procuring buildings less dangerous from the standpoint of earthquakes (§§ 19150, 19151) and requiring that building permits be obtained from the proper city or county officers (§ 19120) do not limit or modify the provisions of the Education Code (§§ 5021, 5041, 18001 et seq.) which set forth a complete system for the construction of school buildings.

(10) Schools § 60--School Property--Buildings and Construction.

Rules and regulations adopted for the construction of school buildings under the Education and Health and Safety Codes (Cal. Administrative Code, tit. 21, ch. 1) may not be interpreted to mean that a city's building regulations must be met in the construction of a school building; they tend more to indicate that school districts could follow such regulations as well as those of the state but are not bound to

do so.

(11) Statutes § 112(1)--Construction.
The final construction of a statute is the function of courts.

SUMMARY

APPEAL from a judgment of the Superior Court of Kern County. William L. Bradshaw, Judge. Affirmed.

Action to enjoin a city from enforcing its building ordinance. Judgment for plaintiff affirmed.

COUNSEL

Henry G. Baron, City Attorney, and Allen Grimes for Appellants.

Mack, Bianco, King & Eyherabide and Dominic Bianco for Respondent.

Edmund G. Brown, Attorney General, Richard H. Perry, Deputy Attorney General, Johnson & Stanton, Gardiner Johnson and Thomas E. Stanton, Jr., as Amici Curiae on behalf of Respondent. ***179**

CARTER, J.

Defendants, Taft, a nonchartered city of the sixth class, its council and chief of police, appeal from a judgment enjoining it from enforcing against plaintiff, a building contractor, its building ordinance.

There is no dispute as to the facts. On April 22, 1955, plaintiff as contractor entered into a contract with Taft Union High School and Junior College District, hereafter called district, a school district duly organized under the state laws, to construct in Taft for the district, a school building for $614,113. The plans and specifications for the building were approved by the State Department of Education and State Division of Architecture. Plaintiff commenced construction which was to be completed in 320 days, but work was "stopped" by Taft, the city, demanding that plaintiff obtain a building permit from it involving a $300 fee and submission to the building ordinance [FN*] of Taft. The district has employed an inspector to assure that the building is constructed according to the plans and specifications. Defendants assert that plaintiff has refused to obtain a permit from the city for the construction of the building and they intend to enforce the penal and civil provisions of the building ordinance of the city.

> FN* Taft by ordinance had adopted the "Uniform Building Code 1952 edition adopted and published by the Pacific Coast Officials Conference in 1952."

The issue is whether a municipal corporation's building regulations are applicable to the construction of a public school building by a school district in the municipality. Taft argues that it had power to adopt police regulations-building construction regulations under the Constitution. [FN†]

> FN† "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." (Cal. Const., art. XI, § 11.)

(1) The public schools of this state are a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the Constitution and the state Legislature is given comprehensive powers in relation thereto. The Legislature shall not pass local or special laws "Providing for the management of common schools." (Cal. Const., art. IV, § 25, subd. 27.) "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, *the Legislature* shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." (Emphasis added; *id.*, art. IX, § 1.) There ***180** is a State Board of Education, an elected superintendent of public instruction and there are county superintendents whose salary and qualifications are prescribed by the Legislature (*id.*, art. IX, §§ 3, 3.1, 7). The proceeds of all public lands that have been or may be granted by the United States to the state and other property is "inviolably" appropriated to the support of the common schools (*id.*, art. IX, § 4) and "Out of the revenue from state taxes for which provision is made in this article, together with all other state revenues, there shall first be set apart the moneys to be applied by the State to the support of the Public School System and the State University." (*Id.*, art. XIII, § 15.) "The *Legislature* shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six

months in every year, after the first year in which a school has been established." (Emphasis added; *id.*, art. IX, § 5.) "The Public School System shall include all kindergarten schools, elementary schools, secondary schools, technical schools, and state colleges, established in accordance with law and, in addition, the school districts and the other agencies authorized to maintain them. No school or college or any other part of the Public School System shall be, directly or indirectly, transferred from the Public School System *or placed under the jurisdiction of any authority* other than one included within the Public School System. ...

"The Legislature shall provide for the levying annually by the governing body of each county, and city and county, of such school district taxes, at rates not in excess of the maximum rates of school district tax fixed or authorized by the Legislature, as will produce in each fiscal year such revenue for each school district as the governing board thereof shall determine is required in such fiscal year for the support of all schools and functions of said district authorized or required by law." (Emphasis added; *id.*, art. IX, § 6.) A school district may lie in more than one county and may issue bonds. (*Id.*, art. IX, § 6 1/2.) No money shall ever be appropriated for "any school not under the exclusive control of the officers of the public schools. ..." (*Id.*, art. IX, § 8.) "The *Legislature* shall have power, by general law, to provide for the incorporation and organization of school districts, high school districts, and junior college districts, of every kind and class, and may classify such districts." (Emphasis added; *id.*, art. IX, § 14.) In harmony with those provisions it has been held that the power of the state Legislature over ***181** the public schools is plenary, subject only to any constitutional restrictions. (*Pass School Dist. v. Hollywood City School Dist.*, 156 Cal. 416, 418 [105 P. 122, 20 Ann.Cas. 87, 26 L.R.A.N.S. 485]; *Kennedy v. Miller*, 97 Cal. 429 [32 P. 558]; *Worthington School Dist. v. Eureka School Dist.*, 173 Cal. 154 [159 P. 437]; *Merrill etc. School Dist. v. Rapose*, 125 Cal.App.2d 819 [271 P.2d 522]; see *Woodcock v. Dick*, 36 Cal.2d 146 [222 P.2d 667]; *Seidel v. Waring*, 36 Cal.2d 149 [222 P.2d 669].) (2) The public school system is of statewide supervision and concern and legislative enactments thereon control over attempted regulation by local government units. (*Esberg v. Badaracco*, 202 Cal. 110 [259 P. 730]; *Cloverdale Union H. S. Dist. v. Peters*, 88 Cal.App. 731 [264 P. 273]; *Piper v. Big Pine School Dist.*, 193 Cal. 664 [226 P. 926]; *Kelso v. Board of Education*, 42 Cal.App.2d 415 [109 P.2d 29]; *Kennedy v. Miller*, *supra*, 97 Cal. 429; *Worthington School Dist. v. Eureka School Dist.*, *supra*, 173 Cal. 154; *Board of Education v. Davidson*, 190 Cal. 162 [210 P. 961]; *Phelps v. Prussia*, 60 Cal.App.2d 732 [141 P.2d 440]; *Lansing v. Board of Education*, 7 Cal.App.2d 211 [45 P.2d 1021]; *People v. Mertz*, 2 Cal.2d 136 [39 P.2d 422]; *Gerth v. Dominguez*, 1 Cal.2d 239 [34 P.2d 135].) It is said in *Piper v. Big Pine School Dist.*, *supra*, 193 Cal. 664, 669: "It [the education of the children of the state] is in a sense exclusively the function of the state which cannot be delegated to any other agency. The education of the children of the state is an obligation which the state took over to itself by the adoption of the Constitution. To accomplish the purposes therein expressed the people must keep under their exclusive control, through their representatives, the education of those whom it permits to take part in directing the affairs of state." (3) School districts are agencies of the state for the local operation of the state school system. (*Cloverdale Union H. S. Dist. v. Peters*, *supra*, 88 Cal.App. 731, 738; *Board of Education v. Davidson*, *supra*, 190 Cal. 162, 168; *Butler v. Compton Junior College Dist.*, 77 Cal.App.2d 719 [176 P.2d 417]; *Lansing v. Board of Education*, *supra*, 7 Cal.App.2d 211; *Merrill etc. School Dist. v. Rapose*, *supra*, 125 Cal.App.2d 819.) (4) The beneficial ownership of property of the public schools is in the state. It is said in *Pass School Dist. v. Hollywood City School Dist.*, *supra*, 156 Cal. 416, 419: "To the contention that a transfer of ownership thus accomplished works the taking of property without due process of law, it should be sufficient ***182** to point out that in all such cases the beneficial owner of the fee [of public school property] is the state itself, and that its agencies and mandatories-the various public and municipal corporations in whom the title rests - are essentially nothing but trustees of the state, holding the property and devoting it to the uses which the state itself directs. The transfer of title without due process of law, of which appellant so bitterly complains, is nothing more, in effect, than the naming by the state of other trustees to manage property which it owns and to manage the property for the same identical uses and purposes to which it was formerly devoted. In point of law, then, the beneficial title to the estate is not affected at all. All that is done is to transfer the legal title under the same trust from one trustee to another. In this sense the trustees of the Hollywood City School District became, by operation of law, successors to the trustees of the Pass School District, as is directly held in *Allen v. School Town of Macey*, 109 Ind. 559 [10 N.E. 578], where it is said: 'It

is now a well-recognized legal inference deducible as well from general principles as from the decided cases, that under the constitution and laws of this state, public school property is held in trust for school purposes by the persons or corporations authorized for the time being to control such property, and that it is in the power of the legislature to provide for a change in the trusteeship of such property in certain contingencies presumably requiring such a change, or, indeed, to change the trustees of that class of property whenever it may choose to do so.'

"Even if such well-established principles could be set aside under the plea that they work injustice in the individual case, this plea here presented is without merit. The state is profoundly interested in the education of its young, but has no deep concern over the personality of the trustees who shall administer this trust, so long as the administration is in the orderly form of law." (See *Fawcett v. Ball*, 80 Cal.App. 131, 136 [251 P. 679]; *Butler v. Compton Junior College Dist.*, 77 Cal.App.2d 719 [176 P.2d 417]; *Kennedy v. Miller*, 97 Cal. 429 [32 P. 558]; *Gridley School Dist. v. Stout*, 134 Cal. 592 [66 P. 785].) (5) While a large degree of autonomy is granted to school districts by the Legislature, we are referred to no statute or constitutional provision which, as far as the question here involved is concerned, expressly makes school buildings or their construction any more amenable to regulation by a municipal corporation than structures which are ***183** built and maintained by the state generally for its use. (6) When it engages in such sovereign activities as the construction and maintenance of its buildings, as differentiated from enacting laws for the conduct of the public at large, it is not subject to local regulations unless the Constitution says it is or the Legislature has consented to such regulation. Section 11 of article XI of the state Constitution, *supra*, should not be considered as conferring such powers on local government agencies. Nor should the Government Code sections which confer on a city the power to regulate the construction of buildings within its limits (see Gov. Code, §§ 38601, 38660) be so considered. It is said in *In re Means*, 14 Cal.2d 254, 258 [93 P.2d 105], holding that a state employee working on a state structure in a city need not meet the requirements of a city charter provision: "If one who has been employed by the state may not work on state property within a municipality without the consent of the municipality obtained after examination, the city has, in effect, added to the requirements for employment by the state, and restricted the rights of sovereignty. ...

"Turning to the contentions of the respondent that the regulation of plumbing is a municipal affair, the rule to be applied is not entirely a geographical one. Under certain circumstances, an act relating to property within a city may be of such general concern that local regulation concerning municipal affairs is inapplicable. ... For example, where one of the city's streets has been declared by an act of the legislature to be a secondary highway, the improvement of that street is not a municipal affair within the meaning of the Constitution. ... Also, regulations prescribed by charter or ordinance of a city requiring that the work of altering and improving buildings be subject to local supervision have been held inapplicable to state building. (*City of Milwaukee v. McGregor*, 140 Wis. 35 [121 N.W. 642, 17 Ann.Cas. 1002].)

"In the case of *Kentucky Institution for Education of Blind v. City of Louisville*, 123 Ky. 767 [97 S.W. 402, 8 L.R.A.N.S. 553], the city attempted to enforce an ordinance relating to fire escapes with respect to a state institution for the blind. The court held the ordinance inapplicable, stating: 'The principle is that the state, when creating municipal governments does not cede to them any control of the state's property situated within them, nor over any property which the state has authorized another body or power to control. ***184** The municipal government is but an agent of the state, not an independent body. It governs in the limited manner and territory that is expressly or by necessary implication granted to it by the state. It is competent for the state to retain to itself some part of the government even within the municipality, which it will exercise directly, or through the medium of other selected and more suitable instrumentalities. How can the city ever have a superior authority to the state over the latter's own property, or in its control and management? From the nature of things it cannot have.' " (See also *Board of Education v. City of St. Louis*, 267 Mo. 356 [184 S.W. 975]; *Salt Lake City v. Board of Education*, 52 Utah 540 [175 P. 654]; 31 A.L.R. 450.)

Pasadena School Dist. v. Pasadena, 166 Cal. 7 [134 P. 985, Ann.Cas. 1915B 1039, 47 L.R.A.N.S. 892], fails to consider the factors above mentioned and insofar as it is inconsistent with this opinion it is overruled. The question here considered was not involved in *Roman Catholic etc. Corp. v. City of Piedmont*, 45 Cal.2d 325, 332-333 [289 P.2d 438].

(7) Moreover, in connection with the foregoing and as an additional ground why the construction of school buildings by school districts are not subject to the building regulations of a municipal corporation in which the building is constructed, is that the state has completely occupied the field by general laws, and such local regulations conflict with such general laws, when we consider the activity involved. (8) A city may not enact ordinances which conflict with general laws on statewide matters. (*Simpson v. City of Los Angeles*, 40 Cal.2d 271 [253 P.2d 464]; *Pulcifer v. County of Alameda*, 29 Cal.2d 258 [175 P.2d 1]; *Ex parte Daniels*, 183 Cal. 636 [192 P. 442, 21 A.L.R. 1172]; *Atlas Mixed Mortar Co. v. City of Burbank*, 202 Cal. 660 [262 P. 334]; *Ganley v. Claeys*, 2 Cal.2d 266 [40 P.2d 817]; *In re Murphy*, 190 Cal. 286 [212 P. 30]; *In re Mingo*, 190 Cal. 769 [214 P. 850]; *Natural Milk etc. Assn. v. City etc. of San Francisco*, 20 Cal.2d 101 [124 P.2d 25]; *Pipoly v. Benson*, 20 Cal.2d 366 [125 P.2d 482, 147 A.L.R. 515]; *Tolman v. Underhill*, 39 Cal.2d 708 [249 P.2d 280].) The particular situation presented and discussed in those cases is not helpful. *In re Means, supra*, 14 Cal.2d 254, herein discussed is most pertinent as it involves the attempted regulation of a state activity by a city, as distinguished from regulations of the members of the public.

The Education Code sets out a complete system for the construction of school buildings. The Legislature there declares ***185** that it is in the interest of the state to aid school districts in the construction of school buildings for the maintenance of the public school system inasmuch as the system is of general concern and the education of the children is an obligation and function of the state. (Ed. Code, §§ 5021, 5041.) The governing board of any school district shall manage and control the school property within its district (*id.*, § 18001). It (the board) shall furnish and repair the school property. (*Id.*, § 18002.) It shall provide as a part of school buildings patent flush water closets for the use of the pupils (*id.*, § 18009). It may repair old buildings by day's labor or by force account (*id.*, §§ 18055, 18057). The State Department of Education shall: "Establish standards for school buildings," review and approve all plans and specifications for buildings and disapprove those not meeting the standards, furnish plans, specifications and "building codes," and make rules and regulations to carry out those activities (*id.*, §§ 18102, 18101). "The governing board of any school district may, and when directed by a vote of the district shall, build and maintain a schoolhouse (*id.*, § 18151). Except in cities having a board of education the county superintendent shall pass upon all plans for school buildings and plans shall be submitted to him. "The Division of Architecture of the Department of Public Works under the police power of the State shall supervise the construction of any school building or, if the estimated cost exceed four thousand dollars ($4,000), the reconstruction or alteration of or addition to any school building, for the protection of life and property." (*Id.*, § 18191.) " 'Construction or alteration' as used in this article includes any construction, reconstruction, or alteration of, or addition to, any school building." (*Id.*, § 18193.) "The Division of Architecture shall pass upon and approve or reject all plans for the construction or alteration of any school building. To enable it to do so, the governing board of each school district and any other school authority before adopting any plans for a school building shall submit the plans to the Division of Architecture for approval, and shall pay the fees prescribed in this article." (*Id.*, § 18194.) "Before letting any contract for any construction or alteration of any school building, the written approval of the plans, as to safety of design and construction, by the Division of Architecture, shall be first had and obtained." (*Id.*, § 18195.) "In each case the application for approval of the plans shall be ***186** accompanied by the plans and full, complete, and accurate specifications, and structural design computations, and estimates of cost, which shall comply in every respect with any and all requirements prescribed by the Division of Architecture. " (*Id.*, § 18196.) All plans and specifications shall be prepared by a duly state licensed architect or engineer and the supervision of the work shall be by a duly licensed person. (*Id.*, § 18199.) No contract for construction is valid and no public money shall be paid for any work or materials furnished thereunder " unless the plans, specifications, and estimates comply in every particular with the provisions of this article and the requirements prescribed by the Division of Architecture and unless the approval thereof in writing has first been had and obtained from the division." (*Id.*, § 18200.) Progress reports must be made to the division (*id.*, § 18201). "The State Division of Architecture shall make such inspection of the school buildings and of the work of construction or alteration as in its judgment is necessary or proper for the enforcement of this article and the protection of the safety of the pupils, the teachers, *and the public.* The school district, city, city and county, or the political subdivision within the juris-

diction of which any school building is constructed or altered shall provide for and require competent, adequate, and continuous inspection during construction or alteration by an inspector satisfactory to the architect or structural engineer and the Division of Architecture. The inspector shall act under the direction of and be responsible to the architect or structural engineer." (Emphasis added; *id.,* § 18203.) The division may adopt rules and regulations to carry out its duties and a violation of the provisions is a felony (*id.,* §§ 18202, 18204). If the supervisor of health of any school district notes any defect in "plumbing, lighting, or heating," he shall report to the district and if it does not act, to the county superintendent. (*Id.,* § 18221.) Each building, if two or more stories, shall have fire escapes (*id.,* § 18222).

(9) It is urged, however, that the foregoing provisions must be read in the background in which they were adopted, that is, that some of them were placed in the Education Code from the Field Act adopted in 1933 (Stats. 1933, ch. 59) and must be construed with the Riley Act of 1933 (Stats. 1933, ch. 601) now in the Health and Safety Code, sections 19100- 19170. The Riley Act provides that all buildings (with certain exceptions Health & Saf. Code, § 19100) must meet certain standards which are set forth (*id.,* §§ 19150, 19151). ***187** Building permits must be obtained from the proper city or county officers charged with the enforcement of laws regulating construction (*id.,* § 19120). Any city or county may establish construction standards higher than those established by sections 19150 and 19151 of the Health and Safety Code. Plans and specifications for buildings shall be filed with the application for a building permit (*id.,* § 19132). Both the Field and Riley acts were enacted as urgency measures, the urgency being stated to be the series of earthquakes occurring shortly prior thereto (Stats. 1933, ch. 59, § 9; 1933, ch. 601, § 8.) We do not believe, however, that the Health and Safety Code provisions (Riley Act) limit or modify the provisions of the Education Code (Field Act) above discussed. The former deal with structural design aimed at procuring buildings less dangerous from the standpoint of earthquakes (Health & Saf. Code, §§ 19150, 19151) while the latter, as above pointed out, are broad and comprehensive including the whole field of construction regulations. The urgency that impelled the Legislature to enact both as urgency measures may have been the same but the scope is clearly different. Hence the provisions in the former providing for more stringent local regulations are not applicable to the latter.

Reference is made to rules and regulations, past and present, adopted for the construction of school buildings under the Education and Health and Safety Codes. (Cal. Administrative Code, tit. 21, Public Works, Division of Architecture, chap. 1, subchap. 1.) The purpose of the rules (we refer to the rules now in existence) is to protect lives and property of the people by regulating the design and construction of public school buildings so that, in addition to the normal loads to which such buildings are subjected, they shall resist future earthquakes. (Tit. 21, subchap. 1, group 1, art. I, § 1.) The rules are intended to establish "reasonable standards and minimum requirements " for the construction of such buildings in order to attain the requisite stability to withstand loads and forces "and to insure safety of construction " (*id.,* § 2). The detailed regulations set forth in sections 101 to 1206 have been adopted as a basis for the approval of plans and specifications. "It is not the intention to limit the ingenuity of the designer nor to interfere with existing building rules and regulations where such rules and regulations are more stringent. Where the designer desires to depart from the methods of analysis set up by these rules and regulations, it will be necessary that he submit his method in detail ***188** together with complete information including computations and test data covering the design in question. Permission to deviate from these rules and regulations is optional with the Division of Architecture and is dependent upon the division being satisfied that the structural members or portions of the building involved would provide at least such safety as would have been obtained had these rules and regulations been adhered to strictly." (*Id.,* § 70.) "Regulations and design values established in these rules and regulations are minimum requirements. Nothing herein contained shall be interpreted to interfere with or to waive the requirements of applicable local or state building laws or ordinances where the requirements of those laws are more stringent than the requirements of these rules and regulations." (*Id.,* § 115.) However, it is also provided that: "No rule or regulation shall be construed to deprive the Division of Architecture of its right to exercise the powers conferred upon it by law, or to limit the division in such enforcement of the act as is necessary to secure safety of construction and the proper administration of the law." (*Id.,* § 5.)

(10) It is very doubtful that those rules indicate an

intention to interpret the Education Code sections to mean that a city's building regulations must be met in the construction of a school building. They tend more to indicate that the school districts could follow such regulations as well as those of the state but are not bound to do so. (11) In any event, since the final construction of a statute is the function of the courts (2 Cal.Jur.2d, Administrative Law, § 17), we hold the statutes here involved should not be construed as requiring a school district to comply with the building regulations of a city.

There is no necessity for comparing in detail Taft's building code and the numerous comprehensive building regulations contained in the Education Code and the rules and regulations of the Division of Architecture, for as we have seen the state has occupied the field. As said in *In re Means, supra*, 14 Cal.2d 254, 258, 260, in speaking of the effect of a city ordinance, establishing standards for plumbers, on a state employee in a city, the state civil service system provides a comprehensive plan for the selection of state employees and although the city ordinance does not purport to prescribe the conditions for state employment, "If one who has been employed by the state may not work on state property within a ***189** municipality without the consent of the municipality obtained after examination, the city has, in effect, *added to the requirements for employment by the state, and restricted the rights of sovereignty.* ...

"Although the legislature has enacted no statute regulating plumbing, if the city's ordinance is a valid exercise of power, then one whom the state has examined and found eligible for employment as a plumber and who has later entered the state civil service may be unable to work on state property because he cannot pass the examination of a city health officer or licensing board. The result is a direct conflict of authority. Either the local regulation is ineffective or the state must bow to the requirement of its governmental subsidiary. Upon fundamental principles, that conflict must be resolved in favor of the state." (Emphasis added.) The same comments apply to the references in the instant construction contract and specifications that the building is to be constructed in compliance with local regulations.

The judgment is affirmed.

Gibson, C. J., Shenk, J., Traynor, J., Schauer, J., Spence, J., and McComb, J., concurred.

Cal.
Hall v. City of Taft
47 Cal.2d 177, 302 P.2d 574

END OF DOCUMENT

130 Cal.App.3d 298, 181 Cal.Rptr. 661, 29 Empl. Prac. Dec. P 32,872
(Cite as: 130 Cal.App.3d 298)

H

RAYFORD R. HIATT et al., Plaintiffs and Appellants,
v.
CITY OF BERKELEY et al., Defendants and Appellants.

Civ. No. 39033.

Court of Appeal, First District, Division 2, California.
Mar 29, 1982.

SUMMARY

In an action by employees of a city fire department against the city and certain city officials challenging the promotional procedures laid down in the city's affirmative action program, the trial court concluded that promotions made in the fire department under the program were made solely on the basis of race, and that certain provisions of the program directing employee appointments or promotions on the sole basis of race or sex, rather than on merit, were unduly discriminatory, and therefore violative of the constitutional and statutory provisions proscribing racial and sexual discrimination. The court enjoined defendants from promoting any person except on the basis of eligibility lists established by competitive examination, from denying promotion to any person on the grounds of race, color, sex, national origin or ancestry, or from granting any applicant for promotion any preference or advantage on those bases, and from adopting any personnel policy which failed to promote candidates on the basis of merit. The court also denied plaintiffs' motion for attorney fees. The record indicated that the affirmative action program set an inflexible 100 percent racial quota system in hiring and promoting, excluding the white class as a whole until projected minority quotas were filled. Also the record contained no legislative or administrative declaration as to past employment discrimination by the city. (Superior Court of Alameda County, No. 453459-2, Lyle E. Cook, Judge.)

The Court of Appeal reversed the judgment insofar as it failed to make an award of attorney fees to plaintiffs, and remanded with directions to reconsider the motion for attorney fees in light of Code Civ. Proc., § 1021.5, permitting the award of attorney fees against public entities in any action which results in the enforcement of an important right affecting the public interest, which was enacted during the pendency of the appeal. The court also reversed those portions of the judgment enjoining the provision of the affirmative action program requiring that written tests be used on a nonranking basis and the provision of the affirmative action program that established an employment list policy which purported to emasculate the determination of ranking on an objective basis, and put the candidates in three large categories in alphabetical order. It affirmed the judgment in all other respects. The court held that the quota system of the affirmative action program, which was based solely on race and sex, violated not only the equal protection provisions of the 14th Amendment and the California Constitution, but also the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e et seq., proscribing discrimination in employment premised on race, color, national origin or sex. (Opinion by Rouse, Acting P. J., with Taylor, J., [FN*] concurring.)

FN* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Constitutional Law § 81--Equal Protection--Classification-- Classifications as Per Se Illegal.

While both the U.S. Const., 14th Amend., and the equal protection clause of the California Constitution (Cal. Const., art. I, § 7), which was patterned after and is substantially the equivalent of the language of the 14th Amendment, accord any person the protection of the laws in plain and unequivocal language and without qualification, different classifications of citizens, including classification by race, are not per se illegal, much less unconstitutional.

(2) Constitutional Law § 83--Equal Protection--Classification--Judicial Review--Reasonable Basis and Suspect Classification Test.

In order to test the validity of a legislative classification, the courts apply a two-tiered system of analysis. Classifications made by government regulations are valid if any state of facts reasonably may be

conceived in their justification. This yardstick, generally called the reasonable basis test, is used in a variety of contexts to determine the validity of the government action. However, in certain circumstances a more stringent standard is imposed. Most notably, where the classification is based solely on the basis of race or sex, it is regarded as a suspect classification which is subject to strict judicial scrutiny.

(3) Civil Rights § 3--Employment--Reverse Discrimination--Necessity of Compelling State Interest.

In the event the government classifies citizens with regard to employment opportunities by virtue of their race, the legislation may be upheld only if it is justified by a compelling state interest and is necessary for the furtherance of that compelling state interest. Further, the classification must be designed to minimize its limiting effect upon the class to be burdened by the classification.

(4) Civil Rights § 3--Employment--Classifications--Necessity of Compelling State Interest.

In a reverse discrimination action by employees of a municipal fire department challenging the hiring and promotional procedures laid down in the city's affirmative action program, the trial court properly concluded that defendant city failed to carry its burden of proving that the racial classifications were warranted by a compelling governmental interest, that the measures taken were necessary to implement that interest, and that the means to achieve the stated policy goal of proportional employment were so designed as to impose the least limitation on the rights of the affected majority; therefore the procedures were in conflict with the equal protection guarantees of both the federal and California Constitutions. The record indicated a complete lack of showing that the attainment of proportional racial employment in the city and fire department work force was compelled by, or was even reasonably related to, any legitimate legislative end directly promotive of governmental efficiency, such as an increase in productivity, or greater efficiency or a better rapport with the community. Furthermore, the record contained no legislative or administrative declaration as to past employment discrimination by the city, but denoted only that the program was enacted in response to a history of discriminatory practices in American society as a whole. Rather, the evidence indicated there had been no prior discriminatory employment practices by the city or the fire department.
[See **Cal.Jur.3d,** Civil Rights, § 10; **Am.Jur.2d,** Civil Rights, § 208.]

(5) Civil Rights § 3--Employment--Past Discrimination--Disproportional Representation.

In a reverse discrimination action by employees of a municipal fire department challenging the hiring and promotional procedures laid down in the city's affirmative action program,the trial court properly concluded that defendant city failed to raise an inference of attribution to past discrimination from evidence of an existing disproportion in racial or sexual representation in its work force, where the city presented no evidence of past discrimination in employment opportunities.

(6) Civil Rights § 3--Employment--Civil Rights Act of 1964--Purpose.

The purpose of the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e et seq., proscribing discrimination in employment premised on race, color, national origin, or sex, is to promote hiring on the basis of job qualifications and to eliminate discriminatory preferences based on race or sex with respect to any group, majority, or minority; however, racial preferences are not required to be granted on account of existing racial imbalance (§ 2000e-2(j)). The act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is a removal of the artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

(7) Civil Rights § 3--Employment--Reverse Discrimination--Quota System.

There was no necessity for a city to establish an inflexible, 100 percent racial quota system as part of its affirmative action program to achieve the program's stated goal of proportional employment, where the city had conducted successful, extensive recruiting and education resulting in a substantial increase in minority applicants prior to the adoption of the program. Thus, that provision of the program violated constitutional and statutory provisions proscribing racial discrimination.

130 Cal.App.3d 298, 181 Cal.Rptr. 661, 29 Empl. Prac. Dec. P 32,872
(Cite as: 130 Cal.App.3d 298)

(8) Civil Rights § 3--Employment--Reverse Discrimination--Quota System.

A 100 percent racial quota system employed in a city's affirmative action program to achieve proportional employment could not be regarded as a means imposing a lesser or the least limitation possible upon the group disadvantaged by the classification, and thus violated constitutional and statutory provisions proscribing racial and sexual discrimination, where the system purported to exclude from new hirings and promotional positions not only a certain number of the majority race, but the white class as a whole, at least until the projected minority quotas were filled in the work force of the city.

(9) Constitutional Law § 81--Equal Protection--Classification Benign Discrimination.

Benign discrimination, that is, discrimination in favor of certain classes aimed at redressing past injustices and prior unequal treatment, is not permissible under the equal protection doctrine. It may not always be clear that a so-called preference is in fact benign, and preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. Also, there is a measure of inequity in forcing innocent persons to bear the burdens of redressing grievances not of their making.

(10) Civil Rights § 13--Employment--Reverse Discrimination--Voluntarily Initiated by Employer.

The principle of unlawful reverse discrimination applies whether the racial preference is compelled by a court or voluntarily initiated by the employer, since to the victim of the racial discrimination the result is not noticeably different in either case.

(11) Civil Rights § 3--Employment--Reverse Discrimination--Written Tests and Hiring Priority.

In a reverse discrimination action by employees of a city fire department against the city and certain officials challenging the promotional procedures laid down in the city's affirmative action program, the trial court committed reversible error in enjoining the provision of the affirmative action program requiring that written tests be used on a nonranking basis in determining the qualifications of the applicants, and in enjoining the provision of the program establishing an employment list policy which purported to emasculate the determination of ranking on an objective basis and put the candidates in three large categories in alphabetical order. Although the portion of the affirmative action program setting an inflexible 100 percent racial quota system in hiring and promoting, excluding the white class as a whole until projected minority quotas were filled, was invalid and constituted illegal racial discrimination, no rule of law nor the provision of the city charter, once the city's hiring priority policy based on “under-utilization” was eliminated, required the city to give determinative weight to the quantitative factors of test scores or grades.

(12) Civil Rights § 3--Employment--Discrimination.

Job appointments made by a city manager were unlawful where, although they were made in the exercise of the city manager's discretionary power accorded by the city charter, the exercise of discretion was within the framework of the city's affirmative action program, which was found to be violative of the equal protection clauses of the federal and California Constitutions.

(13a, 13b) Civil Rights § 3--Employment--Reverse Discrimination-- Promotion.

In an action by employees of a city fire department against the city challenging the promotional procedures laid down in its affirmative action program, the trial court properly refused to issue a writ of mandamus requiring the promotion of two of the employees, where, although the affirmative action program constituted unlawful reverse discrimination, the record indicated that after other employees were promoted there were no additional vacancies, and where ordering the promotions would have been equivalent to mandating the exercise of the city manager's discretion.

(14) Mandamus and Prohibition § 7--Mandamus--Conditions Affecting Issuance--Discretion--Compelling Exercise of Discretion in Particular Manner.

While mandamus is an appropriate remedy by which to compel the exercise of discretion by a court or governmental officer or an agency, it cannot be utilized to compel the exercise of discretion in a particular manner or to reach a particular result.

(15) Civil Rights § 8--Actions--Employment Discrimination--Attorney Fees.

In an action by employees of a municipal fire department in which they successfully challenged the

city's affirmative action program that resulted in reverse discrimination in the hiring and promotion of city employees, the trial court's failure to award plaintiffs attorney fees was reversible error, necessitating remand on appeal for further consideration in light of Code Civ. Proc., § 1021.5, permitting attorneys fees in actions resulting in the enforcement of an important right affecting the public interest under certain circumstances, which was enacted during the pendency of the appeal.

COUNSEL

Carroll, Burdick & McDonough, Ronald Yank and Christopher Burdick for Plaintiffs and Appellants.

Allan Yannow, Arnold Forster, Jeffrey Sinensky and Richard Weisz as Amici Curiae on behalf of Plaintiffs and Appellants.

Dennis A. Lee, Acting City Attorney, and Charles O. Triebel, Jr., for Defendants and Appellants.

ROUSE, Acting P. J.

Plaintiffs, employees of the Berkeley Fire Department (hereafter respondents), brought this action against the City of Berkeley, its City Council, and certain city officials (hereafter collectively appellants), challenging the promotional procedures laid down in the city's Affirmative Action Program (hereafter AAP). Respondents invoked the Fourteenth Amendment of the United States Constitution, article I, section 21 (now § 7) of the California Constitution, 42 United States Code, sections 1983, 2000d, 2000e-2 (Civil Rights Act of 1964), and California Labor Code section 1420 et seq., claiming that the attacked provisions of AAP set up rigid quotas in hiring and promoting city employees which were based solely on race or sex and therefore violated both the constitutional principles of equal protection of laws and the provisions of the Civil Rights Act of 1964 proscribing discrimination premised on race, color, national origin or sex. After trial, a judgment and permanent injunction were issued in favor of respondents. The appeal is taken from the judgment awarding damages to respondents and enjoining City of Berkeley from enforcement of certain provisions of AAP; the cross-appeal is from a denial of attorney's fees and a refusal to promote two of the respondents.

We filed an opinion in which (as modified), we concluded that the judgment should be reversed in three specified respects but should ***305** otherwise be affirmed. [FN1] The Supreme Court granted a hearing and then retransferred the cause to this court for reconsideration in light of *Price v. Civil Service Com.* (1980) 26 Cal.3d 257 [161 Cal.Rptr. 475, 604 P.2d 1365]; and *Steelworkers v. Weber* (1979) 443 U.S. 193 [61 L.Ed.2d 480, 99 S.Ct. 2721]. We granted leave to the parties and to an amicus curiae to file supplemental briefs; we have received and considered the briefs. Upon full reconsideration, we reaffirm the conclusions we reached initially.

FN1 The author of that opinion, Associate Justice Robert F. Kane, has since retired from the court, hence did not participate in this opinion.

Background Facts

AAP, the centerpiece of the legal dispute, was adopted by the City of Berkeley in 1972 pursuant to City Council Resolution No. 45,257-N.S., and was amended in 1974 in order to conform to the 1970 census figure. The stated goal of AAP is to achieve and maintain "proportional employment" for all minorities [FN2] in each city department, job classification, and salary category. In the definition of AAP, proportional employment means that "the percentage of each race and sex in the City of Berkeley work force shall be approximately equal to that of the percentage of each race and sex in the Berkeley population as a whole."

FN2 Pursuant to AAP, "minorities" include Asian, Black, Spanish, American Indian and other nonwhite persons of both sexes, and white females.

In order to attain the stated goal, AAP introduced a wide ranging, elaborate program which purported to base the city's employment practices solely on race and sex rather than on competitive, free examinations and merit as prescribed by the city charter (see discussion, *infra.*). Thus, at the very outset AAP declared that "The 'minimum qualifications' principle shall guide the establishment of job requirements for all City job classifications." AAP then provided that the personnel department shall use written tests on a nonranking basis only, and the qualification of the applicants shall be determined on the results of oral interviews. AAP made it mandatory that the interview

130 Cal.App.3d 298, 181 Cal.Rptr. 661, 29 Empl. Prac. Dec. P 32,872
(Cite as: 130 Cal.App.3d 298)

panels include at least one minority person and one woman; while at the same time it precluded the panel members from eliciting information regarding the applicant's test scores, performance appraisals, sick leave record and/or previous disciplinary actions. AAP next provided that the employment lists be restricted to three general categories ("Outstanding," "Well Qualified," and "Qualified"), and that the names of the candidates in ***306** each qualifying category be listed in alphabetical order rather than according to the actual test scores achieved on the examinations. AAP also ordered that the appointment register (a list of all qualified applicants taken from the employment list) be arranged in order of hiring priorities; that all future vacancies in the city's civil service be filled from the appointment register; that all applicants be interviewed and recommended in order of hiring priorities; and, most importantly, that vacancies in city service be filled on the basis of hiring priorities and underutilization, unless upon the request of the department head a waiver is granted by the city manager.

The most egregious, racially discriminative nature of AAP was demonstrated by the scheme under which the so-called "hiring priorities" and "underutilization" [FN3] were to be determined. For the purpose of achieving the overall policy goal of proportional employment, AAP set up a rigid quota system which worked as follows: First, AAP classified the city population by race and sex. Next, it required that the race and sex of the employees be ascertained within each department, job classification and salary category. As a following step, the percentage of race and sex was to be compared to the population of the City of Berkeley as a whole, as indicated in the census. If the percentage of a particular race or sex in a department, job classification or salary category was below its percentage in the Berkeley population, the group was deemed "underutilized" and became a priority group for hiring and promotion.

> FN3 AAP defines "underutilization" as having fewer minorities and women in a particular department, job classification or salary category than would be reasonably expected by their availability and representation in the Berkeley population.
>
> "Hiring priority" is defined as that category of applicants which will receive emphasis in hiring, promotion, or transfer as determined by the most critical departmental and/or city-wide underutilization.

The present lawsuit grew out of the application of AAP in filling certain vacancies in the Berkeley Fire Department. As the record indicates, on or about June 5, 1974, there were four vacancies for the promotional position of fire captain and three for the job title of fire lieutenant. The city had eligibility lists with respect to both job categories. Contrary to the mandate of AAP, the lists were compiled on the basis of competitive examinations and contained a numerical ranking of the candidates based upon their performance in the examinations. The eligibility list for fire captain comprised nine names. Although respondents Hiatt and Rinne ranked higher on the list than Melvin E. Thompson, a minority candidate, Thompson was promoted to fire captain ***307** solely because of his race. The very same occurred with regard to the promotion of Clinton Beacham, a minority employee, to the position of fire lieutenant. The record affirmatively shows that despite the fact that Beacham ranked tenth in the group, and respondents Salter, Parks, Jones, Littley, Wolf and Leimone were more qualified and outranked Beacham, he was promoted solely on the basis of his race.

While it appears that a racial imbalance existed in the command structure of the fire department, the evidence introduced at trial indicated, and the superior court so found, that the City of Berkeley had not discriminated in the past on any occasion against any person on the ground of his or her race or sex concerning employment opportunities with the City of Berkeley in general or with its fire department in particular. The record likewise disclosed that the City of Berkeley had adopted AAP in recognition of a "history of discriminatory employment practices throughout all segments of American society" but AAP contained no legislative declaration of past discriminatory conduct on the part of the City of Berkeley itself.

Based upon the foregoing considerations, the trial court inter alia concluded that the promotions under challenge were made solely on the basis of race, and that lesser qualified persons were appointed to the positions of fire captain and fire lieutenant pursuant to the directives of AAP. The court also held that certain provisions of AAP directing or facilitating employee

appointments or promotions on the sole basis of race or sex, rather than on merit, were unduly discriminatory and therefore violative of the constitutional and statutory provisions proscribing racial and sexual discrimination. [FN4] In accordance therewith, the trial court enjoined appellants: (1) from promoting any person except on the basis of eligibility lists established by open, competitive examination which shall reflect the scores achieved by the candidate on both the written and oral examinations as prescribed by city charter, article XVI, section 119; (2) from denying promotion to any person on the ***308** grounds of race, color, sex, national origin or ancestry or from granting any applicant for promotion any preference or advantage on the aforestated bases; and (3) from adopting or implementing any personnel policy or system which fails to promote candidates on the basis of open, competitive and free examinations uniformly and fairly administered to each candidate.

FN4 AAP provisions found unconstitutional by the court are as follows: (a) the "proportional employment" directives contained in AAP, especially the "Goals and Timetables" which set forth the percentage of the Berkeley population by race and sex and mandate parity in the work force; (b) the provisions that written tests be used on a nonranking basis; (c) the employment list policy which purports to emasculate the determination of ranking on an objective basis and puts the candidates in three large categories in alphabetical order; (d) the hiring priority policy based upon the concept of "underutilization" of work force; (e) the selection and "waiver" procedure which gives an absolute priority to the minorities in hiring, promotion, etc., unless a "waiver" is granted to eligible white males.

The Appeal

The trial court expressly concluded that in pertinent respects AAP conflicted with the equal protection clauses of both federal and California Constitutions, as well as with California Labor Code section 1420 and following, title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), and section 37 of the Berkeley Charter. Appellants' broad attack on the propriety of the court's judgment implicitly challenges each of the alternative conclusions on which the judgment was based: If any one of the alternative conclusions is correct, the judgment insofar as it enjoins the specified elements of AAP and awards damages to respondents should be affirmed. In this court, the parties have directed their arguments primarily to the constitutional issues; it appears from the record that the trial proceedings were similarly focused. Mindful of "the traditional judicial inclination to avoid a constitutional ruling if a case can be resolved on nonconstitutional grounds" (*Price v. Civil Service Com., supra.*, 26 Cal.3d 257, 268, citing *Ashwander v. Tennessee Valley Authority* (1936) 297 U.S. 288, 346-348 [80 L.Ed. 688, 710-712, 56 S.Ct. 466]), we nevertheless choose to follow the parties' lead and to address the constitutional issues at the outset. We conclude that the trial court's analysis of these issues was correct. Our conclusion renders unnecessary extended discussion of appellants' other contentions.

(1)At the outset, we emphasize that while both the Fourteenth Amendment of the United States Constitution and the equal protection clause of the California Constitution, which was patterned after and "'substantially the equivalent"' of the language of the Fourteenth Amendment (*Serrano v. Priest* (1971) 5 Cal.3d 584, 596, fn. 11 [96 Cal.Rptr. 601, 487 P.2d 1241]; *McGlothlen v. Department of Motor Vehicles* (1977) 71 Cal.App.3d 1005 [140 Cal.Rptr. 168]), accord any person the equal protection of the laws in plain and unequivocal language and without qualification, [FN5] it is well settled that different ***309** classifications of citizens, including classification by race, are not per se illegal, much less unconstitutional.

FN5 Section 1 of the Fourteenth Amendment provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State* deprive any person of life, liberty, or property, without due process of law; nor *deny to any person* within its jurisdiction *the equal protection of the laws*." (Italics added.)

California Constitution, article I, section 7, sets out that "(a) *A person may not be* deprived of life, liberty, or property without due process of law or *denied equal protection of the laws*. [¶] (b) *A citizen or class of citizens*

> *may not be granted privileges* or immunities *not granted on the same terms to all citizens*. Privileges or immunities granted by the Legislature may be altered or revoked." (Italics added).

(2)In order to test the validity of a classification, the courts apply a two-tiered system of analysis. Thus, it has been said that, in general, classifications made by government regulations are valid "if any state of facts reasonably may be conceived" in their justification (*McGowan v. Maryland* (1961) 366 U.S. 420, 426 [6 L.Ed.2d 393, 399, 81 S.Ct. 1101]). This yardstick, generally called the "reasonable basis" test, is used in a variety of contexts to determine the validity of the government action (*Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 8 [39 L.Ed.2d 797, 803-804, 94 S.Ct. 1536]; *Dandridge v. Williams* (1970) 397 U.S. 471, 485 [25 L.Ed.2d 491, 501-502, 90 S.Ct. 1153]). However, in certain circumstances a more stringent standard is imposed. Most notably, where the classification is based solely on the basis of race or sex, it is regarded as a *suspect* classification which is subject to strict judicial scrutiny (*Raffaelli v. Committee of Bar Examiners* (1972) 7 Cal.3d 288 [101 Cal.Rptr. 896, 496 P.2d 1264, 53 A.L.R.3d 1149]; *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351]; *People v. Rappard* (1972) 28 Cal.App.3d 302 [104 Cal.Rptr. 535]). This principle has recently been reaffirmed in *University of California Regents v. Bakke* (1978) 438 U.S. 265 [57 L.Ed.2d 750, 98 S.Ct. 2733], a reverse discrimination case, where the United States Supreme Court emphatically pointed out that distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality (*Loving v. Virginia* (1967) 388 U.S. 1, 11 [18 L.Ed.2d 1010, 1017, 87 S.Ct. 1817]; *Hirabayashi v. United States* (1943) 320 U.S. 81, 100 [87 L.Ed.2d 1774, 1785-1786, 63 S.Ct. 1375]), and held that "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination" (*University of California Regents v. Bakke, supra.*, at p. 291 [57 L.Ed.2d at p. 771]). (3)It follows that in the event the government classifies citizens with ***310** regard to employment opportunities by virtue of their race, the legislation may be upheld only if it (1) is justified by a *compelling state interest*, and (2) is *necessary* for the furtherance of that compelling state interest (*Weber v. City Council* (1973) 9 Cal.3d 950, 959 [109 Cal.Rptr. 553, 513 P.2d 601]; *McLaughlin v. Florida* (1964) 379 U.S. 184 [13 L.Ed.2d 222, 85 S.Ct. 283]). Further, the classification must be designed to minimize its limiting effect upon the class to be burdened by the classification (cf. *Dunn v. Blumstein* (1972) 405 U.S. 330, 343 [31 L.Ed.2d 274, 284-285, 92 S.Ct. 995]; *Shelton v. Tucker* (1960) 364 U.S. 479, 488 [5 L.Ed.2d 231, 237, 81 S.Ct. 247]; *University of California Regents v. Bakke, supra.*, pp. 307-309 [57 L.Ed.2d at pp. 781-783]).

(4)In the case at bench, the record clearly supports the trial court's finding that the classifications in AAP were based solely on the basis of race and sex. As a consequent, they are subject to strict judicial scrutiny. Accordingly, appellants were required to prove that the racial classifications contained in AAP were warranted by a compelling governmental interest, that the measures taken were necessary to implement the latter interest, and that the means to achieve the stated policy goal were so designed as to impose the least limitation on the rights of the affected majority. The trial court concluded that the pivotal provisions of AAP were in conflict with the equal protection guarantees of both federal and California Constitutions. The record supports the trial court's conclusion.

1. *Compelling State Interest*

To begin with, the record is notable for a complete lack of showing that the ultimate goal of AAP, namely, the attainment of proportional racial employment in the city work force in general and the work force of the fire department in particular, was compelled by, or was even reasonably related to, any legitimate legislative end, directly promotive of governmental efficiency, e.g., the enhancement of the employee's ability to perform his or her duty in a productive manner; or a greater efficiency of the work force as a whole by virtue of its racial restructuring; or establishment of a better rapport with minority persons in the community. Indeed, it stretches any imagination to assume or imply that a firefighter is better suited to his job just because he or she belongs to a certain race or sex or that a minority citizen would prefer a minority fireman to put out a fire at his or her house or that a minority employee of the fire department would, of necessity, establish better rapport with ***311** minority communities. These assumptions are negated by the contrary findings of the trial court. [FN6]

FN6 The pertinent findings read as follows:

"32. Proportional representation by race of the workforce of the City of Berkeley, or of any department thereof, including its Fire Department, is entirely unrelated to the efficiency of such workforce or department and is entirely unrelated to the services provided by such workforce or department .... Further, proportional composition by race of the workforce of the City of Berkeley, or of any department thereof, including the Fire Department, is entirely unrelated to any other goal or legislative end for which that workforce or department is retained, established or designed.

"33. Proportional representation by sex of the workforce of the City of Berkeley, or of any department thereof, including its Fire Department, is entirely unrelated to the efficiency of such workforce or department, and is entirely unrelated to the services provided by such workforce or department .... Further, proportional composition by sex of the workforce of the City of Berkeley, or of any department thereof, including the Fire Department, is entirely unrelated to any other goal or legislative end for which that workforce or department is retained, established or designed.

"34. The race of an employee of the City of Berkeley in any department, including the Fire Department, is entirely unrelated to that employee's ability to perform his or her duties in a proper, efficient, and productive manner.

"35. The sex of an employee of the City of Berkeley and any department, including the Fire Department, is entirely unrelated to that employee's ability to perform his or her duties in a proper, efficient, and productive manner.

"36. The race of a particular employee in the City of Berkeley is unrelated to that employee's ability to establish rapport with minority persons in the community."

Appellants argue that the proposed classification was justified by a "racial imbalance" in hiring and promotion within the fire department. But in and of itself, the *existence* of a racial imbalance, or of a disproportionate representation of the sexes, would not give rise to a compelling state interest sufficient to warrant the preferential treatment implicit in an affirmative-action hiring classification based on race or sex. In *University of California Regents v. Bakke, supra.*, 438 U.S. 265, those justices who dealt with the equal protection issue appeared to agree that to justify a race-conscious program the racial disparity at which the program is to be directed should be shown to be *attributable to past discrimination*. In his lead opinion, Justice Powell suggested that such a program should be "far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past. [¶] We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. [Citations.] After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims ***312** must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm." (Pp. 307-309 [57 L.Ed.2d at pp. 782-783]; fn. 44 omitted.) Justice Brennan, writing for himself and three other justices, read the court's previous decisions less stringently but nevertheless perceived a need to find that the racial imbalance should be attributable to prior discrimination: "Properly construed ... our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have *and if there is reason to believe that the disparate impact is itself the product of past discrimination*, whether its own or that of society at large." (P. 369 [57 L.Ed.2d, 820-821]; italics added.) Our own Supreme Court has ac-

knowledged the primacy of decisions of the United States Supreme Court with respect to questions of equal protection under the federal Constitution (cf. *Price v. Civil Service Com., supra.*, 26 Cal.3d 257, 278, fn. 14), and has recently clearly recognized that even the four concurring justices in *Bakke* would require "the existence of a nexus between past discrimination and present disproportionate ... under-representation ...." (*DeRonde v. Regents of University of California* (1981) 28 Cal.3d 875, 886 [172 Cal.Rptr. 677, 625 P.2d 220].)

Here, the trial court expressly found that the City of Berkeley had not discriminated in relevant respects in the past; [FN7] the record supports ***313** these findings. The record contains no legislative or administrative declaration as to past employment discrimination with the City of Berkeley, and denotes only that AAP was enacted in response to a history of discriminatory employment practices in the American society as a whole. In addition, there is positive evidence negating the assumption that the City of Berkeley has ever discriminated against minorities with respect to employment opportunities. For example, Mr. Williams, affirmative action officer, testified that he know of no occasions in the past where appellants had discriminated against any person with regard to employment with the city. Former Fire Chief Robert Kearney also observed no racial discrimination in the fire department throughout his long, 30-year tenure. Fire Chief Victor Porter, who had served in the Berkeley Fire Department for over 14 years, was also called as an adverse witness and testified that he did not know of any instance when the fire department had discriminated against minorities with regard to hirings or promotions. Moreover, the finding of the trial court that the City of Berkeley, its agents, employees and officers had not discriminated in the past on any occasion against any person by virtue of the person's race or sex with regard to employment opportunities with the City of Berkeley in general or its fire department in particular, is supported not only by sufficient evidence, but also by the decision rendered by the federal court in *Brunetti v. City of Berkeley* (N.D. Cal. 1975 ***314** Dock No. HC-74-0051 RFP). [FN8] In *Brunetti*, which, similar to the case at bench, involved reverse discrimination in promotions in the Berkeley Fire Department, the federal court found that there had been no prior discriminatory employment practices and that the affirmative action program by the city had not been launched to rectify past discrimination in the municipal work force.

FN7 The pertinent findings read as follows: "42. The Census figures for the City of Berkeley do not indicate what proportion of minority persons listed were between the ages of 18 and 35, such as to be eligible for entry-level employment in PERS-jurisdiction Fire Departments. The Census figures do not indicate what percentage of persons of each race, or all races, are between the ages of 18 to 65. The Census does not indicate what percentage of any race described therein was employed, or unemployed, or where they hold jobs if they were employed.

"43. The City of Berkeley recruits employees on a statewide and, indeed, a nationwide basis. The City of Berkeley has no information as to what the percentage of the workforce by race was or is in Alameda County, in the San Francisco Bay Area, in the State of California, or in the geographical area (whatever it may be) in which a majority of Berkeley employees live.

"44. The City of Berkeley has no information as to what proportion of the persons in Berkeley described in the Census actually was seeking work. It has no information as to whether or not the statistics included students at the University of California at Berkeley.

"45. The City of Berkeley has no information and no evidence was presented to indicate whether or not the minority composition of the City of Berkeley workforce in general, or in its Fire Department in particular, has been or is greater than the proportion of minority applicants for positions.

"46. The City of Berkeley, and its agents, servants, employees, and officers have not discriminated in the past on any occasion against any person by virtue of that person's race with regard to employment opportunities with the City of Berkeley in general, or in its Fire Department in particular.

"47. The City of Berkeley, and its agents, servants and employees, and officers have not discriminated in the past on any occasion

130 Cal.App.3d 298, 181 Cal.Rptr. 661, 29 Empl. Prac. Dec. P 32,872
(Cite as: 130 Cal.App.3d 298)

against any person by virtue of that person's sex with regard to employment opportunities with the City of Berkeley in general, or in its Fire Department in particular.

"48. While the percentage of the minority persons in the workforce of the City of Berkeley is lower than the population as described in the Census, there has been no evidence presented whatsoever such as to explain the difference between the racial composition of the workforce and the racial composition of the city population-if such explanation is needed.

"49. The City of Berkeley has no information and has presented no evidence to indicate whether or not its percentage of women employees in its workforce is less than or exceeds the percentage of women applicants for positions with the City of Berkeley in previous years."

FN8 We have taken judicial notice of *Brunetti*, an unpublished opinion, pursuant to Evidence Code section 452, subdivision (d).

(5)Appellants suggest that an existing racial imbalance may be deemed prima facie evidence of past societal discrimination and (implicitly) of a causal relation between the past discrimination and the present imbalance. It may be that in an appropriate fact situation an inference of attribution to past discrimination may be drawn from evidence of an existing disproportion in racial or sexual representation (cf. e.g., *DeRonde v. Regents of University of California, supra.*, 28 Cal.3d 875, 886; *University of California Regents v. Bakke, supra.*, 438 U.S. 265, 370-372 [57 L.Ed.2d 750, 821-823] (disparity in professional-school admissions inferentially attributable to documented discrimination in public education)), but in this action a showing of disproportion in hiring and promotion within the Berkeley Fire Department could not be so readily attributed to general societal discrimination. The trial court expressly found that appellants had produced no evidence of such attribution (see fn. 7, *supra.*).

(6)Finally, appellants appear to argue that a compelling state interest may be inferred from title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.). Specifically, they argue that under title VII, "local governments need not wait to be sued or judicially forced into action under title VII ... to remedy discriminatory evidence of racial imbalance." They quote the Washington Supreme Court for the proposition that under title VII "[v]oluntary compliance, rather than court ordered relief, is the congressionally preferred method of achieving equality of employment opportunity" (*Lindsay v. City of Seattle* (1976) 86 Wn.2d 698 [548 P.2d 320, 326], cert. den. 429 U.S. 886 [50 L.Ed.2d 167, 97 S.Ct. 237]).

This statutory argument tends to beg the question whether AAP is in pertinent respects *constitutional* regardless of the *statutory* provisions on which it might be predicated. But we need not reach the question whether a clear expression of congressional intent might somehow provide evidence of compelling state interest for purposes of constitutional ***315** analysis: We agree with respondents that title VII would neither require nor compel the AAP provisions in question in the circumstances of record. By its simple reading, title VII proscribes employment discrimination based on race, color, religion, sex or national origin in unconditional language and without any qualification (42 U.S.C. § 2000e-2 (a)). Addressing the very problem that is before us, section 703, subdivision (j), of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(j)), provides in equally clear and explicit terms that racial preferences are not required to be granted to any employee or group of employees on account of racial imbalance either. [FN9]

FN9 42 United States Code section 2000e-2(a), provides that "*It shall be an unlawful employment practice for an employer-*

"(1) *to* fail or refuse to hire or to discharge any individual, or otherwise to *discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or*

"(2) *to limit*, segregate, or classify *his employees* or applicants for employment *in any way which would deprive* or tend to deprive *any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race,*

> *color, religion, sex, or national origin*." (Italics added.)
>
> Subdivision (j) of the same section sets forth that "*Nothing contained in this subchapter shall be interpreted to require any employer*, employment agency, labor organization, or joint labor-management committee subject to this subchapter *to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin* employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area." (Italics added).)

The legislative history of section 703, subdivision (j), reveals complete harmony between this plain, unmistakable congressional language and the congressional intent. The background facts disclose that the bill which became the Civil Rights Act of 1964 originated in the House of Representatives as H.R. No. 7152. As reported to the House, it did not contain section 703, subdivision (j) (see H.R. No. 914, 1964 U.S. Code Cong. & Admin. News, pp. 2391, 2401-2409). The bill received heated opposition, its opponents expressing the fear that it would impose on unions and employers a federally administered racial quota system. (See generally, EEOC, Legislative History of titles VII and XI, Civil Rights Act of 1964.) When the bill reached the Senate, Senators Clark and Case, its floor managers, filed a report declaring: "*There is no requirement* ***316** *in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance*, whatever such a balance may be, *would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race*. [¶] [*The employer*] *would not be obliged-or indeed, permitted*-to fire whites in order to hire Negroes, or *to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special* seniority *rights at the expense of the white workers* hired earlier ...." (Interpretive Memorandum on title VII of H.R. No. 7152, submitted jointly by Senators Clark and Case, floor managers, 110 Cong. Rec. 7213 (Apr. 8, 1964); EEOC Legislative History, *supra.*, p. 3043; italics added.)

In response to the objections of opponents, Senator Clark filed a series of responses to these objections, among them the following: "Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area. [¶] Answer: Quotas are themselves discriminatory." (EEOC, Legislative History, *supra.*, p. 3015.)

A series of amendments, the so-called Dirksen-Mansfield substitute (which was ultimately adopted by both houses of the Congress), was then framed by supporters of the bill. In order to allay fears of racial preference hiring, the present text of section 703, subdivision (j), was added to the bill. One of its draftsmen, Senator Humphrey, explained its purpose: "A new subsection 703(j)is added to deal with the problem of racial balance among employees. *The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly*." (Remarks of Senator Humphrey, 110 Cong. Rec. 12723 (June 4, 1964); EEOC Legislative History, *supra.*, p. 3005; italics added.)

In addition, the legislative history clearly reflects that title VII was intended to "cover white men and white women and all Americans" (Remarks of Rep. Celler, 110 Cong. Rec. 2578 (1964)), and to create an "obligation not to discriminate against whites." (*Id.*, at p. 7218 memorandum of Senator Clark. See also memorandum of Senators Clark and Case, *id.*, at p. 7213, and remarks of Senator Williams, *id.*, at p. 8912.) ***317**

The Equal Employment Opportunity Commission (EEOC) whose interpretations are entitled to

great deference (*Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 433-434 [28 L.Ed.2d 158, 165, 91 S.Ct. 849]), has consistently interpreted title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites, holding that to proceed otherwise would "constitute a derogation of the Commission's Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians" (EEOC Decision No. 74-31, 7 FEP 1326, 1328,CCH EEOC Decisions, ¶ 6404, p. 4084 (1973)).

United States Supreme Court cases preceding *Bakke* also gave the interpretation that title VII prohibits racial discrimination against any race, including whites. Thus, in *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273 [49 L.Ed.2d 493, 96 S.Ct. 2574], the court concluded that white employees were entitled to relief when the employer dismissed them for misbehavior, but retained a similarly situated black employee. Speaking for a unanimous court, Justice Marshall emphasized that title VII is not limited to discrimination against members of any particular race, and that it prohibits discriminatory preferences for any racial group, minority or majority. In relying on the legislative history and the EEOC interpretation of title VII, the Supreme Court held that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson white." (Pp. 279-280 [49 L.Ed.2d at pp. 500-501].) In *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63 [53 L.Ed.2d 113, 97 S.Ct. 2264], the Supreme Court again reaffirmed its earlier statement that the purpose of title VII was to insure that similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex or national origin, and concluded that "The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin. This is true regardless of whether the discrimination is directed against majorities or minorities." (Pp. 71-72 [53 L.Ed.2d at p. 123]; see also to the same effect *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36 [39 L.Ed.2d 147, 94 S.Ct. 1011].)

We note in passing that *Griggs v. Duke Power Co., supra.*, 401 U.S. 424, supports rather than negates or contradicts the principles enunciated ***318** in the foregoing cases. While observing that under the Civil Rights Act practices, procedures or tests neutral on their face cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices, the court in *Griggs* repeatedly underlined that the very purpose of title VII is to promote hiring on the basis of job qualifications and to eliminate discriminatory preferences based on race or sex with respect to any group, majority or minority. As the court put it, "Title VII 'expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications*. Indeed, *the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color*.'" (P. 434 [28 L.Ed.2d at p. 166]; italics partially added.) And, "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. *Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed*. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." (Pp. 430-431 [28 L.Ed.2d, p. 164]; italics added.)

In summary, the record supports a conclusion that appellants did not show a compelling state interest, in the requisite constitutional sense, to be served by the challenged provisions of AAP.

2. *Necessity*

(7)Even were we to assume for the sake of argument that the record in this action demonstrates a compelling state interest in achieving proportional employment within the Berkeley Fire Department, we would conclude that the record does not establish, in the constitutionally requisite sense, the *necessity* for the proposed classification. Consistent with the trial court's findings, [FN10] the record affirmatively shows that ***319** the establishment of an inflexible, 100 percent racial quota system in AAP was not necessary to achieve the policy goal of proportional employment (assuming arguendo that such goal was acceptable), and that workable alternative methods were available and existed in carrying out the objective. Thus, it

appears that prior to the passage of AAP, the City of Berkeley conducted extensive recruiting and education to increase the percentage of minority applicants in the fire department. Larry Williams, personnel director and affirmative action officer, testified that such program was quite successful and that the proportion of minority firefighter applicants dramatically rose from about 50 out of 1,000 in the mid-1960s, to about 150 out of 350-400 immediately prior to the passage of AAP, which corresponds to an increase from 5 percent to over 30 percent in the surveyed period. Mr. Williams' testimony was corroborated by Councilman Sweeney, who restated that as a result of the city's vigorous efforts and education there was considerable success in recruiting minority applicants to the fire department prior to the adoption of AAP.

> FN10 The relevant court findings are as follows: "39. Procedures employed by the City of Berkeley prior to adoption of the AAP operated such as to substantially increase the proportions of minority persons holding supervisory or promotional positions in employment in the City of Berkeley.
>
> "40. Procedures employed by the City of Berkeley prior to adoption of the AAP operated in a manner to substantially increase the percentage of women in supervisory or promotional positions in employment in the City of Berkeley workforce.
>
> "41. Alternate methods exist to increase the proportion of minorities and of women in supervisory or managerial positions in the City of Berkeley workforce, including in its Fire Department."

3. *Impact*

(8)Further, the quota system employed in AAP purported to exclude from new hirings and promotional positions not only a certain number of the majority race, but the white class as a whole, at least until the projected minority quotas were filled in the work force of the city. Needless to say, the rigid quota system thus conjured cannot be regarded as a means imposing a lesser or the least limitation possible upon the group disadvantaged by the classification, as envisaged by the case law (*Dunn v. Blumstein, supra.*, 405 U.S. 330, 342-343 [31 L.Ed.2d 274, 284-285]; *Loving v. Virginia, supra.*, 388 U.S. 1, 11 [18 L.Ed.2d 1010, 1017]; *McLaughlin v. Florida, supra.*, 379 U.S. 184, 192-193 [13 L.Ed.2d 222, 228-229]; *Price v. Civil Service Com., supra.*, 26 Cal.3d 257, 282; *University of California Regents v. Bakke, supra.*, 438 U.S. 265, 308 [57 L.Ed.2d 771, 782]). AAP signally lacks features which have been deemed significant to a finding of validity in the analysis of other affirmative-action plans: Limited duration (cf. *Price v. Civil Service Com., supra.*, p. 261), continuing oversight (cf. *University of California Regents v. Bakke, supra.*, p. 308 [57 L.Ed.2d at p. 782]), synthesis of factors such as race and sex with several other factors, *all* of which are to be considered in arriving at the classification (cf. *DeRonde v. Regents of University of California, supra.*, 28 Cal.3d 875, 884), and use of flexible ratios rather than fixed quotas (cf. *Price v. Civil Service Com., supra.*, 26 Cal.3d at pp. 266, 282), among others. ***320**

(9)Appellants argue that the racial quotas here challenged should pass constitutional muster because the discrimination in favor of ethnic minorities and women was "benign," aimed at redressing past injustices and prior unequal treatment. We are unable to agree. Appellants' contention is neither meritorious nor novel. The same argument was raised in *Bakke* and rejected by the majority of the United States Supreme Court, as follows: "Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign.' The clock of our liberties, however, cannot be turned back to 1868. *Brown v. Board of Education, supra.*, [347 U.S. 483 (98 L.Ed. 873, 74 S.Ct. 686, 38 A.L.R.2d 1180)], at 492; accord, *Loving v. Virginia, supra.*, at 9. *It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others*." (Pp. 294-295 [57 L.Ed.2d at pp. 773-774]; italics partially added.)

In elaborating on the reasons why "benign" discrimination may not be accepted, the majority of the Supreme Court advanced three major considerations: "First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of particular groups in order to advance the group's general interest. See *United Jewish Organizations v. Carey*, 430 U.S. at 172-173 (Brennan, J., concurring in

part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. See *DeFunis v. Odegaard*, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting). Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making." (*Bakke, supra.*, 438 U.S. at p. 298 [57 L.Ed.2d at p. 776].)

Finally, we find it of singular importance that in rejecting the notion of "benign" discrimination the majority of the Supreme Court cited with approval Professor Bickel's comment on the self-contradictory nature of reverse discrimination: "'The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: *discrimination on the basis of race is illegal,* ***321** *immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now* this is to be unlearned and *we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored*. Those for whom racial equality was demanded are to be more equal than others. *Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution*.' A. Bickel, The Morality of Consent 133 (1975)." (*Bakke, supra.*, p. 295 [57 L.Ed.2d at p. 774] (Italics added.).)

(10)In light of the overwhelming weight of the cited authorities, appellants' remaining contentions do not call for a lengthy discussion. The argument, that even if section 703, subdivision (j), of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(j)) does not *require* the employer to redress the racial imbalance, an affirmative action to do the same is permissible if done on a *voluntary* basis (*Lindsay v. City of Seattle, supra.*, 86 Wn.2d 698 [548 P.2d 320]), may be briefly disposed of. The principle of unlawful reverse discrimination would apply whether the racial preference was compelled by the court or voluntarily initiated by the employer, because to the victim of the racial discrimination the result is not noticeably different in either case. Moreover, as mentioned before, the legislative history of title VII makes it eminently clear that the elimination of racial imbalance at the expense of eligible majority employees is not only not required, but indeed not permitted because to do so would force the employer to hire or fire employees on the basis of race. With respect to those cases upholding voluntary affirmative action programs for the purpose of redressing racial imbalance, suffice to say that the recent United States Supreme Court cases (*McDonald v. Santa Fe Trail Transp. Co., supra.*, 427 U.S. 273; *Trans World Airlines, Inc. v. Hardison, supra.*, 432 U.S. 63; *Alexander v. Gardner-Denver Co., supra.*, 415 U.S. 36; and especially *Regents of University of California v. Bakke, supra.*, 438 U.S. 265) sharply undercut, if not outrightly override them. In light of this new development of law, the continued validity and precedential value of the earlier cases are highly questionable, to say the least.

(11)Appellants' additional claim that in the case at bench no racial discrimination took place, because the grouping of all eligible employees into three qualifying categories and listing of the candidates in alphabetical order, cannot stand in the light of the hiring priority provision of the AAP, already held illegal, which was an integral part of this process. However, no rule of law requires that appellants afford determinative weight to the quantitative factors of test scores or grades where the ***322** AAP's hiring priority policy based on "underutilization" has been eliminated. Nor does Berkeley City Charter, section 119, require a different finding. Thus, those portions of the trial court's decision enjoining the provision of paragraph III of the AAP on the use of written tests, and paragraph V regarding employment list qualifying categories, must be reversed.

(12)Lastly, in answering appellants' remaining contention that the appointments in dispute were no more than mere exercise of the city manager's discretionary power accorded by the charter (city charter, art. VII, § 28), we briefly note that the discretionary power of the city manager is to be exercised within the framework of AAP which, as discussed at length before, is violative of the equal protection clauses of the federal and California Constitutions.

The Cross-appeal

The cross-appeal is taken from that portion of the judgment which refuses to promote two respondents, Messrs. Rinne and Jones, to the position of fire captain and fire lieutenant, respectively, and from the denial of

attorney's fees to respondents.

The factual background giving rise to the respondents' cross-appeal reveal that the case at bench was tried on a bifurcated basis. The first phase addressed the constitutionality of AAP and called for enjoining appellants from the enforcement of the constitutionally infirm provisions of AAP. After the trial court filed its intended memorandum decision on February 13, 1975, holding that AAP was unconstitutional and illegal upon its face and enjoining appellants from proceeding under the illegal AAP, the liability portion of the case went on trial on March 17, 1975. At the conclusion of the second phase, the lower court found that respondents Hiatt, Salter and Parks, who had been in the meanwhile promoted, were entitled to damages by reason of delay in their promotion. As far as respondents Rinne and Jones were concerned, the trial court concluded that they had no just claim to promotion, due to the fact that there had been no additional vacancies in the fire department, and as a consequence the city manager could not exercise his discretion. Relying on *Alyeska Pipeline Co. v. Wilderness Society* (1975) 421 U.S. 240 [44 L.Ed.2d 141, 95 S.Ct. 1612], the trial court at the same time denied respondents' motion for awarding them attorney's fees. Respondents now argue that the ruling of the trial court was erroneous in both respects. ***323**

(13a)In addressing the first issue, we agree with the trial court that respondents Rinne and Jones were not entitled to promotion. As appears in the record, the promotion of these respondents was raised in a supplemental pleading praying for writ of mandamus or "mandatory injunction." (14)It is well settled that while mandate is an appropriate remedy by which to compel the exercise of discretion by a court or governmental officer or an agency (Code Civ. Proc., § 1085; *Anderson v. Phillips* (1975) 13 Cal.3d 733, 736 [119 Cal.Rptr. 879, 532 P.2d 1247]; *Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 579 [114 Cal.Rptr. 106, 522 P.2d 666]), this remedy cannot be utilized to compel the exercise of discretion in a particular manner or to reach a particular result (*Hollman v. Warren* (1948) 32 Cal.2d 351, 355 [196 P.2d 562]; *Carter v. Com. on Qualifications, etc.* (1939) 14 Cal.2d 179, 181 [93 P.2d 140]; *Palmer v. Fox* (1953) 118 Cal.App.2d 453, 456 [258 P.2d 30]; 5 Witkin, Cal. Procedure (2d ed. 1971) § 76, p. 3852.) (13b) Simultaneously, the record shows that the city charter accorded discretion to the city manager in the appointment, discipline and removal of city employees subject to the civil service provisions of the charter. [FN11] Since the ordering of the promotion of respondents Rinne and Jones would have been equivalent to mandating the exercise of discretion in a particular manner, and since there were no vacancies to be filled in the fire department, the trial court's refusal to issue a writ of mandamus was proper.

> FN11 City charter, article VII, section 28, subdivision (b), provides that the city manager shall have power, and it shall be his duty "Except as otherwise provided in this Charter, to appoint, discipline or remove all heads or directors of departments, chief officials, and all subordinate officers and employees of the City, subject to the Civil Service provisions of this Charter. Neither the Council nor any of its committees or members shall dictate, either directly or indirectly, the appointment of any person to office or employment by the City Manager or in any manner interfere with the City Manager or prevent him from *exercising his own judgment in the appointment of officers and employees* in the administrative service. Except for the purpose of inquiry, the Council and its members shall deal with the administrative service solely through the City Manager, and neither the Council nor any member thereof shall give orders to any subordinates of the City Manager, either publicly or privately" (italics added).

(15)On the other hand, the attorney-fee issue must be remanded to the trial court for reconsideration in light of Code of Civil Procedure section 1021.5, [FN12] enacted while this appeal was pending and therefore ***324** applicable to appellants' motion for attorney fees (cf. *Woodland Hills Residents Assn., Inc., v. City Council* (1979) 23 Cal.3d 917, 928-932 [154 Cal.Rptr. 503, 593 P.2d 200]). From the record before us, it appears that appellants should be able to demonstrate the existence of each of the elements essential to an award of attorney fees under section 1021.5 (cf. *Rich v. City of Benicia* (1979) 98 Cal.App.3d 428, 434-435 [159 Cal.Rptr. 473]), but inasmuch as no party had an opportunity to argue to the trial court with reference to the then unenacted section 1021.5, we deem it appropriate simply to reverse the trial court's denial of attorney fees and to remand the issue for

further consideration in light of the new section, as construed in several subsequent appellate decisions, including those cited above in this paragraph (cf. *Woodland Hills Residents Assn., Inc. v. City Council*, *supra.*, pp. 948-949; *Kievlan v. Dahlberg Electronics, Inc.* (1978) 78 Cal.App.3d 951, 959 [144 Cal.Rptr. 585]).

> FN12 Code of Civil Procedure section 1021.5 provides: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor."

The judgment, insofar as it fails to make an award of attorney fees to respondents, is reversed, with directions to the trial court to reconsider appellants' motion for attorney fees in light of Code of Civil Procedure section 1021.5 and to enter judgment for any attorney fees to which it finds appellants entitled. Those portions of the judgment enjoining that part of paragraph III of AAP pertaining to the use of written tests, and the whole of paragraph V of AAP regarding employment list qualifying categories are reversed. In all other respects, the judgment is affirmed. Respondents to recover costs.

Taylor, J., [FN*] concurred. ***325**

> FN* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

Cal.App.1.Dist.
Hiatt v. City of Berkeley
130 Cal.App.3d 298, 181 Cal.Rptr. 661, 29 Empl. Prac. Dec. P 32,872

END OF DOCUMENT

29 Cal.App.4th 1007, 34 Cal.Rptr.2d 864
(Cite as: 29 Cal.App.4th 1007)

C

In re RUDY L., a Person Coming under the Juvenile Court Law. THE PEOPLE, Plaintiff and Respondent,
v.
RUDY L., Defendant and Appellant.

No. B079446.

Court of Appeal, Second District, Division 1, California.
Oct 27, 1994.

SUMMARY

The trial court entered an order declaring a minor to be a ward of the court (Welf. & Inst. Code, § 602), based on his commission of vandalism in violation of Pen. Code, § 594. (Superior Court of Los Angeles County, No. FJ08122, Gary Bounds, Temporary Judge. [FN*])

FN* Pursuant to California Constitution, article VI, section 21.

The Court of Appeal affirmed. It held that the trial court did not err in finding the minor had committed vandalism and in declaring him a ward of the court, despite his assertion that lack of permission is an element of vandalism, and that the People failed to prove he had no permission to spray paint on a building. While defendant's appeal was pending, Pen. Code, § 594, subd. (a), was amended to provide that, with respect to public real property, "it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property." However, nothing in the statute's language, either before or after it was amended, specifically makes lack of permission an element of vandalism. Moreover, the legislative history fails to show a legislative understanding that lack of permission is an element of the offense, nor does it show an intent to change the law and make it an element. Although construing the statute in a manner that does not make lack of permission an element renders the phrase "nor had the permission of the owner" surplusage, an undesirable result, it is consistent with legislative intent as expressed in the statute's language (Code Civ. Proc., § 1859). (Opinion by Spencer, P. J., with Ortega and Vogel (Miriam A.), JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Malicious Mischief § 3--Malicious Injury to Property Vandalism--Lack of Permission as Element of Offense.

The trial court did not err in finding a minor had committed vandalism (Pen. Code, § 594), and in declaring him a ward of the court, despite his assertion that lack of permission is an element of vandalism, and that the People failed to prove he had no permission to spray paint on a building. While defendant's appeal was pending, Pen. Code, § 594, subd. (a), was amended to provide that with respect to public real property, "it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property." However, nothing in the statute's language, either before or after it was amended, specifically makes lack of permission an element of vandalism. Moreover, the legislative history fails to show a legislative understanding that lack of permission is an element of the offense, nor does it show an intent to change the law and make it an element. Although construing the statute in a manner that does not make lack of permission an element renders the phrase "nor had the permission of the owner" surplusage, an undesirable result, it is consistent with legislative intent as expressed in the statute's language (Code Civ. Proc., § 1859).

[See 2 **Witkin & Epstein,** Cal. Criminal Law (2d ed. 1988) §§ 678, 684.]

(2) Statutes § 20--Construction--Judicial Function--Construction of Statute as Written.

It is against all settled rules of statutory construction that courts should write into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute. The court must follow the language used in a statute and give it its plain meaning, even if it appears probable that a different object was in the mind of the Legislature.

COUNSEL

Tibor I. Toczauer, under appointment by the Court of Appeal, for Defendant and Appellant.

29 Cal.App.4th 1007, 34 Cal.Rptr.2d 864
(Cite as: 29 Cal.App.4th 1007)

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, John R. Gorey and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent. ***1009**

SPENCER, P. J.

Introduction

Appellant Rudy L. appeals from an order declaring him to be a ward of the court pursuant to Welfare and Institutions Code section 602 based on his commission of vandalism in violation of Penal Code section 594.

Statement of Facts

On the afternoon of April 29, 1993, appellant spray-painted the letter "A" on the wall of an empty building located at 5327 East Beverly Boulevard. Neither appellant nor his mother owned the building.

Contention

(1a) Appellant contends the petition erroneously was sustained, in that the elements of the crime he was found to have committed were not proven--1ack of permission is an element of vandalism, and the People failed to prove he had no permission to paint on the building wall. For the reasons set forth below, we disagree.

Discussion

At the time appellant spray-painted the building wall and the adjudication hearing was held, Penal Code section 594, subdivision (a) (hereinafter section 594(a)), provided: "Every person who maliciously (1) defaces with paint or any other liquid, (2) damages or (3) destroys any real or personal property not his or her own, ... is guilty of vandalism." Appellant's counsel argued appellant should not be found to have committed vandalism and the petition should not be sustained, in that lack of permission is an element of vandalism and the People failed to prove appellant lacked permission to spray-paint the building wall. The court concluded, based on the language of the statute, lack of permission was not an element of the offense but, rather, permission was a defense. It thereafter found appellant had committed the offense and sustained the petition.

While appellant's appeal was pending, section 594(a) was amended. (Stats. 1993, ch. 605, § 4.) It now provides: "Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, ... is guilty of vandalism: [¶] (1) Sprays, ***1010** scratches, writes on, or otherwise defaces. [¶] (2) Damages. [¶] (3) Destroys. [¶] Whenever a person violates paragraph (1) with respect to real property belonging to any public entity, ... it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property."

Appellant argues the provision as to the permissive inference makes it clear the Legislature considered lack of permission to be an element of vandalism. Since the prosecution failed to prove this element, appellant is entitled to reversal of the adjudication; double jeopardy protection bars retrial of the case.

In the People's view, the Legislature's failure to specify that lack of permission is an element of the offense means it is not and never has been an element, the permissive inference language notwithstanding. Therefore, the prosecution did not fail to prove its case. However, if the court concludes lack of permission is an element of the offense, then the element was added as a result of the 1993 amendment to section 594(a). If so, and the amendment is applied retroactively to appellant's case, double jeopardy protection does not apply and the People should be allowed to retry the case.

Where a statute is ambiguous, it requires construction by the court. Here, the amended statute is ambiguous. The permissive inference language allows an inference an actor had no permission to deface government property, but the language of the statute does not specify that lack of permission is an element of the offense, making it unclear whether or not it is an element. Thus, construction of the statute is necessary.

A statute is to be construed so as to give effect to the intention of the Legislature. (Code Civ. Proc., § 1859; *Landrum v. Superior Court* (1981) 30 Cal.3d 1, 12 [177 Cal.Rptr. 325, 634 P.2d 352].) To do so, " '[t]he court turns first to the words [of the statute] themselves for the answer.' [Citation.]" (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].) The statutory language used is to be given its usual, ordinary meaning and, where possible, significance should be

given to every word and phrase. (*Id.* at p. 230.) As stated in Code of Civil Procedure section 1858, "... where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Accordingly, a construction which renders some words surplusage should be avoided. (*California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844 [157 Cal.Rptr. 676, 598 P.2d 836].) Moreover, "[w]ords must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible. [Citations.]" (*Ibid.*) ***1011**

Additionally, in construing a statute, the duty of the court "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted." (Code Civ. Proc., § 1858.) (2) "It is ... against all settled rules of statutory construction that courts should write into a statute by implication express requirements which the Legislature itself has not seen fit to place in the statute." (*People v. White* (1954) 122 Cal.App.2d 551, 554 [265 P.2d 115]; see *Estate of Tkachuk* (1977) 73 Cal.App.3d 14, 18 [139 Cal.Rptr. 55].) The court must follow the language used in a statute and give it its plain meaning, " ' "even if it appears probable that a different object was in the mind of the legislature." ' " (*People v. Weidert* (1985) 39 Cal.3d 836, 843 [218 Cal.Rptr. 57, 705 P.2d 380].)

(1b) It is clear that in neither version of section 594(a) did the Legislature specify that lack of permission was an element of the offense of vandalism. Moreover, had the Legislature intended to make lack of permission an element it easily could have done so. In other criminal statutes, it has specifically stated that lack of permission or consent is an element of the offense. (See, e.g., Pen. Code, § 211 ["Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and *against his will*, accomplished by means of force or fear." (Italics added.)]; *id.*, § 261, subd. (a)(2) ["Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator ... [w]here it is accomplished *against a person's will* by means of force, violence, duress, menace, or fear ...." (Italics added.)]; *id.*, § 596 ["Every person who, *without the consent of the owner*, wilfully administers poison to any animal, the property of another, ... is guilty of a misdemeanor." (Italics added.)].)

As stated above, a statute is to be interpreted according to the words used, and the court is not to insert provisions omitted by the Legislature. (Code Civ. Proc., § 1858; *People v. White, supra*, 122 Cal.App.2d at p. 554.) Additionally, a statute should be interpreted in the context of the whole system of law of which it is a part. (*People v. Comingore* (1977) 20 Cal.3d 142, 147 [141 Cal.Rptr. 542, 570 P.2d 723].) Thus, if a statute "referring to one subject contains a critical word or phrase, omission of that word or phrase from a similar statute on the same subject generally shows a different legislative intent." (*Craven v. Crout* (1985) 163 Cal.App.3d 779, 783 [209 Cal.Rptr. 649]; accord, *Estate of Reeves* (1991) 233 Cal.App.3d 651, 657 [284 Cal.Rptr. 650].) The omission of language in either version of section 594(a) making lack of permission an element of the offense, when such language has been inserted in other criminal statutes to make lack of permission or consent an element of the offenses, is indicative of a legislative intent not to make lack of permission an element of vandalism. ***1012**

The permissive inference language suggests that the Legislature had in mind the notion that lack of permission was an element of the offense. But, as stated above, the court must follow the language used in a statute and give it its plain meaning, " ' "even if it appears probable that a different object was in the mind of the legislature." ' " (*People v. Weidert, supra*, 39 Cal.3d at p. 843.)

On the other hand, a construction of section 594(a) which does not include lack of permission as an element of the offense renders the phrase "nor had the permission of the owner" surplusage. If lack of permission is not an element of the offense, an inference that the actor lacked permission is unnecessary. Whether or not such an inference existed, the actor still could prove permission-and thus lack of malice-as a defense. Such a construction would violate the principles that a statute should be construed so as to give effect to all provisions, and words used therein should not be rendered mere surplusage. (Code Civ. Proc., § 1858; *California Mfrs. Assn. v. Public Utilities Com., supra*, 24 Cal.3d at p. 844.)

In addition to the rules of statutory construction, a valuable aid in ascertaining legislative intent may be the legislative history of a statute. (*California Mfrs. Assn. v. Public Utilities Com., supra*, 24 Cal.3d at p.

844.) The amendment to section 594(a) was proposed as part of Assembly Bill No. 1179, 1993-1994 Regular Session (Assembly Bill No. 1179). According to a report prepared for hearing by the Assembly Committee on Public Safety on May 4, 1993, the purpose of the bill was "to elevate the sentences for vandalism for persons who have a prior conviction where a term of imprisonment was served. If an individual knows he or she can get away with vandalism, they are going to continue to do it. Graffiti and vandalism generate public outrage," and "[t]he cost of graffiti removal is tremendous." More than that, the blight caused by graffiti "affects all communities" and causes "[t]urf wars" and gang violence, which can lead to murder. "When it comes to vandalism with a prior conviction, we need to look beyond the dollar value the tag caused and wake-up and recognize its link to gang violence, drug trafficking and all the associated social ills that affect neglected communities." The report defines vandalism in the language of section 594(a), and it mentions nothing about the question of permission.

The proposed amendment of section 594(a) was part of the amendment of Assembly Bill No. 1179 on May 17. The report prepared for the Assembly Committee on Ways and Means hearing on June 2, following amendment of the bill on May 17, refers to Assembly Bill No. 1179 as the "1993 California Graffiti Omnibus Bill" and notes the purpose of the bill is to "enhance the punishment for graffiti." It mentions nothing about the proposed amendment to section 594(a) or the issue of permission. ***1013**

The Senate Committee on Judiciary report for its July 13 hearing notes: "This bill would expand the definition of vandalism by replacing 'defaces with paint or any other liquid' with 'sprays, scratches, writes on, or otherwise defaces.' [¶] This bill would also provide a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy any real property owned by a governmental entity." However, the report does not further discuss the inference or the issue of permission. The same is true of the Senate Rules Committee report for its August 25 hearing, which followed the Senate's August 17 amendments to Assembly Bill No. 1179.

The Senate amended the bill again on September 7, then the bill was returned to the Assembly, which concurred in the amendments. The digest prepared for the Assembly vote again mentions the permissive inference but does not explain or discuss it. Neither does the Legislative Counsel's Digest prepared on Assembly Bill No. 1179.

As the foregoing shows, there is nothing in the legislative history of the amendment to section 594(a) to demonstrate a clear legislative understanding that lack of permission was an element of vandalism or an intent to change the law to make lack of permission an element of vandalism; the issue simply appears not to have been raised or discussed. This omission supports an inference, though not necessarily a strong one, the Legislature did not consider lack of permission to be an element of the offense or intend to change the law to make it an element. (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 508 [247 Cal.Rptr. 362, 754 P.2d 70].)

To summarize, there is nothing in the language of section 594(a), either before or after amendment, which specifically makes lack of permission an element of vandalism. There is nothing in the legislative history of the amendment which clearly demonstrates a legislative understanding that lack of permission was an element of the offense, although such an understanding could be inferred from the reference to permission in the permissive inference provision. Neither does the legislative history show an intent to change the law and make it an element. However, construing the statute in a manner which does not make lack of permission an element would render the phrase "nor had the permission of the owner" surplusage.

On balance, we hold the better construction of section 594(a) is that it does not now and did not before amendment make lack of permission an element of vandalism. While this construction does render some of the language in the amended statute surplusage, an undesirable result (*California Mfrs. Assn. v. Public Utilities Com.*, *supra*, 24 Cal.3d at p. 844), it is ***1014** consistent with legislative intent as expressed in the language of the statute. (Code Civ. Proc., § 1859; *Landrum v. Superior Court*, *supra*, 30 Cal.3d at p. 12; *Moyer v. Workmen's Comp. Appeals Bd.*, *supra*, 10 Cal.3d at p. 230.)

Thus, the trial court did not err in finding appellant had committed vandalism and in sustaining the petition; lack of permission was not an element of the offense. The amendment of section 594(a) did not

make it an element, so retroactive application of the amended statute would not benefit appellant. Therefore, we need not consider the issues of retroactivity and retrial.

The order is affirmed.

Ortega, J., and Vogel (Miriam A.), J., concurred.
***1015**

Cal.App.2.Dist.
In re Rudy L.
29 Cal.App.4th 1007, 34 Cal.Rptr.2d 864

END OF DOCUMENT

DENNIS KOIRE, Plaintiff and Appellant,
v.
METRO CAR WASH et al., Defendants and Respondents

L.A. No. 32052.

Supreme Court of California
Oct 17, 1985.

SUMMARY

A man who was refused the same discount prices as were offered by car washes to female customers on "Ladies' Day," and who was also refused free admission to a night club on "Ladies' Night" when women patrons were admitted free, filed suit against the car washes and the bar claiming that their sex- based price discounts violated the Unruh Civil Rights Act (Civ. Code, § 51). The trial court granted judgment for defendants on all causes of action, finding that the sex-based price discounts did not violate the act. (Superior Court of Orange County, No. 317804, Edward J. Wallin, Judge.)

The Supreme Court reversed. The court held that the Unruh Civil Rights Act (Civ. Code, § 51) prohibits sex-based price discounts. (Opinion by Bird, C. J., with Mosk, Broussard, Reynoso and Grodin, JJ., concurring. Kaus, J., [FN*] concurred in the result. Lucas, J., concurred in the judgment only.)

FN* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d, 1e, 1f) Civil Rights § 4--Public Accommodations--Sex-based Price Discounts.

The Unruh Civil Rights Act (Civ. Code, § 51) prohibited sex-based price discounts offered by several car washes and a night club to female patrons, but not to a male patron. The scope of the act is not narrowly limited to practices which totally exclude classes or individuals from business establishments. The act's proscription is broad enough to include discrimination in the form of sex-based price discounts. Moreover, sex-based price discounts could not be upheld on the ground that they did not constitute "arbitrary" discrimination; the discounts were not supported by any significant public policy, and they were not permissible merely because they were profitable. Such discriminatory treatment was not only injurious to the individual male patron, but was also detrimental to society at large. Finally, there was no merit to the argument that an end to "Ladies' Day" price discounts would mean an end to all types of promotional discounts. There are a multitude of promotional discounts which are clearly permissible under the Unruh Act. [See **Cal.Jur.3d,** Civil Rights, § 6; **Am.Jur.2d,** Civil Rights, § 28.]

(2) Civil Rights § 1--Unruh Civil Rights Act--Construction.

The Unruh Civil Rights Act (Civ. Code, § 51) is to be given a liberal construction with a view to effectuating its purposes.

(3) Civil Rights § 4--Public Accommodations.

The Unruh Civil Rights Act (Civ. Code, § 51) guarantees "full and equal accommodations, advantages, facilities, privileges, or services." The scope of the statute is not limited to exclusionary practices. The Legislature's choice of terms evidences concern not only with access to business establishments, but with equal treatment of patrons in all aspects of the business.

(4a, 4b) Civil Rights § 4--Public Accommodations--Differential Treatment of Students by Fast Food Outlets and Convenience Stores.

Differential treatment of students by fast food outlets and convenience stores violates the Unruh Civil Rights Act (Civ. Code, § 51). Discriminatory practices, including limiting the number of student patrons, restricting students to certain hours or portions of the premises, or levying a minimum charge on student purchases, are arbitrary and unlawful.

(5) State of California § 10--Attorney General--Opinions.

While opinions of the Attorney General are not controlling authority, they are entitled to consideration.

(6) Civil Rights § 4--Public Accommodations--Reasonable, Not Arbitrary, Discrimination.

Although the Unruh Civil Rights Act (Civ. Code, § 51) proscribes any form of arbitrary discrimination, certain types of discrimination have been denominated "reasonable" and, therefore, not arbitrary. For example the act does not prevent a business enterprise from promulgating "reasonable deportment regulations." An entrepreneur need not tolerate customers who damage property, injure others, or otherwise disrupt his business. In certain contexts, the act is inapplicable to discrimination between patrons based on the nature of the business enterprise and of the facilities provided. For example, it is permissible to exclude children from bars or adult bookstores because it is illegal to serve alcoholic beverages or to distribute "harmful matter" to minors. (Bus. & Prof. Code, § 25658; Pen. Code, § 313.1.) This sort of discrimination is not arbitrary because it is based on a compelling societal interest and does not violate the act.

(7) Civil Rights § 4--Public Accommodations--Unruh Civil Rights Act.

By passing the Unruh Civil Rights Act (Civ. Code, §§ 51, 52) the Legislature established that arbitrary sex discrimination by businesses is per se injurious: § 51 provides that all patrons are entitled to equal treatment, and § 52 provides for minimum statutory damages of $250 for every violation of § 51, regardless of the plaintiff's actual damages.

(8a, 8b) Civil Rights § 1--Sex Discrimination--Public Policy.

Public policy in California strongly supports eradication of discrimination based on sex, and mandates the equal treatment of men and women.

(9) Constitutional Law § 99--Equal Protection--Classification--Bases of Classification--Sex.

Classifications based on sex are considered "suspect" for purposes of equal protection analysis under the California Constitution.

COUNSEL

Wallin, Roseman & Talmo, Wallin, Roseman, Talmo & Klarich and Ronald R. Talmo for Plaintiff and Appellant.

John K. Van de Kamp, Attorney General, Andrea Sheridan Ordin, Chief Assistant Attorney General, and Marian M. Johnston, Deputy Attorney General, as Amici Curiae on behalf of Plaintiff and Appellant.

William A. Woodyard and William A. Elliott for Defendants and Respondents. ***27**

BIRD, C. J.

(1a) Does the Unruh Civil Rights Act (Civ. Code, § 51) [FN1] prohibit sex-based price discounts?

FN1 Section 51 provides: "This section shall be known, and may be cited, as the Unruh Civil Rights Act. [¶] All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. [¶] This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, or national origin."

All subsequent statutory references are to the Civil Code unless otherwise indicated.

I.

In the spring of 1979, plaintiff sought to have his car washed at several car washes located in Orange County. He visited the car washes on "Ladies' Day" and asked to be charged the same discount prices as were offered to females. [FN2] These businesses refused his request. [FN3]

FN2 The discounts offered to women on "Ladies' Day" ranged from 4 percent (men paid $3.75 and women paid $3.60) to 38 percent (men paid $4.79 and women paid $2.99).

FN3 There was conflicting testimony at trial about whether defendant State College Car Wash refused to wash plaintiff's car for the reduced "Ladies' Day" price. The trial court did not resolve the factual dispute, since it held as a matter of law that "Ladies' Day" discounts do not violate the Unruh Civil

Rights Act. State College Car Wash does not deny that it advertises special "Ladies' Day" prices. At a minimum, men who wish to be charged the same price as women on "Ladies' Day" must affirmatively assert their right to equal treatment.

Plaintiff also visited several bars which offered admission discounts to women, including a nightclub, Jezebel's. At trial, plaintiff testified that he heard a radio advertisement for Jezebel's. The ad publicized an event scheduled for the following weekend to celebrate the first opportunity for young adults aged 18 to 21 to patronize the establishment. The ad stated that all "girls" aged 18 to 21 would be admitted free. Plaintiff, 18 years old at the time, went to Jezebel's and requested free admission which was refused.

Jezebel's owner and manager testified that there had been no such advertisement and promotional discount as described by plaintiff. However, the nightclub does have a regular "Ladies' Night." Women are admitted free but men must pay a $2 cover charge.

Plaintiff filed suit against numerous car washes and bars, claiming that their sex-based price discounts violated the Unruh Civil Rights Act (hereafter the Unruh Act or the Act.) [FN4] He sought statutory damages and an injunction. [FN5] ***28** He eventually went to trial against seven car washes and Jezebel's.

FN4 Plaintiff also alleged that defendants' policies constituted an unfair business practice in violation of Business and Professions Code section 17500.

FN5 Section 52 provides in pertinent part: "(a) Whoever ... makes any discrimination, distinction or restriction on account of sex ... contrary to the provisions of section 51 ..., is liable for each and every such offense for the actual damages, and such amount as may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage, but in no case less than two hundred and fifty dollars ($250) ...." In addition, "[a]lthough the Unruh Act makes no express provision for injunctive relief, that remedy as well as damages may be available to an aggrieved person." (*Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 470 [20 Cal.Rptr. 609, 370 P.2d 313].)

The trial court granted judgment for defendants on all causes of action. The court found that the sex-based price discounts did not violate the Unruh Act. Plaintiff appeals. [FN6]

FN6 Plaintiff did not appeal the judgment on the cause of action alleging a violation of Business and Professions Code section 17500.

II.

The language of the Unruh Act is clear and unambiguous: "All persons within the jurisdiction of this state are free and equal, and *no matter what their sex ... are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments* of every kind whatsoever. ..." (2) The Act is to be given a liberal construction with a view to effectuating its purposes. (*Orloff v. Los Angeles Turf Club* (1947) 30 Cal.2d 110, 113 [180 P.2d 321, 171 A.L.R. 913]; *Winchell v. English* (1976) 62 Cal.App.3d 125, 128 [133 Cal.Rptr. 20].)

(1b) The parties do not dispute that defendants are business establishments to which the Unruh Act applies. (See generally, *In re Cox* (1970) 3 Cal.3d 205, 212-213 [9 Cal.Rptr. 24, 474 P.2d 992]; 34 Ops.Cal.Atty.Gen. 230, 231-232 (1959).) Nor can there be any dispute that the Act applies to classifications based on sex. Although the list of classes enumerated in the Act has been held to be illustrative rather than exhaustive (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 725 [180 Cal.Rptr. 496, 640 P.2d 115, 30 A.L.R.4th 1161] [hereafter *Marina Point*]; *In re Cox, supra*, 3 Cal.3d at p. 216; *Rolon v. Kulwitzky* (1984) 153 Cal.App.3d 289, 292 [200 Cal.Rptr. 217]; *Curran v. Mount Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712, 733 [195 Cal.Rptr. 325, 38 A.L.R.4th 607]), the inclusion of "sex" in the list clearly covers discrimination based on sex. (See, e.g., *Easebe Enterprises, Inc. v. Alcoholic Bev. etc. Appeals Bd.* (1983) 141 Cal.App.3d 981, 986 & fn. 4 [190 Cal.Rptr. 678, 38 A.L.R.4th 332]; *Hales v. Ojai Valley Inn & Country Club* (1977) 73 Cal.App.3d 25, 28-29 [140 Cal.Rptr. 555, 89 A.L.R.3d 1].) ***29**

Defendants argue that the Unruh Act prohibits only the *exclusion* of a member of a protected class from a business establishment. They claim the law allows discrimination based on admission prices and services. Defendants also argue that the Unruh Act prohibits only *arbitrary* discrimination, and that the sex-based price discounts at issue here fall within recognized exceptions to the Act. In addition, defendants argue that the sex-based discounts did not violate the Act because they did not injure plaintiff. Finally, they contend that a prohibition on sex-based discounts will mean an end to all promotional discounts.

Defendant's first contention, that the Act prohibits only the *exclusion* of prospective patrons from business establishments, is without merit. (3) The Act guarantees "*full and equal accommodations, advantages, facilities, privileges, or services ....*" (§ 51.) The scope of the statute clearly is not limited to exclusionary practices. The Legislature's choice of terms evidences concern not only with access to business establishments, but with equal treatment of patrons in all aspects of the business.

Courts have repeatedly held that the Unruh Act is applicable where unequal treatment is the result of a business practice. Several early cases found violations of this Act and its predecessor when blacks were allowed to enter business establishments but were restricted to certain portions of the premises. (See, e.g., *Jones v. Kehrlein* (1920) 49 Cal.App. 646, 651 [194 P. 55] [black ticketholders admitted to theatre but restricted to seating in segregated section]; *Suttles v. Hollywood Turf Club* (1941) 45 Cal.App.2d 283, 287 [114 P.2d 27] [black ticketholders admitted to racetrack but denied clubhouse seating].) In *People* v. *McKale* (1979) 25 Cal.3d 626 [159 Cal.Rptr. 811, 602 P.2d 731], the plaintiff alleged "a pattern of discriminative conduct" by defendant mobilehome park against applicants and tenants, "varying from instances of abusive language ... to discriminative sales and leasing policies." This court concluded that such discrimination was "clearly unlawful" under the Unruh Act and held that plaintiff had adequately stated a cause of action. (*Id.*, at p. 637.)

In *Hutson v. The Owl Drug Co.* (1926) 79 Cal.App. 390 [249 P. 524], a black plaintiff was allowed to sit at a soda fountain, but the employee "placed [her order] amongst dirty dishes on the counter." (*Id.*, at p. 392.) Another employee then struck the plaintiff and threw a cup of coffee on her. (*Ibid.*) The court held that the plaintiff "was not accorded the same accommodations, advantages, facilities and privileges" due persons of all races. (*Id.*, at p. 393.)

(4a) In 59 Ops.Cal.Atty.Gen. 70 (1976), the Attorney General opined that differential treatment of students by fast food outlets and convenience ***30** stores violated the Unruh Act. The opinion disapproved of a variety of discriminatory practices, including limiting the number of student patrons, restricting students to certain hours or portions of the premises, or levying a minimum charge on student purchases. (*Id.*, at p. 70.) "Any business restrictions of the type enumerated ... would appear to be arbitrary and unlawful." (*Ibid.*) (5) While opinions of the Attorney General are not controlling authority, they are entitled to consideration. (*Wenke* v. *Hitchcock* (1972) 6 Cal.3d 746, 751-752 [100 Cal.Rptr. 290, 493 P.2d 1154]; *Sonoma County Bd. of Education v. Public Employment Relations Bd.* (1980) 102 Cal.App.3d 689, 699 [163 Cal.Rptr. 464].) (4b) In this instance, the Attorney General's interpretation of the Act is correct.

(1c) Contrary to defendants' assertions, the scope of the Unruh Act is not narrowly limited to practices which totally exclude classes or individuals from business establishments. The Act's proscription is broad enough to include within its scope discrimination in the form of sex-based price discounts.

Defendants' primary argument is that sex-based price discounts do not constitute "arbitrary" discrimination. (6) Although the Unruh Act proscribes "any form of arbitrary discrimination" (*O'Connor* v. *Village Green Owners Assn.* (1983) 33 Cal.3d 790, 794 [191 Cal.Rptr. 320, 662 P.2d 427]), certain types of discrimination have been denominated "reasonable" and, therefore, not arbitrary. For example, the Act does not prevent a business enterprise from promulgating ""'reasonable deportment regulations. "'" (*Ibid.*; *Marina Point, supra*, 30 Cal.3d at pp. 725, 738-739; *Orloff* v. *Los Angeles Turf Club* (1951) 36 Cal.2d 734, 741 [227 P.2d 449].) ""'[A]n entrepreneur need not tolerate customers who damage property, injure others or otherwise disrupt his business.'"" (*O'Connor v. Village Green Owners Assn., supra*, 33 Cal.3d at p. 794; *Marina Point, supra*, 30 Cal.3d at p.

737; *In re Cox, supra*, 3 Cal.3d at p. 217.)

In certain contexts, it has been said that the Act is inapplicable to discrimination between patrons based on the "nature of the business enterprise and of the facilities provided." (*O'Connor v. Village Green Owners Assn., supra*, 33 Cal.3d at p. 794; see *Marina Point, supra*, 30 Cal.3d at p. 741; *Wynn v. Monterey Club* (1980) 111 Cal.App.3d 789, 796-798 [168 Cal.Rptr. 878].) However, few cases have held discriminatory treatment to be nonarbitrary based solely on the special nature of the business establishment.

One such case is *Wynn v. Monterey Club, supra*, 111 Cal.App.3d 789. In *Wynn*, the Court of Appeal held that excluding an *individual* woman from a gambling club did not violate the Unruh Act when she was "a compulsive ***31** gambler who had manifested a propensity to gamble beyond her means to the extent of committing what was possibly an illegal act, all of which was having a detrimental effect on her own well-being as well as that of her husband, and these factors were all known to the defendants." (*Id.*, at p. 797.) The court observed that defendants' business was a "gambling establishment[] and not some form of harmless entertainment." (*Id.*, at p. 798.)

In *Ross v. Forest Lawn Memorial Park* (1984) 153 Cal.App.3d 988 [203 Cal.Rptr. 468], the Court of Appeal held that it was not a violation of the Unruh Act for a cemetery to exclude "punk rockers" from a private funeral at the request of the mother of the deceased. "Given the sensitive nature of the services offered by the cemetery, a policy permitting private funerals by which those who are not invited may not attend is a reasonable regulation 'rationally related to the services performed.'" (*Id.*, at p. 993.) [FN7]

FN7 It should be noted that this "nature of the business" exception to the Act had its origin in *In re Cox, supra*, 3 Cal.3d 205. This court concluded that a business establishment may "promulgate reasonable *deportment* regulations that are rationally related to the services performed and the facilities provided." (*Id.*, at p. 217, italics added.) That pronouncement did nothing more than acknowledge that certain behavior may be appropriate in one setting but inappropriate in another. For example, loudly voicing one's excitement, exultation or disappointment may be acceptable and appropriate behavior at a racetrack, but it may be entirely inappropriate in an otherwise tranquil restaurant.

Since the "exception" at issue was originally but one aspect of the exception for reasonable deportment regulations, its application to other situations should be carefully and narrowly construed.

Most often, the nature of the business enterprise or the facilities provided has been asserted as a basis for upholding a discriminatory practice *only* when there is a strong public policy in favor of such treatment. (See *Marina Point, supra*, 30 Cal.3d at pp. 742-743.) Public policy may be gleaned by reviewing other statutory enactments. For example, it is permissible to exclude children from bars or adult bookstores because it is illegal to serve alcoholic beverages or to distribute "'harmful matter"' to minors. (*Id.*, at p. 741, citing Bus. & Prof. Code, § 25658 and Pen. Code, § 313.1.) This sort of discrimination is not arbitrary because it is based on a "compelling societal interest" (*Marina Point, supra*, 30 Cal.3d at p. 743) and does not violate the Act. [FN8] ***32**

FN8 "Public policy" exceptions to the Unruh Act are rare. In *Pines v. Tomson* (1984) 160 Cal.App.3d 370 [206 Cal.Rptr. 866], the defendants owned and operated the "Christian Yellow Pages," which accepted only advertisements placed by persons who affirmed orally and in writing that they had accepted Jesus Christ as their personal savior and were "born-again" Christians. (*Id.*, at p. 375.) The defendants argued that they were entitled to a "public policy" exception to the Unruh Act. The Court of Appeal rejected this argument, noting that when this court had discussed such an exception in *Marina Point*, the public policy at issue had a statutory basis. (*Pines v. Tomson, supra*, at p. 387.) Characterizing the defendant's contention as a First Amendment "constitutional argument in disguise," (*ibid.*) the Court of Appeal held that the Act "require[d] [defendants] to act in a nondiscriminatory manner toward all prospective advertisers" (*id.*, at p. 389, italics omitted) and that their practices violated the Unruh Act. The court noted the government's "'compelling interest in eradicating

discrimination in all forms,'" including discrimination based on religious creed. (*Id.*, at p. 391.)

(1d) Defendants argue that sex-based price differences are not arbitrary because they are supported by "substantial business and social purposes." [FN9] Essentially, they argue that the discounts are permissible because they are profitable.

FN9 Defendants do not contend that their sex-based admission discounts constitute reasonable deportment regulations. The prices charged are in no way dependent on the individual characteristics or conduct of the customers. They are based solely on the customer's sex.

In *Marina Point*, this court held that the fact that a business enterprise was "'proceed[ing] from a motive of rational self-interest'" did *not* justify discrimination. (*Marina Point, supra*, 30 Cal.3d at p. 740, fn. 9, disapproving *Newby v. Alto Riviera Apartments* (1976) 60 Cal.App.3d 288, 302 [131 Cal.Rptr. 547].) This court noted that "an entrepreneur may pursue many discriminatory practices 'from a motive of rational self-interest,' e.g., economic gain, which would unquestionably violate the Unruh Act. For example, an entrepreneur may find it economically advantageous to exclude all homosexuals, or alternatively all nonhomosexuals, from his restaurant or hotel, but such a 'rational' economic motive would not, of course, validate the practice." (*Marina Point, supra*, 30 Cal.3d at p. 740, fn. 9.) It would be no less a violation of the Act for an entrepreneur to charge all homosexuals, or all nonhomosexuals, reduced rates in his or her restaurant or hotel in order to encourage one group's patronage and, thereby, increase profits. The same reasoning is applicable here, where reduced rates were offered to women and not men. [FN10] ***33**

FN10 Defendants rely principally on *Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152 [140 Cal.Rptr. 599], for the proposition that price discounts are permissible. In *Archibald*, the plaintiff sued a number of Hawaiian hotels which gave special discount rates to Hawaiian residents. She alleged several causes of action, including a violation of the Unruh Act. The Court of Appeal held that the plaintiff had failed to state a cause of action since the Unruh Act applies only in California. (*Id.*, at p. 159.) The court added that even if the Act were to be applied, it did not proscribe the practices about which plaintiff complained. (*Ibid.*) The latter statement, made in a conclusory manner and without the benefit of analysis, was merely dictum. It is of no value to defendants in this action. To the extent that it is inconsistent with the views expressed herein, it is disapproved.

The Court of Appeal also held that the plaintiff failed to state a cause of action for breach of the *common law* duties of an innkeeper not to discriminate. (*Archibald, supra*, 73 Cal.App.3d at pp. 156-158.) The court stated broadly that it found "no authority holding that the offering of a discount to certain clients, patrons or customers based on an attempt to attract their business is unlawful under the common law." (*Id.*, at p. 157.) Defendants attempt to adopt the court's analysis of that cause of action in the context of an alleged Unruh Act violation. Carried to its logical conclusion, defendants' argument would permit hotels and other business establishments to charge discriminatory rates based on a customer's race, religion, or other arbitrary criterion. Whatever the parameters of the common law proscriptions against discrimination in public accommodations, the Unruh Act provides a clear statement of *legislative* intent to prohibit exactly this sort of discriminatory treatment.

Defendant Jezebel's argues that "Ladies' Night" encourages more women to attend the bar, thereby promoting more interaction between the sexes. This it deems to be a "socially desirable goal" of the state. However, the "social" policy on which Jezebel's relies - encouraging men and women to socialize in a bar - is a far cry from the social policies which have justified other exceptions to the Unruh Act. For example, the compelling societal interest in ensuring adequate housing for the elderly which justifies differential treatment based on age cannot be compared to the goal of attracting young women to a bar. (*Marina Point, supra*, 30 Cal.3d at pp. 742-743; see *post*, at pp. 36-38.) The need to promote the "social policy" asserted by Jezebel's is not sufficiently compelling to

warrant an exception to the Unruh Act's prohibition on sex discrimination by business establishments. [FN11]

FN11 The other defendants do not offer to explain how "Ladies' Day" at the car washes promotes any important social policy.

Next, defendants argue that their sex-based price discounts do not violate the Unruh Act because "Ladies' Day" discounts do no injury to either men or women. [FN12] They contend that this plaintiff was not injured by the price differences. [FN13] Defendants' argument fails for several reasons.

FN12 The trial court found "no intent to arbitrarily exclude men on 'Ladies Day,'" and that "Ladies Day" is "not calculated to make men feel unwelcome, unaccepted or undesired." However, discriminatory *intent* is not required by the Unruh Act. The Act states simply that "*[a]ll persons ... are entitled* to [] full and equal ... advantages [or] privileges ...." Plaintiff was entitled to equal treatment, "no matter what [his] sex," regardless of defendants' intent in denying him equal treatment.

Some bars may offer price discounts to women in order to *discourage* male patronage (see *Harari Restaurant Corp. v. McLaughlin* (1981) 81 App.Div.2d 512 [437 N.Y.S.2d 349, 350], affd. in pert. part 55 N.Y.2d 730 [447 N.Y.S.2d 153, 43 N.E.2d 638]), while others, such as Jezebel's, do so in order to *encourage* the patronage of men. The legality of the practice cannot be dependent on the nature, indeed the *sex*, of the clientele an establishment wishes to attract.

FN13 Jezebel's claims it "has not harmed a single hair on the plaintiff's head or subjected him to the slightest deprivation or embarrassment of any kind."

(7) First, it does not recognize that by passing the Unruh Act, the Legislature established that arbitrary sex discrimination by businesses is *per se* injurious. Section 51 provides that all patrons are entitled to *equal* treatment. Section 52 provides for minimum statutory damages of $250 for *every* violation of section 51, *regardless* of the plaintiff's actual damages. [FN14]

FN14 See, *ante*, footnote 5 for the text of section 52.

As this court noted in *Orloff v. Los Angeles Turf Club, supra*, 30 Cal.2d at page 115, construing an earlier version of the statute, the statute provides for damages aside from any actual damages incurred by the plaintiff. "'This sum is unquestionably a penalty which the law imposes, and which it directs shall be paid to the complaining party. ... [But], while the law has seen ***34** fit to declare that it shall be paid to the complaining party, it might as well have directed that it be paid into the common-school fund. The imposition is in its nature penal, *having regard only to the fact that the law has been violated and its majesty outraged*.'" (Italics added.) (Accord *MacLean v. First North. Industries of America* (1981) 96 Wn.2d 338 [635 P.2d 683, 690] (dis. opn. of Utter, J.) [arguing that the state of Washington's antidiscrimination laws recognize that discrimination "injures not only the victim but the state and public in general," and can therefore be attacked "despite an injury-free victim"].)

(1e) Second, defendants ignore both the individual nature of a cause of action under the Unruh Act (see *Marina Point, supra*, 30 Cal.3d at pp. 725, 738) and the actual injury to this plaintiff. The plaintiff *was* adversely affected by the price discounts. His female peers were admitted to the bar free, while he had to pay. On the days he visited the car washes, he had to pay more than any woman customer, based solely on his sex. In addition to the economic impact, the price differentials made him feel that he was being treated unfairly. [FN15]

FN15 Plaintiff testified at trial that he remembered the radio advertisement for Jezebel's clearly:

"I can recall that, because I thought that that was so unbelievable that I can recall that like it was yesterday - like it was today. That is how unbelievable that was to me. Letting minors in the club and then just letting the girls in free, that is unbelievable. A Celebration there. The guy was all happy. Come on down. We're letting in these people 18 to 21. You know, all the girls from 18 to 21 get in free. It just smoked me."

> Plaintiff also testified that he encountered hostility and ridicule when he requested car washes at the "Ladies' Day" prices. On one occasion, the cashier responded to his request, "[n]o, I don't see you wearing a skirt." On another occasion, at a different car wash, the cashier "screamed" at him, "[n]o, are you a lady?"

Moreover, differential pricing based on sex may be generally detrimental to both men and women, because it reinforces harmful stereotypes. (See Babcock et al., Sex Discrimination and the Law (1975) p. 1069; Note, *Washington's Equal Rights Amendment and Law Against Discrimination - The Approval of the Seattle Sonics' "Ladies' Night"* (1983) 58 Wash. L.Rev. 465, 473.)

Men and women alike suffer from the stereotypes perpetrated by sex-based differential treatment. (See Kanowitz, "*Benign" Sex Discrimination: Its Troubles and Their Cure* (1980) 31 Hastings L.J. 1379, 1394; Comment, *Equal Rights Provisions: The Experience Under State Constitutions* (1977) 65 Cal.L.Rev. 1086, 1106-1107.) When the law "emphasizes irrelevant differences between men and women[,] [it] cannot help influencing the content and the tone of the social, as well as the legal, relations between the sexes. ... As long as organized legal systems, at once the most respected ***35** and most feared of social institutions, continue to differentiate sharply, in treatment or in words, between men and women on the basis of irrelevant and artificially created distinctions, the likelihood of men and women coming to regard one another primarily as fellow human beings and only secondarily as representatives of another sex will continue to be remote. When men and women are prevented from recognizing one another's essential humanity by sexual prejudices, nourished by legal as well as social institutions, society as a whole remains less than it could otherwise become." (Kanowitz, Women and the Law (1969) p. 4.)

Whether or not these defendants consciously based their discounts on sex stereotypes, the practice has traditionally been of that character. For example, in *Com., Pa. Liquor Control Bd. v. Dobrinoff* (1984) 80 Pa.Cmwlth. 453 [471 A.2d 941], the trial court relied on just such a stereotype in upholding a tavern's cover charge distinction based on sex. The court suggested that the purpose of the discount was "'chivalry and courtesy to the fair sex.'" (*Id.*, at p. 943.) The appellate court held, however, that a variance in admission charge based "solely upon a difference in gender, having no legitimate relevance in the circumstances" violated the Pennsylvania Human Relation Act's prohibition against sex discrimination. (*Ibid.*)

Similarly, in striking down the New York Yankees "Ladies' Day" promotion, the New York State Human Rights Appeal Board observed that "the stereotyped characterizations of a woman's role in society that prevailed at the inception of 'Ladies' Day' in 1876" were outdated and no longer valid "in a modern technological society where women and men are to be on equal footing as a matter of public policy." (*Abosh v. New York Yankees, Inc.* (1972) No. CPS-25284, Appeal No. 1194, reprinted in Babcock et al., Sex Discrimination and the Law, *supra*, at pp. 1069, 1070.)

With all due respect, the Washington Supreme Court also succumbed to sexual stereotyping in upholding the Seattle Supersonics' "Ladies' Night." (*MacLean v. First North. Industries of America, supra*, 635 P.2d at p. 684.) The court found that the discount was reasonable because, inter alia, "women do not manifest the same interest in basketball that men do." (*Ibid.*) [FN16]

> FN16 The court also noted other "attraction[s]" offered by the Sonics especially for women, including "performances by the Seattle Symphony before the game and at half time, women's fashion shows at half time, gifts and souvenirs, and women's hoop shooting at half time." (*MacLean, supra*, 635 P.2d at p. 685.)

This sort of class-based generalization as a justification for differential treatment is precisely the type of practice prohibited by the Unruh Act. (See ***36** *O'Connor* v. *Village Green Owners Assn., supra*, 33 Cal.3d at p. 794; *Marina Point, supra*, 30 Cal.3d at pp. 739-740.) "[T]he Unruh Civil Rights Act prohibits all forms of stereotypical discrimination." (*San Jose Country Club Apartments v. County of Santa Clara* (1982) 137 Cal.App.3d 948, 952 [187 Cal.Rptr. 493].) These sex-based discounts impermissibly perpetuate sexual stereotypes.

Defendants protest that an end to "Ladies' Day" will mean an end to all types of promotional discounts. They contend that this will be detrimental to businesses, and that the Legislature never intended such a result.

A multitude of promotional discounts come to mind which are clearly permissible under the Unruh Act. For example, a business establishment might offer reduced rates to *all* customers on one day each week. Or, a business might offer a discount to any customer who meets a condition which any patron could satisfy (e.g., presenting a coupon, or sporting a certain color shirt or a particular bumper sticker). In addition, nothing prevents a business from offering discounts for purchasing commodities in quantity, or for making advance reservations. [FN17] The key is that the discounts must be "applicable alike to persons of every sex, color, race, [etc.]" (§ 51), instead of being contingent on some arbitrary, class-based generalization.

FN17 The Legislature has explicitly provided for certain price discounts. (See, e.g., Pub. Util. Code, § 523 [persons who may be given free or reduced rates on common carriers]; Food & Agr. Code, §§ 3021, 3022 [persons who may be admitted free to state, district and county fairs].)

Defendants want their discriminatory acts to be analogized to age-based price discounts. Charging different prices to children and senior citizens is sometimes permissible and socially desirable. However, the fact that sex-based price discounts are not permissible does not have an impact on the validity of age-based discounts.

(8a) Public policy in California strongly supports eradication of discrimination based on sex. The Unruh Act expressly prohibits sex discrimination by business enterprises. (§ 51.) The California Fair Employment and Housing Act prohibits sex discrimination in employment. (Gov. Code, § 12900 et seq.) Numerous other statutes stand as evidence of this strong public policy. (See, e.g., Lab. Code, § 1197.5 [Equal Pay Act]; Ed. Code, § 89757 [prohibiting use of public funds by university or college for membership or participation in private organizations with discriminatory membership practices].) ***37**

(9) In addition, classifications based on sex are considered "suspect" for purposes of equal protection analysis under the California Constitution. (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 20 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351].) California ratified the proposed Equal Rights Amendment to the United States Constitution on November 17, 1972, within one year of its passage by Congress. (Sen. Joint Res. No. 20, Stats. 1972 (Reg. Sess.) res. ch. 148, p. 3440.) (8b) In short, public policy in California mandates the *equal* treatment of men and women.

The public policy considerations applicable to price discounts for children or senior citizens are very different from those applicable to sex-based discounts. Although this court need not determine the validity of any specific age-based discount, especially without the benefit of briefing on the issue from parties actually affected by the practice, several important and distinguishing features should be noted.

Numerous statutes in California provide for differential treatment of children and adults. (See, e.g., Welf. & Inst. Code, § 200 et seq. [the Arnold-Kennick Juvenile Court Law]; Civ. Code, § 1556 [limitation on minors' capacity to contract]; Veh. Code, § 12507 [no person under 16 years of age may be licensed to drive].)

Similarly, state and federal legislation has been enacted to address the special needs of our elderly citizens. (See, e.g., 42 U.S.C. § 1381 et seq. [supplemental security income]; Welf. & Inst. Code, § 12050 et seq. [eligibility for old age security benefits]. In *Marina Point, supra,* 30 Cal.3d at page 742, this court chronicled the special housing needs of the elderly, and the "age-conscious" legislation aimed at meeting those needs, as evidence that public policy supported some age-based housing discrimination. The Legislature subsequently expressed its agreement. (See § 51.3.)

Children and elderly persons frequently have limited earning capacities which justify differential treatment in some circumstances. While women generally earn less than men, the societal remedy for this inequity has been equal employment opportunities. There is legislation on the books which seeks to lessen the gap in earnings between men and women. (See, e.g., Lab. Code, § 1197.5 [Equal Pay Act].) [FN18] By

contrast, the vast majority of ***38** children are *incapable* of earning as much as adults and are, in fact, *prohibited* from working except under strict limitations. (See Lab. Code, § 1285 et seq.) For example, minors under the age of 16 may work only in occupations specified by statute (Lab. Code, § 1290). They are limited in the number of hours and the time of day they may work (Lab. Code, § 1391).

> FN18 The nightclub attempts to justify its price discount as "remedial" because women tend to have lower incomes than men. This argument appears to be disingenuous at best. The club's profit motive is obvious. Jezebel's waives the cover charge for women not because women on the average earn 59 cents for every dollar earned by men (Koziara, Pierson & Johannesson, *The Comparable Worth Issue: Current Status and New Directions* (1983) 34 Lab. L.J. 504, 505), but because it wants to earn as many dollars as it can for itself. "Ladies' Night" at Jezebel's is not for the benefit of women, but for the benefit of the nightclub.
>
> In fact, the testimony indicated that the club had directed several promotional offers at men, including a "Men's Night." This practice was instituted in order to increase business and, thereby, profits. It was discontinued because it failed to achieve that goal.

Similarly, many elderly persons have limited incomes. While efforts are being made to increase employment opportunities for senior citizens (see Unemp.Ins. Code, § 16000 et seq.), many are unable to work due to health problems. For others, retirement may even be legislatively encouraged or mandated. (See, e.g., *Rittenband v. Cory* (1984) 159 Cal.App.3d 410 [205 Cal.Rptr. 576] [upholding the constitutionality of a provision of the Judges' Retirement Law (Gov. Code, § 75000 et seq.) which decreases pension benefits to judges who fail to retire at age 70]; Gov. Code, § 20980 et seq.) In addition, our society has recognized that senior citizens are *entitled* to retire at some point in their lives.

Thus, price discounts for children or for the elderly are justified by social policy considerations as evidenced by legislative enactments. This is not true as to sex-based discounts. In fact, the Legislature has specifically provided for certain price discounts for senior citizens. (See, e.g., Veh. Code, § 13001 [permitting reduced transit fares]; Pub. Resources Code, § 5011 [providing for reduced rate passes to the state park system]; Ed. Code, § 89330 [providing for waiver of fees at California State University campuses].)

There may also be instances where public policy warrants differential treatment for men and women. For example, some sex-segregated facilities, such as public restrooms, may be justified by the constitutional right to personal privacy. (See Comment, *The Unruh Civil Rights Act: An Uncertain Guarantee* (1983) 31 UCLA L.Rev. 443, 462, fn. 98.) (1f) However, defendants' discriminatory pricing policies are in no way based on privacy considerations, nor are they justified by any other public policy which might warrant differential treatment based on sex.

The plain language of the Unruh Act mandates equal provision of advantages, privileges and services in business establishments in this state. Absent a compelling social policy supporting sex-based price differentials, such discounts violate the Act. ***39**

Jezebel's argues that it will be forced to close its nightclub business if it cannot charge a lower cover price to women one evening each week. [FN19] "However, such a fact, if it be a fact, is not determinative." (*Easebe Enterprises, Inc. v. Alcoholic Bev. etc. Appeals Bd., supra*, 141 Cal.App.3d at p. 987.)

> FN19 The testimony of the nightclub personnel indicated that "Ladies' Night" is the night on which the club collects its greatest revenue.

Moreover, Jezebel's has offered no reason why it could not charge a lower admission fee one night each week to men and women alike. This would encourage increased patronage by both sexes on equal terms. When faced with a similar question, the New York Human Rights Commission observed that "[p]erhaps, in their unending quest to serve best the social interests of the public, a Community Day at reduced prices irrespective of sex, rather than a Ladies Day with its attendant pricing based on sex, might well accomplish respondents' social concerns without violating the public policy of this State ...." (*Abosh v. New York Yankees, Inc.*, reprinted in Babcock et al., Sex Discrimination and the Law, *supra*, at p. 1070.) Such a

solution might work equally well here.

Courts are often hesitant to upset traditional practices such as the sex-based promotional discounts at issue here. Some may consider such practices to be of minimal importance or to be essentially harmless. Yet, many other individuals, men and women alike, are greatly offended by such discriminatory practices.

The legality of sex-based price discounts cannot depend on the subjective value judgments about which types of sex-based distinctions are important or harmful. The express language of the Unruh Act provides a clear and objective standard by which to determine the legality of the practices at issue. The Legislature has clearly stated that business establishments must provide "*equal* ... advantages ... [and] privileges" to all customers "no matter what their sex." (§ 51.) Strong public policy supports application of the Act in this case. The defendants have advanced no convincing argument that this court should carve out a judicial exception for their sex-based price discounts. The straightforward proscription of the Act should be respected.

The judgment is reversed and the cause remanded to the trial court for further proceedings consistent with the views expressed herein.

Mosk, J., Broussard, J., Reynoso, J., and Grodin, J., concurred. ***40**
Kaus, J., [FN*] concurred in the result.

FN* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

Lucas, J., concurred in the judgment only. ***41**

Cal.
Koire v. Metro Car Wash
40 Cal.3d 24, 707 P.2d 195, 219 Cal.Rptr. 133, 54 USLW 2227

END OF DOCUMENT

Supreme Court of California
MERCURY INSURANCE GROUP, Petitioner,
v.
THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; RONALD A. WOOSTER et al., Real Parties in Interest.

No. S067462.
Nov. 9, 1998.

SUMMARY

An insured couple that had been involved in an automobile accident filed a personal injury action against the other driver and his employer, and the couple also made an uninsured motorist claim on their insurance policy with their insurer. A contractual arbitration proceeding with the insurer commenced as to the uninsured motorist claim. The trial court entered an order consolidating the contractual arbitration proceeding with the pending personal injury action and diverted the entire matter to mandatory nonbinding judicial arbitration. Thereafter, the trial court entered an order denying the insurer's motion to separate nonbinding judicial arbitration from binding contractual arbitration and, in so doing, made a clarification to the effect that the consolidation was "for all purposes, including trial." (Superior Court of San Bernardino County, No. SCV19185, W. Robert Fawke, FN* Judge.) The Court of Appeal, Fourth Dist., Div. Two, No. E019906, declined to treat the insurer's appeal as such and ordered issuance of a writ of mandate ordering the trial court to vacate its order denying the insurer's motion for separate judicial arbitration and contractual arbitration, holding that the trial court was not authorized to consolidate the contractual arbitration proceeding with the pending action against third parties for all purposes, including trial.

FN* Judge of the San Bernardino Municipal Court, Central Division, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the cause to that court with directions to affirm the trial court's order denying the insurer's motion for separate judicial arbitration and contractual arbitration. The court held that the Court of Appeal erred by declining to treat the insurer's appeal as an appeal. The court further held that the trial court did not abuse its discretion by diverting the entire matter to mandatory nonbinding judicial arbitration, with the threat of a jury trial if the arbitration award was ultimately rejected, and by denying the insurer's motion for separate judicial arbitration and contractual arbitration. A trial court has authority to consolidate a contractual arbitration proceeding between an insurer and an insured as to uninsured motorist coverage in the insured's pending action against third parties-that is, to join the insurer as a defendant as to uninsured motorist coverage issues-for all purposes, including trial, in order to avoid conflicting rulings on a common issue of law or fact. There is no limitation imposed on the superior court's authority to consolidate in order to avoid conflicting rulings on a common issue of law or fact. Further, there is no pertinent preemptive effect arising from any pertinent requirement under the uninsured motorist coverage law that, in the event of disagreement between the insurer and the insured under an uninsured motorist coverage provision, the issues whether the insured shall be legally entitled to recover damages and, if so, in what amount, may be resolved only by means of contractual arbitration, or at least by means of some kind of "arbitration," resulting in a binding and final decision. (Opinion by Mosk, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Automobiles and Highway Traffic § 21.5--Operation of Motor Vehicles-- Financial Responsibility Law--Nature and Purpose.

The primary purpose of the financial responsibility law (Veh. Code, § 16000 et seq.), which requires the owners and operators of automobiles to be financially responsible for any bodily injury or property damage that they may cause, is to assure compensation for persons who have suffered injury or damage of this sort.

(2) Insurance Contracts and Coverage § 57--Coverage of Contracts--Uninsured Motorist Coverage

Law--Nature and Purpose.

The purposes of the uninsured motorist coverage law (Ins. Code, § 11580.2 et seq.), which is a permanent partial solution to the problem of the uninsured owner or operator of an automobile who, in spite of the financial responsibility law, proved to be financially irresponsible, are to require a type of self-protection on the part of insured owners or operators and to offer a means of resolving disputes that is more expeditious and less expensive than litigation. Its beneficiaries include the insurer and the insured, who are each thereby given a right against litigating these issues, as well as the courts themselves, which are thereby freed from entertaining such litigation.

(3) Arbitration and Award § 8--Statutory Procedures for Compulsory Arbitration--Nature and Purpose of Contractual Arbitration Law.

The purpose of the contractual arbitration law (Code Civ. Proc., § 1280 et seq.), which functions as a comprehensive scheme regulating contractual arbitration, is to promote contractual arbitration, in accordance with a strong public policy in favor thereof, as a more expeditious and less expensive means of resolving disputes than litigation. Contractual arbitration generally results in a binding and final decision.

[See 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 484 et seq.]

(4) Arbitration and Award § 14--Arbitration Proceedings--Judicial Arbitration Law--Nature and Purpose.

The purpose of the judicial arbitration law (Code Civ. Proc., § 1141.10 et seq.), which establishes a largely mandatory system of diversion of a broad range of relatively "small" actions for attempted resolution before they become eligible to proceed to trial, is to fashion and set in operation a mechanism to resolve disputes more expeditiously and less expensively than continued litigation, to the benefit of the parties and the courts. The title of the law is inapt, for the system it describes is neither judicial nor arbitration. It is not judicial because it is not entrusted to a judge. It is not arbitration, meaning contractual arbitration, because it generally does not result in a binding or final decision, but instead allows a trial de novo at the election of any party by timely request therefor.

[See 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 524 et seq.]

(5) Arbitration and Award § 2--Judicial Arbitration and Contractual Arbitration Distinguished.

The judicial arbitration law (Code Civ. Proc., § 1141.10 et seq.) and the contractual arbitration law (Code Civ. Proc., § 1280 et seq.) are mutually exclusive and independent of each other, and also differ from one another in various features. As to commencement, contractual arbitration arises solely out of an arbitration agreement, specifically, a written arbitration agreement, whereas judicial arbitration may be imposed on the parties, whether or not they agree in writing or otherwise. As to process, contractual arbitration allows the parties to an arbitration agreement to select the arbitrator, whereas judicial arbitration, absent a stipulation, selects the arbitrator for the parties by operation of law. Similarly, contractual arbitration allows the parties to an arbitration agreement to define the powers of the arbitrator, whereas judicial arbitration defines the arbitrator's powers for the parties by operation of law. In addition, contractual arbitration does not permit full and unconditional discovery, whereas judicial arbitration does. Further, contractual arbitration dispenses with any necessity to observe rules of evidence and procedure, whereas judicial arbitration, although it makes certain modifications, does not. Likewise, contractual arbitration generally frees the arbitrator from making a decision strictly in accordance with the law, whereas judicial arbitration does not. Lastly, as to conclusion, contractual arbitration generally results in a binding and final decision, whereas judicial arbitration generally does not.

(6a, 6b, 6c) Insurance Contracts and Coverage § 113--Arbitration-- Uninsured Motorist Claim--Consolidated With Related Personal Injury Action-- Combined Arbitration Procedure--Propriety:Arbitration and Award § 15-- Submission of Dispute--Authority to Consolidate Judicial and Contractual Arbitration.

After the trial court consolidated a contractual arbitration proceeding arising from an insured couple's uninsured motorist claim against the insurer with a related personal injury action against the other driver and his employer, the court did not abuse its discretion by diverting the entire matter to mandatory nonbinding judicial arbitration, with the threat of a jury trial if the arbitration award was ultimately rejected, and by denying the insurer's motion for separate judicial arbitration and contractual arbitration. A trial court has authority to consolidate a contractual arbitration proceeding between an insurer and an insured as to uninsured motorist coverage in the insured's pending action against third parties-that is, to join the insurer as

a defendant as to uninsured motorist coverage issues-for all purposes, including trial, in order to avoid conflicting rulings on a common issue of law or fact. There is no limitation imposed on the superior court's authority to consolidate in order to avoid conflicting rulings on a common issue of law or fact. Further, there is no preemptive effect arising from any pertinent requirement under the uninsured motorist coverage law that, in the event of disagreement between the insurer and the insured under an uninsured motorist coverage provision, the issues whether the insured shall be legally entitled to recover damages and, if so, in what amount, may be resolved only by means of contractual arbitration, or at least by means of some kind of "arbitration" resulting in a binding and final decision.

(7) Arbitration and Award § 8--Statutory Procedures for Compulsory Arbitration--Effect of Petition to Compel Contractual Arbitration--Authority of Trial Court.

In the general case, in the absence of a petition to compel contractual arbitration, there is no requirement that issues subject to contractual arbitration may be resolved only by means of contractual arbitration, or at least only by means of some kind of "arbitration" resulting in a binding and final decision. For reasons of their own, the parties may choose to litigate such questions. A trial court is not authorized to force them to contractual arbitration sua sponte. Should the parties choose to litigate such questions in a relatively small action, they may find themselves diverted to judicial arbitration, which generally does not result in a binding or final decision. At his or her election by timely request, any party is allowed a trial de novo. Furthermore, in the general case, even in the presence of a petition to compel contractual arbitration, there is no requirement that issues subject to contractual arbitration may be resolved only by means of contractual arbitration, or at least only by means of some kind of "arbitration" resulting in a binding and final decision.

(8) Insurance Contracts and Coverage § 56--Coverage of Contracts--Uninsured Motorist Coverage--Necessity of Resolution of Disputes by Binding Arbitration.

In the absence of a petition to compel contractual arbitration, there is no requirement that uninsured motorist coverage issues may be resolved only by means of contractual arbitration, or at least only by means of some kind of "arbitration" resulting in a binding and final decision. Nothing bars the insurer and the insured from choosing to litigate. Nothing prevents diversion to judicial arbitration. Even in the presence of a petition to compel contractual arbitration, there is no requirement that these questions may be resolved only by such means in such manner. Although the contractual arbitration law generally mandates a trial court to compel arbitration, it does not always do so. It broadly applies to all contractual arbitration, whether freely chosen by the parties or imposed on them by law, including the uninsured motorist coverage law. Thus, under the contractual arbitration law (Code Civ. Proc., § 1281.2), the general right to contractual arbitration of uninsured motorist coverage issues generally resulting in a binding and final decision is, indeed, a right, but nothing more. It may be "revoked" by rescission. Even if not "revoked," it may be lost by a party's waiver. Even if not waived, it may have to yield if there is an issue of law or fact common to the arbitration and a pending action or proceeding with a third party and there is a possibility of conflicting rulings thereon.

(9) Appellate Review § 12--Decisions Appealable--Order Denying Motion for Separate Judicial Arbitration and Contractual Arbitration.

The Court of Appeal erred by declining to treat as an appealable order the trial court's order consolidating a contractual arbitration proceeding arising from an insured couple's uninsured motorist claim against the insurer with a related personal injury action against the other driver and his employer, and denying the insurer's motion for separate judicial arbitration and contractual arbitration. Under Code Civ. Proc., § 1294, subd. (a), an order denying a petition to compel contractual arbitration is appealable. Although the insurer submitted a motion rather than a petition, the term petition has been construed, in practice, to include the term motion when, as in this case, an action is already pending. Further, although the insurer's motion did not seek an order compelling contractual arbitration in specific terms but, rather, separate judicial arbitration and contractual arbitration, it did seek such an order in effect. In requesting separate judicial arbitration and contractual arbitration, it necessarily requested contractual arbitration. To seek an order compelling contractual arbitration in terms is not necessary; to do so in effect is sufficient.

[See Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 1997) ¶ 5:301.]

COUNSEL

Williamson, Raleigh & Doherty, John K. Raleigh and Jeffrey H. Leo for Petitioner.

No appearance for Respondent.

Magana, Cathcart & McCarthy, Richard L. Bisetti and Marnie S. Skeen for Real Parties in Interest.

Anthony P. David as Amicus Curiae on behalf of Real Parties in Interest.

MOSK, J.

We granted review to address an important question of law: Does a trial court have authority to "consolidate" a contractual arbitration proceeding between an insurer and an insured as to uninsured motorist coverage in the insured's pending action against third parties-strictly speaking, does it have authority to join the insurer as a defendant as to uninsured motorist coverage issues-for all purposes, including trial, in order to avoid conflicting rulings on a common issue of law or fact? As we shall explain, we conclude that the answer that we must give is: Yes.

I

Although it contains some gaps and ambiguities, the record on review may be read to this effect. ***338**

Following a motor vehicle accident on a rural highway in San Bernardino County, Ronald A. and Andrea Wooster, who are husband and wife, filed a complaint in that county's superior court seeking damages for personal injury, and specifically bodily injury, against persons and entities including a motorist named Samuel Lewis Hull, Hull's employer, Mountain Top Rentals, and, by fictitious name, an unidentified motorist who fled the scene. They demanded trial by jury.

Prior to the accident, the Woosters had been issued an automobile liability insurance policy by Mercury Insurance Group (hereafter Mercury). As required by the uninsured motorist coverage law, the policy included coverage for damages for bodily injury caused by an uninsured motorist. As also required by the uninsured motorist law, the policy provided that the "determination as to whether the insured shall be legally entitled to recover damages, and if so entitled, the amount thereof, shall be made by agreement between the insured and the [insurer] or, in the event of disagreement, by arbitration"-meaning *contractual* arbitration, which generally results in a binding and final decision. The Woosters presented Mercury with a claim for damages caused by the unidentified, and effectively uninsured, motorist. The Woosters and Mercury apparently disagreed. The Woosters then made a demand on Mercury for contractual arbitration. A contractual arbitration proceeding commenced.

Over Mercury's opposition, the Woosters moved to "consolidat[e]" the contractual arbitration proceeding with Mercury as to the uninsured motorist coverage issues with the pending action against Hull and Mountain Top Rentals-in effect, to join Mercury as a defendant as to these questions-"for all purposes," including trial, in order to avoid conflicting rulings on a common issue of law or fact. The superior court generally granted the motion. In its order, it broadly "consolidat[ed]" the contractual arbitration proceeding with the pending action. But it did not "decide[]" whether to do so "as to ... trial."

The superior court subsequently diverted the now-consolidated action to judicial arbitration, which generally does not result in a binding or final decision. A judicial arbitration hearing was later scheduled.

Over the Woosters' opposition, Mercury moved for separate judicial arbitration and contractual arbitration. Specifically, it sought an order for: (1) judicial arbitration as to the consolidated action generally-apparently distinct from the uninsured motorist coverage issues-to result in a decision that would not be binding or final as between the Woosters and Hull and Mountain Top Rentals; and (2) contractual arbitration as to the uninsured ***339** motorist coverage issues-apparently distinct from the consolidated action generally-to result in a decision that would be binding and final as between the Woosters and itself. The superior court denied the motion by order. In so doing, it made a "clarification" to the effect that the consolidation of the contractual arbitration proceeding with the pending action was "for all purposes, including trial."

In the Court of Appeal, Fourth Appellate District, Division Two, Mercury filed a petition for a writ of mandate against the superior court relating to its order

denying its motion for separate judicial arbitration and contractual arbitration, and requested a stay of the scheduled judicial arbitration hearing. The Court of Appeal summarily denied the petition and the request.

In the superior court, Mercury filed a notice of appeal from the order denying its motion for separate judicial arbitration and contractual arbitration, describing the order as one "denying" a "[m]otion ... for an [o]rder compelling arbitration." In the Court of Appeal, it filed a docketing statement identifying the "[n]ature of order or judgment appealed" as "[o]rder denying [m]otion [c]ompelling [a]rbitration."

At the threshold, the Court of Appeal declined to treat Mercury's appeal as such. It stated that the "question of appealability was far from clear in advance ...." It noted that an order denying a petition to compel contractual arbitration would be appealable. It concluded that, if Mercury's motion for separate judicial arbitration and contractual arbitration could properly be characterized as such a petition, then the superior court's order denying its motion could properly be characterized as an order denying such a petition, and would therefore be appealable. It asserted, however, that the condition was not satisfied.

Treating Mercury's appeal as a petition for writ of mandate-which it concluded was not "preclude[d]" by its summary denial of the previous one-the Court of Appeal proceeded to find its position meritorious.

Relying on *Prudential Property & Casualty Ins. Co. v. Superior Court* (1995) 36 Cal.App.4th 275 [42 Cal.Rptr.2d 227] (hereafter sometimes *Prudential Property & Casualty*), the Court of Appeal concluded, in substance, that, as a general matter, a trial court has authority to consolidate a contractual arbitration proceeding between an insurer and an insured as to uninsured motorist coverage in the insured's pending action against third parties in order to avoid conflicting rulings on a common issue of law or fact. In the words of *Prudential Property & Casualty*, such consolidation " 'may be an important tool where an auto accident victim has claims against several ***340** defendants, one of whom is uninsured ....' " (*Id.* at p. 279 (*per curiam*), quoting Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 1994) ¶ 4:328, p. 4-70.) " '[A]rbitration could be dangerous for [the victim] ... because [his] insurance carrier may attempt to shift responsibility to the other (insured) defendants; and later, at trial, they are likely to blame the uninsured motorist!' " (36 Cal.App.4th at p. 279.)

But relying on *Gordon v. G.R.O.U.P., Inc.* (1996) 49 Cal.App.4th 998 [56 Cal.Rptr.2d 914] (hereafter sometimes *Gordon*), the Court of Appeal concluded, in substance, that a trial court does not have authority to consolidate for all purposes, including trial, even to avoid conflicting rulings on a common issue of law or fact, because of what it believed was a preemptive effect arising from what it believed was a requirement under the uninsured motorist coverage law that, in the event of disagreement between the insurer and the insured, uninsured motorist coverage issues may be resolved *only* by means of contractual arbitration, or at least *only* by means of some kind of "arbitration" resulting in a binding and final decision.

Applying the abuse of discretion standard of review, the Court of Appeal then held that the superior court erred by denying Mercury's motion for separate judicial arbitration and contractual arbitration. Its reasoning appears to have been this: In denying Mercury's motion, the superior court consolidated the contractual arbitration proceeding with the pending action for all purposes, including trial; it was not authorized, however, to do so.

In its judgment, the Court of Appeal caused issuance of a peremptory writ of mandate compelling the superior court (1) to vacate its order denying Mercury's motion for separate judicial arbitration and contractual arbitration, and (2) to make a new and different order directing the Woosters, Hull, Mountain Top Rentals, and Mercury to participate in what appears to be a "consolidated" contractual/judicial arbitration proceeding that would result in a decision that would be binding and final as to the uninsured motorist coverage issues as between the Woosters and Mercury, but not binding or final as to the pending action as between the Woosters and Hull and Mountain Top Rentals.

On the Woosters' petition, we granted review. We now reverse.

II

Before we address the question whether a trial court has authority to consolidate a contractual arbitration proceeding between an insurer and an insured

as to uninsured motorist coverage in the insured's pending action ***341** against third parties-that is, to join the insurer as a defendant as to uninsured motorist coverage issues-for all purposes, including trial, in order to avoid conflicting rulings on a common issue of law or fact, we must consider the laws on financial responsibility, uninsured motorist coverage, contractual arbitration, and judicial arbitration, and their interrelationship.

(1) First is the *financial responsibility law*, which appears at Vehicle Code section 16000 et seq. This law requires the owners and operators of automobiles "to be 'financially responsible' (usually by means of insurance) for any" bodily injury or property damage that they may cause. (*King v. Meese* (1987) 43 Cal.3d 1217, 1220 [240 Cal.Rptr. 829, 743 P.2d 889].) Its purpose-at least its *primary* purpose-is to assure compensation for persons who have suffered injury or damage of this sort. (Stats. 1974, ch. 1409, § 1, p. 3085; see *King v. Meese*, *supra*, 43 Cal.3d at pp. 1220-1221; *Jess v. Herrmann* (1979) 26 Cal.3d 131, 138-139 [161 Cal.Rptr. 87, 604 P.2d 208].)

(2) Related to the financial responsibility law is the *uninsured motorist coverage law*, which appears at Insurance Code section 11580.2 et seq.

This law was conceived as a "temporary solution to the problem of the uninsured" owner or operator of an automobile, who, in spite of the financial responsibility law, proved to be "financially *ir*responsible" (Traffic Accident Consequences Subcom. of Assem. Com. on Judiciary, Rep. (1959) 3 Appen. to Assem. J. (1959 Reg. Sess.) p. 10, italics added). It has turned out to be a permanent solution-or, at least, a permanent *partial* solution-to this problem.

At its core, in Insurance Code section 11580.2, the law states that, generally, an automobile liability insurance policy that an insurer issues or delivers to an insured owner or operator covering damages that a third party shall be legally entitled to recover for bodily injury from the insured owner or operator shall also cover damages that the insured owner or operator shall be legally entitled to recover for bodily injury from an *un*insured owner or operator. (*Id.*, subd. (a)(1).) In this aspect, its purpose is to require a "type of self-protection" on the part of insured owners or operators. (Traffic Accident Consequences Subcom. of Assem. Com. on Judiciary, Rep., *supra*, 3 Appen. to Assem. J. (1959 Reg. Sess.) p. 15; see *Waite v. Godfrey* (1980) 106 Cal.App.3d 760, 771 [163 Cal.Rptr. 881].)

In addition, in Insurance Code section 11580.2, the law states that such an automobile liability insurance policy shall also "provide that the determination as to whether the insured shall be legally entitled to recover damages, and if so entitled, the amount thereof, shall be made by agreement between ***342** the insured and the insurer or, in the event of disagreement, by arbitration"-meaning *contractual* arbitration. (*Id.*, subd. (f).) In *this* aspect, its purpose is to offer a means of resolving disputes that is more expeditious and less expensive than litigation. (*Goulart v. Crum & Forster Personal Ins. Co.* (1990) 222 Cal.App.3d 527, 530 [271 Cal.Rptr. 627]; *Chrisman v. Superior Court* (1987) 191 Cal.App.3d 1465, 1469 [236 Cal.Rptr. 703]; see *Orpustan v. State Farm Mut. Auto. Ins. Co.* (1972) 7 Cal.3d 988, 992 [103 Cal.Rptr. 919, 500 P.2d 1119].) Its beneficiaries include the insurer and the insured, who are each thereby given a right against litigating these issues. (See *Goulart v. Crum & Forster Personal Ins. Co.*, *supra*, 222 Cal.App.3d at p. 530.) But they also include the courts themselves, which are thereby freed from entertaining such litigation. (See *ibid.*)

(3) Connected to the uninsured motorist coverage law is the *contractual arbitration law*, which appears at Code of Civil Procedure section 1280 et seq. This law is implicated because the uninsured motorist coverage law requires an automobile liability insurance policy, which is a *contract* (see, e.g., *Buss v. Superior Court* (1997) 16 Cal.4th 35, 45 [65 Cal.Rptr.2d 366, 939 P.2d 766]), to provide for *arbitration*.

The law functions as a comprehensive scheme regulating contractual arbitration. (E.g., *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 [10 Cal.Rptr.2d 183, 832 P.2d 899].) Contractual arbitration generally results in a binding and final decision. (E.g., *ibid.*) The purpose of this law is to promote contractual arbitration, in accordance with a "strong public policy" in favor thereof (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322 [197 Cal.Rptr. 581, 673 P.2d 251]), as a more expeditious and less expensive means of resolving disputes than litigation. (See, e.g., *Moncharsh v. Heily & Blase*, *supra*, 3 Cal.4th at p. 9.)

In Code of Civil Procedure section 1281, the law states that, generally, a "written agreement to submit" a dispute "to arbitration ... is valid, enforceable and irrevocable ...."

In Code of Civil Procedure section 1281.2-which is crucial to our analysis-the law further states that, on petition of a party alleging that an arbitration agreement exists and that another party thereto refuses to comply, a trial court shall generally compel the parties to arbitrate if it determines that such allegations are true. It may decline to compel, however, if it determines that the petitioning party has waived its right. (*Id.*, subd. (a).) It may also decline to compel if it determines that grounds exist for the "revocation" (*id.*, subd. (b))-meaning "rescission" (***343***Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973 [64 Cal.Rptr.2d 843, 938 P.2d 903])-of the agreement in question. (Code Civ. Proc., § 1281.2, subd. (b).) Lastly, it may decline to compel if it determines that a "party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact." (*Id.*, subd. (c).) In such a situation, it may, among other options, "order intervention or joinder of all parties in a single action or special proceeding ... as to all or only certain issues ...." (*Id.*, foll. subd. (c).) There is an exception, however, for a specified kind of arbitration agreement concerning the "professional negligence of a health care provider": a trial court's authority to decline to compel does *not* apply thereto. (*Id.*, subd. (c).) There is no other exception-and none, specifically, for an uninsured motorist coverage provision.

(4) Similar to the contractual arbitration law in name, but not in substance, is the judicial arbitration law, which appears at Code of Civil Procedure section 1141.10 et seq., and is implemented as to "practice and procedure" (Code Civ. Proc., § 1141.14) by California Rules of Court, rule 1600 et seq.

This law establishes a largely mandatory system of diversion of a broad range of relatively "small" actions (Code Civ. Proc., § 1141.10, subd. (a)) for attempted resolution "before they become eligible to proceed to ... trial" (6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 524, p. 970). Its title is "inapt ..., for the system it describes is neither judicial nor arbitration." (*Dodd v. Ford* (1984) 153 Cal.App.3d 426, 432, fn. 7 [200 Cal.Rptr. 256]; accord, e.g., *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 907, fn. 7 [30 Cal.Rptr.2d 265, 872 P.2d 1190].) It is not "judicial" because it is not entrusted to a judge. (E.g., *In re Marriage of Assemi, supra*, 7 Cal.4th at p. 907, fn. 7; *Dodd v. Ford, supra*, 153 Cal.App.3d at p. 432, fn. 7.) It is not "arbitration," meaning *contractual* arbitration, because it generally does not result in a binding or final decision (see, e.g., *In re Marriage of Assemi, supra*, 7 Cal.4th at p. 907, fn. 7; *Dodd v. Ford, supra*, 153 Cal.App.3d at p. 432, fn. 7), but instead allows a trial de novo at the election of any party by timely request therefor (Code Civil Proc., § 1141.20, subd. (b); see Cal. Rules of Court, rule 1616). [FN1] The purpose of the law is to fashion, and set in operation, a mechanism to resolve ***344** disputes more expeditiously and less expensively than continued litigation, to the benefit of the parties and the courts. (See Code Civ. Proc., § 1141.10.)

> FN1 In *Dodd v. Ford, supra*, 153 Cal.App.3d at page 432, footnote 7, and in decisions that have followed, the phrase "extrajudicial mediation" has been used to characterize judicial arbitration. The words may be clear. But they may also be somewhat misleading. "Extrajudicial" may suggest, incorrectly, that judicial arbitration is outside of the court system. And "mediation" may suggest, also incorrectly, that judicial arbitration is merely a "process in which a neutral person ... facilitate[s] communication between ... disputants to assist them in reaching a mutually acceptable agreement" (Evid. Code, § 1115, subd. (a)).

(5) In Code of Civil Procedure section 1141.30, it is declared that the judicial arbitration law and the contractual arbitration law differ the one from the other in their respective spheres. To quote the provision, they are "mutually exclusive and independent of each other."

Unsurprisingly, in light of their mutual exclusiveness and independence, the judicial arbitration law and the contractual arbitration law also differ the one from the other in various features.

For example, as to commencement, contractual

arbitration arises solely out of an arbitration agreement, specifically, a *written* arbitration agreement (Code Civ. Proc., § 1281), between the parties thereto (e.g., *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1272 [8 Cal.Rptr.2d 587]; *Herman Feil, Inc. v. Design Center of Los Angeles* (1988) 204 Cal.App.3d 1406, 1414 [251 Cal.Rptr. 895]), whereas judicial arbitration may be imposed on the parties litigant, whether or not they agree, in writing or otherwise (see Code Civ. Proc., § 1141.11).

As to process, contractual arbitration allows the parties to an arbitration agreement to select the arbitrator (e.g., *Elliott & Ten Eyck Partnership v. City of Long Beach* (1997) 57 Cal.App.4th 495, 503 [67 Cal.Rptr.2d 140]; *Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 684 [57 Cal.Rptr.2d 867]), whereas judicial arbitration, absent a stipulation, selects the arbitrator for the parties litigant by operation of law (Code Civ. Proc., § 1141.18; see Cal. Rules of Court, rules 1602-1606). Similarly, contractual arbitration allows the parties to an arbitration agreement to define the powers of the arbitrator (see, e.g., *Moncharsh v. Heily & Blase, supra*, 3 Cal.4th at pp. 8-9), whereas judicial arbitration defines the arbitrator's powers for the parties litigant by operation of law (Code Civ. Proc., § 1141.19; Cal. Rules of Court, rule 1614(a)). In addition, contractual arbitration does not permit full and unconditional discovery (see Code Civ. Proc., §§ 1283-1283.1; see generally, 6 Witkin, Cal. Procedure, *supra*, Proceedings Without Trial, §§ 513, 530(1)(e), pp. 952, 975), whereas judicial arbitration does (Cal. Rules of Court, rule 1612; see generally, 6 Witkin, Cal. Procedure, *supra*, Proceedings Without Trial, §§ 530(1)(e), 548(1), pp. 975, 986-987). Further, contractual arbitration dispenses with any necessity to ***345** observe rules of evidence and procedure (Code Civ. Proc., § 1282.2, subd. (d); see generally, 6 Witkin, Cal. Procedure, *supra*, Proceedings Without Trial, §§ 514, 530(1)(c), pp. 952-953, 975), whereas judicial arbitration, although it makes certain modifications, does not (see Cal. Rules of Court, rules 1613(b) & 1614; see generally, 6 Witkin, Cal. Procedure, *supra*, Proceedings Without Trial, §§ 530(1)(c), 553-556, pp. 975, 990-992). Likewise, contractual arbitration generally frees the arbitrator from making a decision strictly in accordance with the law (e.g., *Moncharsh v. Heily & Blase, supra*, 3 Cal.4th at pp. 10-11), whereas judicial arbitration does not (cf. Cal. Rules of Court, rule 1614(a)(7) [providing that, in judicial arbitration, the arbitrator has the power "to decide the law and facts of the case and make an award accordingly"]).

Lastly, as to conclusion, contractual arbitration, as noted, generally results in a binding and final decision (e.g., *Moncharsh v. Heily & Blase, supra*, 3 Cal.4th at p. 9), whereas judicial arbitration generally does not (e.g., *In re Marriage of Assemi, supra*, 7 Cal.4th at p. 907, fn. 7; *Dodd v. Ford, supra*, 153 Cal.App.3d at p. 432, fn. 7; see Code Civ. Proc., § 1141.20, subd. (b); Cal. Rules of Court, rule 1616).

III

(6a) We now turn to address the question whether a trial court has authority to consolidate a contractual arbitration proceeding between an insurer and an insured as to uninsured motorist coverage in the insured's pending action against third parties-that is, to join the insurer as a defendant as to uninsured motorist coverage issues-for all purposes, including trial, in order to avoid conflicting rulings on a common issue of law or fact.

As we shall explain, we conclude that a trial court does indeed have such authority.

In Code of Civil Procedure section 1281.2, the contractual arbitration law generally authorizes a trial court to consolidate, that is, to "order intervention or joinder of all parties in a single action or special proceeding ... as to all or only certain issues" (*id.*, foll. subd. (c)), if it determines that a "party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact" (*id.*, subd. (c)). The law authorizes the trial court to order intervention or joinder. It does not prohibit it from doing so ***346** *for all purposes, including trial*. Neither does any other law, including the uninsured motorist coverage law.

Contrary to the Court of Appeal's conclusion, there is no preemptive effect arising from any requirement under the uninsured motorist coverage law that, in the event of disagreement between the insurer and the insured under an uninsured motorist coverage provision, the issues whether the insured shall be legally entitled to recover damages, and if so, in what amount, may be resolved *only* by means of contractual arbitration, or at least *only* by means of some kind of

"arbitration" resulting in a binding and final decision. There is no such effect. That is because there is no such requirement.

It is true that an uninsured motorist coverage provision gives both the insurer and the insured a general right, as a matter of contract, to contractual arbitration of uninsured motorist coverage issues, and that contractual arbitration generally results in a binding and final decision.

It is also true that the uninsured motorist coverage law, which generally mandates such an uninsured motorist coverage provision, gives both the insurer and the insured a general right, as a matter of law, to a contractual right of this sort.

But a general right to contractual arbitration of uninsured motorist coverage issues generally resulting in a binding and final decision simply does not amount to an absolute prohibition against the resolution of such questions by any other means in any other manner.

(7) In the general case, in the absence of a petition to compel contractual arbitration, there is no requirement that issues subject to contractual arbitration may be resolved *only* by means of contractual arbitration, or at least *only* by means of some kind of "arbitration" resulting in a binding and final decision. For reasons of their own, the parties may choose to litigate such questions. (See *Lofberg v. Aetna Cas. & Sur. Co.* (1968) 264 Cal.App.2d 306, 309 [70 Cal.Rptr. 269].) A trial court is not obligated to force them to contractual arbitration sua sponte. Indeed, from all that appears, it is not authorized to do so. Should the parties choose to litigate such questions in a relatively small action, they may find themselves diverted to judicial arbitration, which generally does not result in a binding or final decision. A trial court is not obligated to make a decision of this sort binding and final. Indeed, it is not authorized to do so: at his or her election by timely request, ***347** any party is allowed a trial de novo (Code Civ. Proc., § 1141.20, subd. (b); see Cal. Rules of Court, rule 1616).

Furthermore, in the general case, even in the presence of a petition to compel contractual arbitration, there is no requirement that issues subject to contractual arbitration may be resolved *only* by means of contractual arbitration, or at least *only* by means of some kind of "arbitration" resulting in a binding and final decision. To be sure, provided that the allegations necessary to such a petition are true, the contractual arbitration law, in Code of Civil Procedure section 1281.2, *generally* mandates a trial court to compel. *But not always.* The trial court may decline to do so if the petitioning party has waived its right. (*Id.*, subd. (a).) *Or* if grounds exist to "revoke" the underlying arbitration agreement by rescission. (*Id.*, subd. (b).) *Or* if there is an issue of law or fact common to the arbitration and a pending action or proceeding with a third party and there is a possibility of conflicting rulings thereon. (*Id.*, subd. (c).) In such a situation, it may consolidate. (*Id.*, foll. subd. (c).) If it does, it effectively orders the resolution of the issues subject to arbitration within the action or special proceeding in question and, therefore, outside of arbitration. For, in ordering intervention or joinder, it necessarily "refuse[s] to enforce the arbitration agreement ...." (*Ibid.*)

(8) In the case of uninsured motorist coverage-with which we are here concerned-the same is true. In the absence of a petition to compel contractual arbitration, there is no requirement that uninsured motorist coverage issues may be resolved *only* by means of contractual arbitration, or at least *only* by means of some kind of "arbitration" resulting in a binding and final decision. Nothing bars the insurer and the insured from choosing to litigate. Nothing prevents diversion to judicial arbitration. Even in the presence of a petition to compel contractual arbitration, there is no requirement that these questions may be resolved *only* by such means in such manner. Although the contractual arbitration law generally mandates a trial court to compel, it does not always do so. It broadly applies to *all* contractual arbitration, whether freely chosen by the parties or imposed on them by law, including the uninsured motorist coverage law. (*Porter v. Golden Eagle Ins. Co.* (1996) 43 Cal.App.4th 1282, 1289 [51 Cal.Rptr.2d 338].) True, in Code of Civil Procedure section 1281.2, it allows an exception for a specified kind of arbitration agreement concerning the "professional negligence of a health care provider." (*Id.*, subd. (c).) But it does not allow any other-including for an uninsured motorist coverage provision.

In a word, under the contractual arbitration law as it appears in Code of Civil Procedure section 1281.2, the general right to contractual arbitration of ***348**

uninsured motorist coverage issues generally resulting in a binding and final decision is, indeed, a right-but nothing more. It may be "revoked" by rescission. Even if not "revoked," it may be lost by a party's waiver. And even if not waived, it may have to yield if there is an issue of law or fact common to the arbitration and a pending action or proceeding with a third party and there is a possibility of conflicting rulings thereon.

In accord with our conclusion on the absence of any preemptive effect arising from any requirement under the uninsured motorist coverage law for contractual arbitration as to uninsured motorist coverage issues is *Prudential Property & Casualty*, which "perceive[s]" nothing of the sort. (*Prudential Property & Casualty Ins. Co. v. Superior Court, supra*, 36 Cal.App.4th at p. 278 (*per curiam*).) Not to the contrary is *Gordon*. For *Gordon* does not even consider whether any such preemptive effect arising from any such requirement exists. A decision, of course, is not authority for what it does not consider. (E.g., *In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388 [53 Cal.Rptr.2d 81, 916 P.2d 476].) We recognize that *Gordon* contains language to the effect that "[contractual] [a]rbitration of" the "uninsured motorist claims" in that case-which the superior court chose to compel-"was required." (*Gordon v. G.R.O.U.P., Inc., supra*, 49 Cal.App.4th at p. 1006.) But such words [FN2] reflect only the existence of a general right to contractual arbitration of uninsured motorist coverage issues generally resulting in a binding and final decision. It simply does not establish any pertinent preemptive effect arising from any pertinent requirement.

FN2 Like similar words in decisions including *Goulart v. Crum & Forster Personal Ins. Co., supra*, 222 Cal.App.3d at page 528, and *Chrisman v. Superior Court, supra*, 191 Cal.App.3d at page 1469.

IV

(6b) We proceed to consider the decision of the Court of Appeal insofar as it vacated the order of the superior court denying Mercury's motion for separate judicial arbitration and contractual arbitration, specifically, judicial arbitration as to the consolidated action generally and contractual arbitration as to the uninsured motorist coverage issues.

(9) At the threshold, we believe that the Court of Appeal erred by declining to treat Mercury's appeal as such.

We undertake to review the Court of Appeal's action independently. "We have no need to defer, because we can ourselves conduct the same analysis," ***349** which "involves a purely legal question or a predominantly legal mixed question." (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 146 [44 Cal.Rptr.2d 441, 900 P.2d 690], affd. (1996) 517 U.S. 735 [116 S.Ct. 1730, 135 L.Ed.2d 25].)

After independent review, we conclude that the action was wrong. An order denying a petition to compel contractual arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).) It is true that Mercury submitted a motion rather than a petition. The term "petition," however, has been construed, in practice, to include the term "motion" when, as here, an action is already pending. (See *Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1368-1369 [62 Cal.Rptr.2d 27]; *Fireman's Fund Ins. Companies v. Younesi* (1996) 48 Cal.App.4th 451, 456-457 [55 Cal.Rptr.2d 671]; but see *Los Angeles Police Protective League v. City of Los Angeles* (1985) 163 Cal.App.3d 1141, 1144, fn. 1 [209 Cal.Rptr. 890] [*semble*], disapproved on another point, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 427, fn. 28 [253 Cal.Rptr. 426, 764 P.2d 278].) That appears sound, inasmuch as one may proceed by motion as well as petition under such circumstances (Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 1997) ¶ 5:301, p. 5-95). It is also true that Mercury's motion did not seek an order compelling contractual arbitration in terms, but rather separate judicial arbitration and contractual arbitration. It did, however, seek such an order in effect. In requesting separate judicial arbitration and contractual arbitration, it necessarily requested contractual arbitration. To seek an order compelling contractual arbitration in terms is not necessary; to do so in effect is sufficient. (See *Henry v. Alcove Investment, Inc.* (1991) 233 Cal.App.3d 94, 98-100 [284 Cal.Rptr. 255].)

(6c) On the merits, we believe that the Court of Appeal erred by holding that the superior court's order denying Mercury's motion for separate judicial arbitration and contractual arbitration was erroneous as unauthorized.

We agree as to what standard of review should be applied, namely, abuse of discretion (cf., e.g., *Todd-Stenberg v. Dalkon Shield Claimants Trust* (1996) 48 Cal.App.4th 976, 978-979 [56 Cal.Rptr.2d 16] [consolidation of actions]; *Estate of Baker* (1982) 131 Cal.App.3d 471, 485 [182 Cal.Rptr. 550] [same]), which looks to see "whether the trial court exceeded the bounds of reason" (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478 [243 Cal.Rptr. 902, 749 P.2d 339]).

But we do not agree as to what the application of that standard should yield. In denying Mercury's motion, the superior court consolidated the ***350** contractual arbitration proceeding with the pending action for all purposes, including trial. It could reasonably have so consolidated in order to avoid conflicting rulings on a common issue of law or fact. For, under the contractual arbitration law as it appears in Code of Civil Procedure section 1281.2, it could reasonably have determined that the contractual arbitration proceeding and the pending action arose "out of the same transaction." (*Id.*, subd. (c).) Indeed, it could not have done otherwise. In addition, it could reasonably have determined that "there [was] a possibility of conflicting rulings on a common issue of law or fact." (*Ibid.*) By way of illustration, in the contractual arbitration proceeding, the arbitrator might conclude that the Woosters were not legally entitled to damages in any amount from the unidentified, and effectively uninsured, motorist, and therefore could not obtain anything from Mercury. In the pending action, however, the superior court might conclude that the Woosters were indeed legally entitled to damages in some amount from the unidentified, and effectively uninsured, motorist, and therefore could obtain such sum from Mercury. As explained, there is no limitation imposed on the superior court's authority to consolidate in order to avoid conflicting rulings on a common issue of law or fact. As also explained, there is no pertinent preemptive effect arising from any pertinent requirement under the uninsured motorist coverage law.

In arguing to the contrary, Mercury asserts that the superior court did not have authority to consolidate the contractual arbitration proceeding with the pending action for all purposes, including trial, even in order to avoid conflicting rulings on a common issue of law or fact. It is without support, resting as it does on a nonexistent preemptive effect arising from a nonexistent requirement under the uninsured motorist coverage law.

Mercury then asserts that, even if the superior court had authority to consolidate the contractual arbitration proceeding with the pending action for all purposes, including trial, it could have exercised such authority only in favor of denial. In part, it maintains, in effect, that trial by jury, which the Woosters demanded, would be *impossible*. It says, for example, that the underlying automobile liability insurance policy would have to be admitted. But it then says that, under Evidence Code section 1155, a liability insurance policy could not be. The first proposition may be true. The second is not. Under Evidence Code section 1155, a liability insurance policy is inadmissible only for the purpose of proving negligence or other wrongdoing. The policy in question would not, and could not, be offered for that purpose. The only negligence or other wrongdoing that would be material would be that of the unidentified, and effectively uninsured, motorist. The policy is not relevant thereto. In other part, it maintains, in effect, that trial by jury would ***351** be *unfair*. It says, for example, that, as a "deep pocket," it might not receive even treatment at the hands of a jury, and hence should not be ordered to submit thereto. Its point implicates an issue of public policy-an issue that the Legislature has already resolved. In Code of Civil Procedure section 1281.2, the contractual arbitration law authorizes a trial court to do what the superior court has done under the present circumstances. (See *id.*, subd. (c); *id.*, foll. subd. (c).) It allows an exception *only* for a specified kind of arbitration agreement concerning the "professional negligence of a health care provider." (*Id.*, subd. (c).) If Mercury believes that the law should allow an additional one for an uninsured motorist coverage provision, it must present its request to the body that can give it satisfaction-which is the Legislature, and not this court.

At the end, Mercury urges that, instead of consolidating the contractual arbitration proceeding with the pending action for all purposes, including trial, the superior court might reasonably have chosen some other means to avoid a conflicting ruling on a common issue of law or fact. Perhaps so. But immaterial. The reasonableness of an approach that was not selected does not entail the unreasonableness of the one that was.

Because of the conclusion at which we have arrived, we are not required to, and do not, consider the decision of the Court of Appeal insofar as it caused issuance of a peremptory writ of mandate compelling the superior court to order the Woosters, Hull, Mountain Top Rentals, and Mercury to participate in what appears to be a "consolidated" contractual/judicial arbitration proceeding that would result in a decision that would be binding and final as to the uninsured motorist coverage issues as between the Woosters and Mercury, but not binding or final as to the pending action as between the Woosters and Hull and Mountain Top Rentals. Whether a trial court has authority to make such an order-as *Gordon* concludes that it does (*Gordon v. G.R.O.U.P., Inc., supra*, 49 Cal.App.4th at pp. 1005-1008)-is a question that we need not, and do not, reach. We note, however, that Code of Civil Procedure section 1281.3, the purported source of such authority, appears only to authorize consolidation of separate *contractual* arbitration proceedings. (See *Keating v. Superior Court* (1982) 31 Cal.3d 584, 611-612 [183 Cal.Rptr. 360, 645 P.2d 1192], app. dism. in part and judg. revd. in part on other grounds *sub nom. Southland Corp. v. Keating* (1984) 465 U.S. 1 [104 S.Ct. 852, 79 L.Ed.2d 1].) We also note that "consolidation" of contractual arbitration and judicial arbitration would, at best, be awkward, in light of their mutual exclusiveness and independence and their various differences. *Gordon* asserts that such "consolidation" is not thereby "prevent[ed]." (*Gordon v. G.R.O.U.P., Inc., supra*, 49 Cal.App.4th at p. 1007, fn. 13.) The ***352** question, however, is whether it is *authorized*. That may be left to another day.

V

For the reasons stated above, we conclude that we must reverse the judgment of the Court of Appeal and remand the cause to that court with directions to affirm the order of the superior court denying Mercury's motion for separate judicial arbitration and contractual arbitration.

It is so ordered.

George, C. J., Kennard, J., Baxter, J., Werdegar, J., Chin, J., and Brown, J., concurred. ***353**

Cal. 1998.
Mercury Ins. Group v. Superior Court

19 Cal.4th 332, 965 P.2d 1178, 79 Cal.Rptr.2d 308, 98 Cal. Daily Op. Serv. 8305, 98 Daily Journal D.A.R. 11,525

END OF DOCUMENT

Supreme Court of the United States
MISSISSIPPI UNIVERSITY FOR WOMEN, et al., Petitioners,
v.
Joe HOGAN.

No. 81-406.
Argued March 22, 1982.
Decided July 1, 1982.

Suit seeking declaratory and injunctive relief as well as monetary damages, was brought against state-supported university, and others, by adult male who was interested in pursuing education in nursing but who was denied admission to university because of his sex. The United States District Court for the Northern District of Mississippi at Aberdeen, L. T. Senter, Jr., J., denied injunctive relief and subsequently entered summary judgment for defendants, and plaintiff appealed. The Court of Appeals, 646 F.2d 1116, Charles Clark, Circuit Judge, dismissed appeal from denial of injunction as moot, reversed summary judgment in part and vacated in part and remanded. On petition for rehearing and suggestion for rehearing en banc, the Court of Appeals, 653 F.2d 222, denied the petition. Certiorari was granted. The Supreme Court, Justice O'Connor, held that policy of state-supported university, which limited its enrollment to women, of denying otherwise qualified males right to enroll for credit in its nursing school violated equal protection clause.

Judgment of Court of Appeals affirmed.

Chief Justice Burger and Justice Blackmun filed dissenting opinions.

Justice Powell filed dissenting opinion in which Justice Rehnquist joined.

West Headnotes

[1] Constitutional Law 92 3081

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes
92k3081 k. Sex or gender. Most Cited Cases
(Formerly 92k224(1))

Party seeking to uphold a statute that classifies individuals on basis of their gender must carry burden of showing exceedingly persuasive justification for classification and that burden is met only by showing at least that classification serves important governmental objectives and that discriminatory means employed are substantially related to achievement of those objectives. U.S.C.A.Const.Amend. 14.

[2] Constitutional Law 92 3380

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3380 k. In general. Most Cited Cases
(Formerly 92k224(1))

Although test for determining validity of gender-based classification is straightforward, it must be applied free of fixed notions concerning roles and abilities of males and females. U.S.C.A.Const.Amend. 14.

[3] Constitutional Law 92 3380

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3380 k. In general. Most Cited Cases
(Formerly 92k224(1))

If statutory objective of gender-based classification is to exclude or protect members of one gender because they are presumed to suffer from inherent handicap or to be innately inferior, objective itself is illegitimate. U.S.C.A.Const.Amend. 14.

[4] Constitutional Law 92 3381

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3381 k. Affirmative action in general. Most Cited Cases
(Formerly 92k224(1))

In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of sex that is disproportionately burdened. U.S.C.A.Const.Amend. 14.

[5] Colleges and Universities 81 9.15

81 Colleges and Universities
81k9 Students
81k9.15 k. Admission or matriculation. Most Cited Cases
(Formerly 81k9)

Constitutional Law 92 3397

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3393 Education
92k3397 k. Single-sex institutions. Most Cited Cases
(Formerly 92k224(2))

Policy of state-supported university, which limited its enrollment to women, of denying otherwise qualified males right to enroll for credit in its nursing school violated equal protection clause. U.S.C.A.Const.Amend. 14.

[6] Colleges and Universities 81 9.15

81 Colleges and Universities
81k9 Students
81k9.15 k. Admission or matriculation. Most Cited Cases
(Formerly 81k9)

Constitutional Law 92 3397

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3393 Education
92k3397 k. Single-sex institutions. Most Cited Cases
(Formerly 92k224(2))

Even were the Supreme Court to assume that discrimination against women affected their opportunity to obtain education or to obtain leadership roles in nursing, challenged policy of state-supported university limiting its enrollment to women but denying otherwise qualified males right to enroll for credit in its nursing school would be invalid under equal protection clause in that state failed to establish that legislature intended single-sex policy to compensate for any perceived discrimination. U.S.C.A.Const.Amend. 14.

[7] Civil Rights 78 1067(4)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1067 Sex Discrimination
78k1067(4) k. Discrimination against males. Most Cited Cases
(Formerly 78k128, 78k9.14)

Constitutional Law 92 3397

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3393 Education
92k3397 k. Single-sex institutions. Most Cited Cases
(Formerly 92k224(2))

Exclusion of men from nursing school of state-supported university, which limited its enrollment to women, could not be justified on basis of Title IX of the Education Amendments of 1972 which

exempted from general prohibition of gender discrimination in federally funded educational programs admissions policies of public institutions of undergraduate higher education that traditionally and continually from their establishment had a policy of admitting only students of one sex in that it was not clear that Congress enacted the statute pursuant to its power granted by the Fourteenth Amendment to enforce that Amendment and thus place limitation upon prohibitions of equal protection clause. U.S.C.A.Const.Amends. 14, 14, § 5; Education Amendments of 1972, § 901(a)(5), 20 U.S.C.A. § 1681(a)(5).

****3332** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

718** *Held* : The policy of petitioner Mississippi University for Women (MUW), a state-supported university which has from its inception limited its enrollment to women,*3333** of denying otherwise qualified males (such as respondent) the right to enroll for credit in its School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 3336-3341.

(a) The party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. *Kirchberg v. Feenstra*, 450 U.S. 455, 461, 101 S.Ct. 1195, 1199, 67 L.Ed.2d 428; *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273, 99 S.Ct. 2282, 2293, 60 L.Ed.2d 870. The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107. The test must be applied free of fixed notions concerning the roles and abilities of males and females. Pp. 3336-3337.

(b) The single-sex admissions policy of MUW's School of Nursing cannot be justified on the asserted ground that it compensates for discrimination against women and, therefore, constitutes educational affirmative action. A State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification. Rather than compensating for discriminatory barriers faced by women, MUW's policy tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. Moreover, the State has not shown that the gender-based classification is substantially and directly related to its proposed compensatory objective. To the contrary, MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men. Thus, the State has fallen far short of establishing the "exceedingly persuasive justification" needed to sustain the gender-based classification. Pp. 3337-3340.

(c) Nor can the exclusion of men from MUW's School of Nursing be justified on the basis of the language of § 901(a)(5) of Title IX of the Education Amendments of 1972, which exempts from § 901(a)'s general prohibition***719** of gender discrimination in federally funded education programs the admissions policies of public institutions of undergraduate higher education "that traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex." It is not clear that, as argued by the State, Congress enacted the statute pursuant to its power granted by § 5 of the Fourteenth Amendment to enforce that Amendment, and thus placed a limitation upon the broad prohibitions of the Equal Protection Clause. Rather, Congress apparently intended, at most, to create an exemption from Title IX's requirements. In any event, Congress' power under § 5 "is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Katzenbach v. Morgan*, 384 U.S. 641, 651, n. 10, 86 S.Ct. 1717, 1724, n. 10, 16 L.Ed.2d 828. Pp. 3340-3341.

646 F.2d 1116 (5th Cir.) and 653 F.2d 222 (5th Cir.) affirmed.

Hunter M. Gholson argued the cause for petitioners. With him on the briefs were *Bill Allain*, Attorney General of Mississippi, and *Ed Davis Noble, Jr.*, Assistant Attorney General.

Wilbur O. Colom argued the cause for respondent. With him on the brief was *W. Wayne Drinkwater, Jr.**

* *Zona Fairbanks Hostetler, Suellen Terrill Keiner, Phyllis N. Segal, Marcia D. Greenberger,* and *Judith L. Lichtman* filed a brief for the National Women's Law Center et al. as *amici curiae* urging affirmance.

Justice O'CONNOR delivered the opinion of the Court.

This case presents the narrow issue of whether a state statute that excludes males from enrolling in a state-supported professional nursing school violates the Equal Protection Clause of the Fourteenth Amendment.

****3334** I

The facts are not in dispute. In 1884, the Mississippi Legislature created the Mississippi Industrial Institute and College***720** for the Education of White Girls of the State of Mississippi, now the oldest state-supported all-female college in the United States. 1884 Miss.Gen.Laws, Ch. 30, § 6. The school, known today as Mississippi University for Women (MUW), has from its inception limited its enrollment to women.[FN1]

FN1. The charter of MUW, basically unchanged since its founding, now provides:

"The purpose and aim of the Mississippi State College for Women is the moral and intellectual advancement of the girls of the state by the maintenance of a first-class institution for their education in the arts and sciences, for their training in normal school methods and kindergarten, for their instruction in bookkeeping, photography, stenography, telegraphy, and typewriting, and in designing, drawing, engraving, and painting, and their industrial application, and for their instruction in fancy, general and practical needlework, and in such other industrial branches as experience, from time to time, shall suggest as necessary or proper to fit them for the practical affairs of life." Miss.Code Ann. § 37-117-3 (1972).

Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide "separate but equal" undergraduate institutions for males and females. Cf. *Vorchheimer v. School District of Philadelphia*, 532 F.2d 880 (CA3 1975), aff'd by an equally divided Court, 430 U.S. 703, 97 S.Ct. 1671, 51 L.Ed.2d 750 (1977).

In 1971, MUW established a School of Nursing, initially offering a 2-year associate degree. Three years later, the school instituted a 4-year baccalaureate program in nursing and today also offers a graduate program. The School of Nursing has its own faculty and administrative officers and establishes its own criteria for admission.[FN2]

FN2. Record, Exhibit 1, 1980-1981 Bulletin of Mississippi University for Women 31-34, 212-229.

Respondent, Joe Hogan, is a registered nurse but does not hold a baccalaureate degree in nursing. Since 1974, he has worked as a nursing supervisor in a medical center in Columbus, the city in which MUW is located. In 1979, Hogan applied for admission to the MUW School of Nursing's baccalaureate program. [FN3] Although he was otherwise qualified, he ***721** was denied admission to the School of Nursing solely because of his sex. School officials informed him that he could audit the courses in which he was interested, but could not enroll for credit. Tr. 26.[FN4]

FN3. With a baccalaureate degree, Hogan would be able to earn a higher salary and would be eligible to obtain specialized training as an anesthetist. Tr. 18.

FN4. Dr. James Strobel, President of MUW, verified that men could audit the equivalent of a full classload in either night or daytime classes. *Id.*, at 39-40.

Hogan filed an action in the United States District Court for the Northern District of Mississippi, claiming the single-sex admissions policy of MUW's School of Nursing violated the Equal Protection Clause of the Fourteenth Amendment. Hogan sought injunctive and declaratory relief, as well as compen-

satory damages.

Following a hearing, the District Court denied preliminary injunctive relief. App. to Pet. for Cert. A4. The court concluded that maintenance of MUW as a single-sex school bears a rational relationship to the State's legitimate interest "in providing the greatest practical range of educational opportunities for its female student population." *Id.*, at A3. Furthermore, the court stated, the admissions policy is not arbitrary because providing single-sex schools is consistent with a respected, though by no means universally accepted, educational theory that single-sex education affords unique benefits to students. *Ibid.* Stating that the case presented no issue of fact, the court informed Hogan that it would enter summary judgment dismissing his claim unless he tendered a factual issue. When Hogan offered no further evidence, the District Court entered summary judgment in favor of the State. Record 73.

The Court of Appeals for the Fifth Circuit reversed, holding that, because the admissions policy discriminates on the basis ****3335** of gender, the District Court improperly used a "rational relationship" test to judge the constitutionality of the policy. 646 F.2d 1116, 1118 (1981). Instead, the Court of Appeals stated, the proper test is whether the State has carried the heavier burden of showing that the gender-based classification is substantially related to an important governmental***722** objective. *Id.*, at 1118, 1119. Recognizing that the State has a significant interest in providing educational opportunities for all its citizens, the court then found that the State had failed to show that providing a unique educational opportunity for females, but not for males, bears a substantial relationship to that interest. *Id.*, at 1119. Holding that the policy excluding Hogan because of his sex denies him equal protection of the laws, the court vacated the summary judgment entered against Hogan as to his claim for monetary damages, and remanded for entry of a declaratory judgment in conformity with its opinion and for further appropriate proceedings. *Id.*, at 1119-1120.

On rehearing, the State contended that Congress, in enacting § 901(a)(5) of Title IX of the Education Amendments of 1972, Pub.L. 92-318, 86 Stat. 373, 20 U.S.C. § 1681 *et seq.*, expressly had authorized MUW to continue its single-sex admissions policy by exempting public undergraduate institutions that traditionally have used single-sex admissions policies from the gender discrimination prohibition of Title IX.[FN5] Through that provision, the State argued, Congress limited the reach of the Fourteenth Amendment by exercising ***723** its power under § 5 of the Amendment.[FN6] The Court of Appeals rejected the argument, holding that § 5 of the Fourteenth Amendment does not grant Congress power to authorize States to maintain practices otherwise violative of the Amendment. 653 F.2d 222 (1981).

FN5. Section 901(a) of Title IX, Education Amendments of 1972, Pub.L. 92-318, 86 Stat. 373, 20 U.S.C. § 1681(a), provides in part:

> "(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> "(1) ... in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;
>
> "(5) ... in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex...."

FN6. Section 5 of the Fourteenth Amendment provides:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

We granted certiorari, 454 U.S. 962, 102 S.Ct. 501, 70 L.Ed.2d 377 (1981), and now affirm the judgment of the Court of Appeals.[FN7]

FN7. Although some statements in the Court

of Appeals' decision refer to all schools within MUW, see 646 F.2d, at 1119, the factual underpinning of Hogan's claim for relief involved only his exclusion from the nursing program, Complaint ¶ 8-10, and the Court of Appeals' holding applies only to Hogan's individual claim for relief. 646 F.2d, at 1119-1120. Additionally, during oral argument, counsel verified that Hogan sought only admission to the School of Nursing. Tr. of Oral Arg. 24. Because Hogan's claim is thus limited, and because we review judgments, not statements in opinions, *Black v. Cutter Laboratories*, 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed. 1188 (1956), we decline to address the question of whether MUW's admissions policy, as applied to males seeking admission to schools other than the School of Nursing, violates the Fourteenth Amendment.

II

[1] We begin our analysis aided by several firmly established principles. Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Reed v. Reed*, 404 U.S. 71, 75, 92 S.Ct. 251, 253, 30 L.Ed.2d 225 (1971). That this statutory policy discriminates against males rather than against females ****3336** does not exempt it from scrutiny or reduce the standard of review.[FN8] *Caban v. Mohammed*, 441 U.S. 380, 394, ***724** 99 S.Ct. 1760, 1769, 60 L.Ed.2d 297 (1979); *Orr v. Orr*, 440 U.S. 268, 279, 99 S.Ct. 1102, 1111, 59 L.Ed.2d 306 (1979). Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. *Kirchberg v. Feenstra*, 450 U.S. 455, 461, 101 S.Ct. 1195, 1199, 67 L.Ed.2d 428 (1981); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273, 99 S.Ct. 2282, 2293, 60 L.Ed.2d 870 (1979). The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107 (1980).[FN9]

FN8. Without question, MUW's admissions policy worked to Hogan's disadvantage. Although Hogan could have attended classes and received credit in one of Mississippi's state-supported coeducational nursing programs, none of which was located in Columbus, he could attend only by driving a considerable distance from his home. Tr. 19-20, 63-65. A similarly situated female would not have been required to choose between forgoing credit and bearing that inconvenience. Moreover, since many students enrolled in the School of Nursing hold full-time jobs, Deposition of Dean Annette K. Barrar 29-30, Hogan's female colleagues had available an opportunity, not open to Hogan, to obtain credit for additional training. The policy of denying males the right to obtain credit toward a baccalaureate degree thus imposed upon Hogan "a burden he would not bear were he female." *Orr v. Orr*, 440 U.S. 268, 273, 99 S.Ct. 1102, 1108, 59 L.Ed.2d 306 (1979).

FN9. In his dissenting opinion, Justice POWELL argues that a less rigorous test should apply because Hogan does not advance a "serious equal protection claim." *Post*, at 3345. Justice BLACKMUN, without proposing an alternative test, labels the test applicable to gender-based discrimination as "rigid" and productive of "needless conformity." *Post*, at 3341, 3342. Our past decisions establish, however, that when a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual Members of the Court. While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change.

> Thus, we apply the test previously relied upon by the Court to measure the constitutionality of gender-based discrimination. Because we conclude that the challenged statutory classification is not substantially related to an important objective, we need not decide whether classifications based upon gender are inherently suspect. See

Stanton v. Stanton, 421 U.S. 7, 13, 95 S.Ct. 1373, 1377, 43 L.Ed.2d 688 (1975).

[2][3] Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free ***725** of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. See *Frontiero v. Richardson*, 411 U.S. 677, 684-685, 93 S.Ct. 1764, 1769-70, 36 L.Ed.2d 583 (1973) (plurality opinion).[FN10]

FN10. History provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function. In 1873, this Court remained unmoved by Myra Bradwell's argument that the Fourteenth Amendment prohibited a State from classifying her as unfit to practice law simply because she was female. *Bradwell v. Illinois*, 16 Wall. 130, 21 L.Ed. 442 (1873). In his opinion concurring in the judgment, Justice Bradley described the reasons underlying the State's decision to determine which positions only men could fill:

> "It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex." *Id.*, 16 Wall., at 142.

In a similar vein, the Court in *Goesaert v. Cleary*, 335 U.S. 464, 466, 69 S.Ct. 198, 199, 93 L.Ed. 163 (1948), upheld a legislature's right to preclude women from bartending, except under limited circumstances, on the ground that the legislature could devise preventive measures against "moral and social problems" that result when women, but apparently not men, tend bar. Similarly, the many protective labor laws enacted in the late 19th and early 20th centuries often had as their objective the protection of weaker workers, which the laws assumed meant females. See generally B. Brown, A. Freedman, H. Katz, & A. Price, Women's Rights and the Law 209-210 (1977).

****3337** If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the ***726** validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.[FN11] The need for the requirement is amply revealed by reference to the broad range of statutes already invalidated by this Court, statutes that relied upon the simplistic, outdated assumption that gender could be used as a "proxy for other, more germane bases of classification," *Craig v. Boren*, 429 U.S. 190, 198, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976), to establish a link between objective and classification. [FN12]

FN11. For instance, in *Stanton v. Stanton*, *supra*, this Court invalidated a state statute that specified a greater age of majority for males than for females and thereby affected the period during which a divorced parent was responsible for supporting his children. We did not question the importance or validity of the State's interest in defining parents' obligation to support children during their minority. On analysis, however, we determined that the purported relationship between that objective and the gender-based classification was based upon traditional assumptions that "the female [is] destined solely for the home and the rearing of the

family, and only the male for the marketplace and the world of ideas.... If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl." 421 U.S., at 14-15, 95 S.Ct., at 1377-78. Once those traditional notions were abandoned, no basis for finding a substantial relationship between classification and objective remained.

FN12. See, *e.g.*, *Kirchberg v. Feenstra*, 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981) (statute granted only husbands the right to manage and dispose of jointly owned property without the spouse's consent); *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980) (statute required a widower, but not a widow, to show he was incapacitated from earning to recover benefits for a spouse's death under workers' compensation laws); *Orr v. Orr*, *supra* (only men could be ordered to pay alimony following divorce); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (women could purchase "nonintoxicating" beer at a younger age than could men); *Stanton v. Stanton*, *supra* (women reached majority at an earlier age than did men); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975) (widows, but not widowers, could collect survivors' benefits under the Social Security Act); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (determination of spouse's dependency based upon gender of member of Armed Forces claiming dependency benefits); *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) (statute preferred men to women as administrators of estates).

***727** Applying this framework, we now analyze the arguments advanced by the State to justify its refusal to allow males to enroll for credit in MUW's School of Nursing.

III

A

The State's primary justification for maintaining the single-sex admissions policy of MUW's School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action. Brief for Petitioners 8.[FN13] As applied to the School of ****3338** Nursing, we find the State's argument unpersuasive.

FN13. In the reply brief, the State understandably retreated from its contention that MUW was founded to provide opportunities for women which were not available to men. Reply Brief for Petitioners 4. Apparently, the impetus for founding MUW came not from a desire to provide women with advantages superior to those offered men, but rather from a desire to provide white women in Mississippi access to state-supported higher learning. In 1856, Sally Reneau began agitating for a college for white women. Those initial efforts were unsuccessful, and, by 1870, Mississippi provided higher education only for white men and black men and women. E. Mayes, History of Education in Mississippi 178, 228, 245, 259, 266, 270 (1899) (hereinafter Mayes). See also S. Neilson, The History of Mississippi State College for Women 4-5 (unpublished manuscript, 1952) (hereinafter Neilson). In 1882, two years before MUW was chartered, the University of Mississippi opened its doors to women. However, the institution was in those early years not "extensively patronized by females; most of those who come being such as desire to qualify themselves to teach." *Id.*, at 178. By 1890, the largest number of women in any class at the University had been 23, while nearly 350 women enrolled in the first session of MUW. *Id.*, at 178, 253. Because the University did not solicit the attendance of women until after 1920, and did not accept women at all for a time between 1907 and 1920, most Mississippi women who attended college attended MUW. Neilson, at 86. Thus, in Mississippi, as elsewhere in the country, women's colleges were founded to provide some form of higher education for the academically disenfranchised. See generally 2 T. Woody, A History of Women's Education in the United States 137-223 (1929); L. Baker, I'm Radcliffe! Fly Me! The Seven Sisters and the Failure of Women's Education 22, 136-141 (1976).

***728** [4] In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened. See *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975). However, we consistently have emphasized that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648, 95 S.Ct. 1225, 1233, 43 L.Ed.2d 514 (1975). The same searching analysis must be made, regardless of whether the State's objective is to eliminate family controversy, *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), to achieve administrative efficiency, *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), or to balance the burdens borne by males and females.

It is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification. We considered such a situation in *Califano v. Webster*, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977), which involved a challenge to a statutory classification that allowed women to eliminate more low-earning years than men for purposes of computing Social Security retirement benefits. Although the effect of the classification was to allow women higher monthly benefits than were available to men with the same earning history, we upheld the statutory scheme, noting that it took into account that women "as such have been unfairly hindered from earning as much as men" and "work[ed] directly to remedy" the resulting economic disparity. *Id.*, at 318, 97 S.Ct., at 1195.

A similar pattern of discrimination against women influenced our decision in *Schlesinger v. Ballard, supra*. There, we considered a federal statute that granted female Naval officers a 13-year tenure of commissioned service before mandatory discharge, but accorded male officers only a 9-year tenure. We recognized that, because women were barred from combat duty, they had had fewer opportunities for promotion than had their male counterparts. By allowing***729** women an additional four years to reach a particular rank before subjecting them to mandatory discharge, the statute directly compensated for other statutory barriers to advancement.

In sharp contrast, Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that women currently are deprived of such opportunities. In fact, in 1970, the year before the School of Nursing's first class enrolled, women earned 94 percent of the nursing baccalaureate degrees conferred in Mississippi and ****3339** 98.6 percent of the degrees earned nationwide. U.S. Dept. of Health, Education, and Welfare, Earned Degrees Conferred: 1969-1970, Institutional Data 388 (1972). That year was not an aberration; one decade earlier, women had earned all the nursing degrees conferred in Mississippi and 98.9 percent of the degrees conferred nationwide. U.S. Dept. of Health, Education, and Welfare, Earned Degrees Conferred, 1959-1960: Bachelor's and Higher Degrees 135 (1960). As one would expect, the labor force reflects the same predominance of women in nursing. When MUW's School of Nursing began operation, nearly 98 percent of all employed registered nurses were female. [FN14] United States Bureau of Census, 1981 Statistical Abstract of the United States 402 (1981).

> FN14. Relatively little change has taken place during the past 10 years. In 1980, women received more than 94 percent of the baccalaureate degrees conferred nationwide, National Center for Education Statistics, 1981 Digest of Education Statistics 121 (1981), and constituted 96.5 percent of the registered nurses in the labor force. United States Bureau of the Census, 1981 Statistical Abstract of the United States 402 (1981).

[5][6] Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job.[FN15] By assuring ***730** that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy. See *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975). Thus,

we conclude that, although the State recited a "benign, compensatory purpose," it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification.[FN16]

FN15. Officials of the American Nurses Association have suggested that excluding men from the field has depressed nurses' wages. Hearings before the United States Equal Employment Opportunity Commission on Job Segregation and Wage Discrimination 510-511, 517-518, 523 (Apr.1980). To the extent the exclusion of men has that effect, MUW's admissions policy actually penalizes the very class the State purports to benefit. Cf. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975).

FN16. Even were we to assume that discrimination against women affects their opportunity to obtain an education or to obtain leadership roles in nursing, the challenged policy nonetheless would be invalid, for the State has failed to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination. Cf. *Califano v. Webster*, 430 U.S. 313, 318, 97 S.Ct. 1192, 1195, 51 L.Ed.2d 360 (1977) (legislative history of the compensatory statute revealed that Congress "directly addressed the justification for differing treatment of men and women" and "purposely enacted the more favorable treatment for female wage earners..."). The State has provided no evidence whatever that the Mississippi Legislature has ever attempted to justify its differing treatment of men and women seeking nurses' training. Indeed, the only statement of legislative purpose is that in § 37-117-3 of the Mississippi Code, see n. 1, *supra*, a statement that relies upon the very sort of archaic and overbroad generalizations about women that we have found insufficient to justify a gender-based classification. *E.g.*, *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975).

The policy is invalid also because it fails the second part of the equal protection test, for the State has made no showing that the gender-based classification is substantially and directly related to its proposed compensatory objective. To the contrary, MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men.

***731** MUW permits men who audit to participate fully in classes. Additionally, both men and women take part in continuing education courses offered by the School of Nursing, in which regular nursing students also can enroll. Deposition of Dr. James Strobel 56-60 and Deposition of Dean Annette K. Barrar 24-26. The uncontroverted record reveals that admitting men to nursing classes does not affect teaching style, Deposition of Nancy L. Herban 4, ****3340** that the presence of men in the classroom would not affect the performance of the female nursing students, Tr. 61 and Deposition of Dean Annette K. Barrar 7-8, and that men in coeducational nursing schools do not dominate the classroom. Deposition of Nancy Herban 6. In sum, the record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals.

Thus, considering both the asserted interest and the relationship between the interest and the methods used by the State, we conclude that the State has fallen far short of establishing the "exceedingly persuasive justification" needed to sustain the gender-based classification. Accordingly, we hold that MUW's policy of denying males the right to enroll for credit in its School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment. [FN17]

FN17. Justice POWELL's dissent suggests that a second objective is served by the gender-based classification in that Mississippi has elected to provide women a choice of educational environments. *Post*, at 3345-3347. Since any gender-based classification provides one class a benefit or choice not available to the other class, however, that argument begs the question. The issue is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is

substantially related to achieving a legitimate and substantial goal.

B

[7] In an additional attempt to justify its exclusion of men from MUW's School of Nursing, the State contends that MUW is ***732** the direct beneficiary "of specific congressional legislation which, on its face, permits the institution to exist as it has in the past." Brief for Petitioners 19. The argument is based upon the language of § 901(a) in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). Although § 901(a) prohibits gender discrimination in education programs that receive federal financial assistance, subsection 5 exempts the admissions policies of undergraduate institutions "that traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex" from the general prohibition. See n. 5, *supra*. Arguing that Congress enacted Title IX in furtherance of its power to enforce the Fourteenth Amendment, a power granted by § 5 of that Amendment, the State would have us conclude that § 901(a)(5) is but "a congressional limitation upon the broad prohibitions of the Equal Protection Clause of the Fourteenth Amendment." Brief for Petitioners 20.

The argument requires little comment. Initially, it is far from clear that Congress intended, through § 901(a)(5), to exempt MUW from any constitutional obligation. Rather, Congress apparently intended, at most, to exempt MUW from the requirements of Title IX.

Even if Congress envisioned a constitutional exemption, the State's argument would fail. Section 5 of the Fourteenth Amendment gives Congress broad power indeed to enforce the command of the Amendment and "to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion...." *Ex parte Virginia*, 100 U.S. (10 Otto) 339, 346, 25 L.Ed. 676 (1880). Congress' power under § 5, however, "is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Katzenbach v. Morgan*, 384 U.S. 641, 651, n. 10, 86 S.Ct. 1717, 1724, n. 10, 16 L.Ed.2d 828 (1966). Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth***733** Amendment. See, *e.g.*, *Califano v. Goldfarb*, 430 U.S. 199, 210, 97 S.Ct. 1021, 1028, 51 L.Ed.2d 270 (1977); *Williams v. Rhodes*, 393 U.S. 23, 29, 89 S.Ct. 5, 9, 21 L.Ed.2d 24 (1968).

The fact that the language of § 901(a)(5) applies to MUW provides the State no solace:****3341** "[A] statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. *Marbury v. Madison*, 1 Cranch 137 [2 L.Ed. 60] (1803)." *Younger v. Harris*, 401 U.S. 37, 52, 91 S.Ct. 746, 754, 27 L.Ed.2d 669 (1971).

IV

Because we conclude that the State's policy of excluding males from MUW's School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment, we affirm the judgment of the Court of Appeals.

It is so ordered.

Chief Justice BURGER, dissenting.

I agree generally with Justice POWELL's dissenting opinion. I write separately, however, to emphasize that the Court's holding today is limited to the context of a professional nursing school. *Ante*, at 3335, n. 7, 3338. Since the Court's opinion relies heavily on its finding that women have traditionally dominated the nursing profession, see *ante*, at 3339-3340, it suggests that a State might well be justified in maintaining, for example, the option of an all-women's business school or liberal arts program.

Justice BLACKMUN, dissenting.

Unless Mississippi University for Women wished to preserve a historical anachronism, one only states the obvious when he observes that the University long ago should have replaced its original statement of purpose and brought its corporate papers into the 20th century. It failed to do so and, perhaps in partial consequence, finds itself in this litigation, with the Court's opinion, *ante*, at 3334, and n.1, now ***734** taking full advantage of that failure, to MUW's embarrassment and discomfiture.

Despite that failure, times have changed in the intervening 98 years. What was once an "Institute and College" is now a genuine university, with a 2-year School of Nursing established 11 years ago and then

expanded to a 4-year baccalaureate program in 1974. But respondent Hogan "wants in" at this particular location in his home city of Columbus. It is not enough that his State of Mississippi offers baccalaureate programs in nursing open to males at Jackson and at Hattiesburg. Mississippi thus has not closed the doors of its educational system to males like Hogan. Assuming that he is qualified-and I have no reason whatsoever to doubt his qualifications-those doors are open and his maleness alone does not prevent his gaining the additional education he professes to seek.

I have come to suspect that it is easy to go too far with rigid rules in this area of claimed sex discrimination, and to lose-indeed destroy-values that mean much to some people by forbidding the State to offer them a choice while not depriving others of an alternative choice. Justice POWELL in his separate opinion, *post,* p. 3342, advances this theme well.

While the Court purports to write narrowly, declaring that it does not decide the same issue with respect to "separate but equal" undergraduate institutions for females and males, *ante*, at 3334, n.1, or with respect to units of MUW other than its School of Nursing, *ante*, at 3335, n.7, there is inevitable spillover from the Court's ruling today. That ruling, it seems to me, places in constitutional jeopardy any state-supported educational institution that confines its student body in any area to members of one sex, even though the State elsewhere provides an equivalent program to the complaining applicant. The Court's reasoning does not stop with the School of Nursing of the Mississippi University for Women.

I hope that we do not lose all values that some think are worthwhile (and are not based on differences of race or religion)***735** and relegate ourselves to needless conformity. The ringing words of the Equal Protection Clause of the Fourteenth Amendment-what Justice POWELL aptly ****3342** describes as its "liberating spirit," *post*, at 3345,-do not demand that price.
Justice POWELL, with whom Justice REHNQUIST joins, dissenting.

The Court's opinion bows deeply to conformity. Left without honor-indeed, held unconstitutional-is an element of diversity that has characterized much of American education and enriched much of American life. The Court in effect holds today that no State now may provide even a single institution of higher learning open only to women students. It gives no heed to the efforts of the State of Mississippi to provide abundant opportunities for young men and young women to attend coeducational institutions, and none to the preferences of the more than 40,000 young women who over the years have evidenced their approval of an all-women's college by choosing Mississippi University for Women (MUW) over seven coeducational universities within the State. The Court decides today that the Equal Protection Clause makes it unlawful for the State to provide women with a traditionally popular and respected choice of educational environment. It does so in a case instituted by one man, who represents no class, and whose primary concern is personal convenience.

It is undisputed that women enjoy complete equality of opportunity in Mississippi's public system of higher education. Of the State's 8 universities and 16 junior colleges, all except MUW are coeducational. At least two other Mississippi universities would have provided respondent with the nursing curriculum that he wishes to pursue.[FN1] No other ***736** male has joined in his complaint. The only groups with any personal acquaintance with MUW to file *amicus* briefs are female students and alumnae of MUW. And they have emphatically rejected respondent's arguments, urging that the State of Mississippi be allowed to continue offering the choice from which they have benefited.

> FN1. "[T]wo other Mississippi universities offered coeducational programs leading to a Bachelor of Science in Nursing-the University of Southern Mississippi in Hattiesburg, 178 miles from Columbus; and the University of Mississippi in Jackson, 147 miles from Columbus ...." Brief for Respondent 3. See also Tr. of Oral Arg. 8.

Nor is respondent significantly disadvantaged by MUW's all-female tradition. His constitutional complaint is based upon a single asserted harm: that he must *travel* to attend the state-supported nursing schools that concededly are available to him. The Court characterizes this injury as one of "inconvenience." *Ante*, at 3336, n. 8. This description is fair and accurate, though somewhat embarrassed by the fact that there is, of course, no constitutional right to attend a state-supported university in one's home town. Thus the Court, to redress respondent's injury of inconvenience, must rest its invalidation of MUW's single-sex program on a mode of "sexual stereotype" reasoning

that has no application whatever to the respondent or to the "wrong" of which he complains. At best this is anomalous. And ultimately the anomaly reveals legal error-that of applying a heightened equal protection standard, developed in cases of genuine sexual stereotyping, to a narrowly utilized state classification that provides an *additional* choice for women. Moreover, I believe that Mississippi's educational system should be upheld in this case even if this inappropriate method of analysis is applied.

I

Coeducation, historically, is a novel educational theory. From grade school through high school, college, and graduate and professional training, much of the Nation's population during much of our history has been educated in sexually segregated classrooms. At the college level, for instance, until recently some of the most prestigious colleges and universi ***737** ties-including most of the Ivy League-had long histories of single-sex education. As Harvard, Yale, and Princeton remained all-male colleges well into the second half of this ****3343** century, the "Seven Sister" institutions established a parallel standard of excellence for women's colleges. Of the Seven Sisters, Mount Holyoke opened as a female seminary in 1837 and was chartered as a college in 1888. Vassar was founded in 1865, Smith and Wellesley in 1875, Radcliffe in 1879, Bryn Mawr in 1885, and Barnard in 1889. Mount Holyoke, Smith, and Wellesley recently have made considered decisions to remain essentially single-sex institutions. See Carnegie Commission on Higher Education 70-75 (1973) Opportunities for Women in Higher Education 70-75 (1973) (Carnegie Report), excerpted in B. Babcock, A. Freedman, E. Norton, & S. Ross, Sex Discrimination and the Law 1013, 1014 (1975) (Babcock). Barnard retains its independence from Columbia, its traditional coordinate institution. Harvard and Radcliffe maintained separate admissions policies as recently as 1975.[FN2]

> FN2. The history, briefly summarized above, of single-sex higher education in the Northeast is duplicated in other States. I mention only my State of Virginia, where even today Hollins College, Mary Baldwin College, Randolph Macon Woman's College, and Sweet Briar College remain all women's colleges. Each has a proud and respected reputation of quality education.

The sexual segregation of students has been a reflection of, rather than an imposition upon, the preference of those subject to the policy. It cannot be disputed, for example, that the highly qualified women attending the leading women's colleges could have earned admission to virtually any college of their choice.[FN3] Women attending such colleges have chosen ***738** to be there, usually expressing a preference for the special benefits of single-sex institutions. Similar decisions were made by the colleges that elected to remain open to women only.[FN4]

> FN3. It is true that historically many institutions of higher education-particularly in the East and South-were single-sex. To these extents, choices were by no means universally available to all men and women. But choices always were substantial, and the purpose of relating the experience of our country with single-sex colleges and universities is to document what should be obvious: generations of Americans, including scholars, have thought-wholly without regard to any discriminatory animus-that there were distinct advantages in this type of higher education.

> FN4. In announcing Wellesley's decision in 1973 to remain a women's college, President Barbara Newell said that "[t]he research we have clearly demonstrates that women's colleges produce a disproportionate number of women leaders and women in responsible positions in society; it does demonstrate that the higher proportion of women on the faculty the higher the motivation for women students." Carnegie Report, in Babcock, at 1014. Similarly rejecting coeducation in 1971, the Mount Holyoke Trustees Committee on Coeducation reported that "the conditions that historically justified the founding of women's colleges" continued to justify their remaining in that tradition. *Ibid.*

The arguable benefits of single-sex colleges also continue to be recognized by students of higher education. The Carnegie Commission on Higher Education has reported that it "favor[s] the continuation of colleges for women. They provide an element of diversity ... and [an environment in which women] generally ... speak up more in their classes, ... hold

more positions of leadership on campus, ... and ... have more role models and mentors among women teachers and administrators." Carnegie Report, quoted in K. Davidson, R. Ginsburg, & H. Kay, Sex-Based Discrimination 814 (1975 ed.). A 10-year empirical study by the Cooperative Institutional Research Program of the American Counsel of Education and the University of California, Los Angeles, also has affirmed the distinctive benefits of single-sex colleges and universities. As summarized in A. Astin, Four Critical Years 232 (1977), the data established that

> "[b]oth [male and female] single-sex colleges facilitate student involvement in several areas: academic, interaction with faculty, and verbal aggressiveness.... Men's and women's colleges also have a positive effect on intellectual self-esteem. Students at single-sex colleges are more satisfied than students at coeducational colleges***739** with virtually all aspects of college****3344** life .... The only area where students are less satisfied is social life." FN5

FN5. In this Court the benefits of single-sex education have been asserted by the students and alumnae of MUW. One would expect the Court to regard their views as directly relevant to this case:

> "[I]n the aspect of life known as courtship or mate-pairing, the American female remains in the role of the pursued sex, expected to adorn and groom herself to attract the male. Without comment on the common sense or equities of this social arrangement, it remains a sociological fact.
>
> "An institution of collegiate higher learning maintained exclusively for women is uniquely able to provide the education atmosphere in which some, but not all, women can best attain maximum learning potential. It can serve to overcome the historic repression of the past and can orient a woman to function and achieve in the still male dominated economy. It can free its students of the burden of playing the mating game while attending classes, thus giving academic rather than sexual emphasis. Consequently, many such institutions flourish and their graduates make significant contributions to the arts, professions and business." Brief for Mississippi University for Women Alumnae Association as *Amicus Curiae* 2-3.

Despite the continuing expressions that single-sex institutions may offer singular advantages to their students, there is no doubt that coeducational institutions are far more numerous. But their numerical predominance does not establish-in any sense properly cognizable by a court-that individual preferences for single-sex education are misguided or illegitimate, or that a State may not provide its citizens with a choice.FN6

FN6. "[T]he Constitution does not require that a classification keep abreast of the latest in educational opinion, especially when there remains a respectable opinion to the contrary .... Any other rule would mean that courts and not legislatures would determine all matters of public policy." *Williams v. McNair*, 316 F.Supp. 134, 137 (SC 1970) (footnote omitted), summarily aff'd, 401 U.S. 951, 91 S.Ct. 976, 28 L.Ed.2d 235 (1971).

II

The issue in this case is whether a State transgresses the Constitution when-within the context of a public system that offers a diverse range of campuses, curricula, and educational***740** alternatives-it seeks to accommodate the legitimate personal preferences of those desiring the advantages of an all-women's college. In my view, the Court errs seriously by assuming-without argument or discussion-that the equal protection standard generally applicable to sex discrimination is appropriate here. That standard was designed to free women from "archaic and overbroad generalizations ...." *Schlesinger v. Ballard*, 419 U.S. 498, 508, 95 S.Ct. 572, 577, 42 L.Ed.2d 610 (1975). In no previous case have we applied it to invalidate state efforts to *expand* women's choices. Nor are there prior sex discrimination decisions by this Court in which a male plaintiff, as in this case, had the choice of an equal benefit.

The cases cited by the Court therefore do not control the issue now before us. In most of them women were given no opportunity for the same benefit as men.FN7 Cases involving male plaintiffs are equally inapplicable. In *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), a male under 21 was not

permitted to buy beer anywhere in the State, and women were ****3345** afforded no choice as to whether they would accept the "statistically measured but loose-fitting generalities concerning the drinking ***741** tendencies of aggregate groups." *Id.*, at 209, 97 S.Ct., at 463. A similar situation prevailed in *Orr v. Orr*, 440 U.S. 268, 279, 99 S.Ct. 1102, 1111, 59 L.Ed.2d 306 (1979), where men had no opportunity to seek alimony from their divorced wives, and women had no escape from the statute's stereotypical announcement of "the State's preference for an allocation of family responsibilities under which the wife plays a dependent role ...." [FN8]

FN7. See *Kirchberg v. Feenstra*, 450 U.S. 455, 456, 101 S.Ct. 1195, 1197, 67 L.Ed.2d 428 (1981) (invalidating statute "that gave husband, as 'head and master' of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent"); *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 147, 100 S.Ct. 1540, 1544, 64 L.Ed.2d 107 (1980) (invalidating law under which the benefits "that the working woman can expect to be paid to her spouse in the case of her work-related death are less than those payable to the spouse of the deceased male wage earner"); *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975) (invalidating statute that provided a shorter period of parental support obligation for female children than for male children); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645, 95 S.Ct. 1225, 1232, 43 L.Ed.2d 514 (1975) (invalidating statute that failed to grant a woman worker "the same protection which a similarly situated male worker would have received"); *Frontiero v. Richardson*, 411 U.S. 677, 683, 93 S.Ct. 1764, 1768, 36 L.Ed.2d 583 (1973) (invalidating statute containing a "mandatory preference for male applicants"); *Reed v. Reed*, 404 U.S. 71, 74, 92 S.Ct. 251, 253, 30 L.Ed.2d 225 (1971) (invalidating an "arbitrary preference established in favor of males" in the administration of decedent's estates).

FN8. See also *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979) (invalidating law that both denied men the opportunity-given to women-of blocking the adoption of his illegitimate child by means of withholding his consent, and did not permit women to counter the statute's generalization that the maternal role is more important to women than the paternal role is to men).

By applying heightened equal protection analysis to this case,[FN9] the Court frustrates the liberating spirit of the Equal Protection Clause. It prohibits the States from providing women with an opportunity to choose the type of university they prefer. And yet it is these women whom the Court regards as the *victims* of an illegal, stereotyped perception of the role of women in our society. The Court reasons this way in a case in which no woman has complained, and the only complainant is a man who advances no claims on behalf of anyone else. His claim, it should be recalled, is not that he is being denied a substantive educational opportunity, or even the right to attend an all-male or a coeducational college.***742** See Brief for Respondent 24. [FN10] It is *only* that the colleges open to him are located at inconvenient distances.[FN11]

FN9. Even the Court does not argue that the appropriate standard here is "strict scrutiny"-a standard that none of our "sex discrimination" cases ever has adopted. Sexual segregation in education differs from the tradition, typified by the decision in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), of "separate but equal" *racial* segregation. It was characteristic of racial segregation that segregated facilities were offered, not as alternatives to increase the choices available to blacks, but as the *sole* alternative. MUW stands in sharp contrast. Of Mississippi's 8 public universities and 16 public junior colleges, only MUW considers sex as a criterion for admission. Women consequently are free to select a coeducational education environment for themselves if they so desire; their attendance at MUW is not a matter of coercion.

FN10. The Court says that "any gender-based classification provides one class a benefit or choice not available to the other class ...." *Ante*, at 3340, n. 17. It then states that the issue "is not whether the benefited

class profits from the classification, but whether the State's decision to confer a benefit *only* upon *one* class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal." *Ibid.* (emphasis added). This is *not* the issue in this case. Hogan is not complaining about any benefit conferred upon women. Nor is he claiming discrimination because Mississippi offers no all-male college. As his brief states: "Joe Hogan does not ask to attend an all-male college which offers a Bachelor of Science in Nursing; he asks only to attend MUW." Brief for Respondent 24. And he asks this only for his personal convenience.

FN11. Students in respondent's position, in "being denied the right to attend the State college in their home town, are treated no differently than are other students who reside in communities many miles distant from any State supported college or university. The location of any such institution must necessarily inure to the benefit of some and to the detriment of others, depending upon the distance the affected individuals reside from the institution." *Heaton v. Bristol*, 317 S.W.2d 86, 99 (Tex.Civ.App.1958), cert. denied, 359 U.S. 230, 79 S.Ct. 802, 3 L.Ed.2d 765 (1959), quoted in *Williams v. McNair*, 316 F.Supp., at 137.

III

The Court views this case as presenting a serious equal protection claim of sex discrimination. I do not, and I would sustain Mississippi's right to continue MUW on a rational-basis analysis. But I need not apply this "lowest tier" of scrutiny. I can accept for present purposes the standard applied by the Court: that there is a gender-based distinction that must serve an important governmental objective by means that are substantially related to its achievement. *E.g.*, *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107 (1980). ****3346** The record in this case reflects that MUW has a historic position in the State's educational system dating back to 1884. More than 2,000 women presently evidence their preference for MUW by having enrolled there. The choice is ***743** one that discriminates invidiously against no one.[FN12] And the State's purpose in preserving that choice is legitimate and substantial. Generations of our finest minds, both among educators and students, have believed that single-sex, college-level institutions afford distinctive benefits. There are many persons, of course, who have different views. But simply because there are these differences is no reason-certainly none of constitutional dimension-to conclude that no substantial state interest is served when such a choice is made available.

FN12. " 'Such a plan (i.e., giving the student a choice of a "single-sex" and coeducational institutions) exalts neither sex at the expense of the other, but to the contrary recognizes the equal rights of both sexes to the benefit of the best, most varied system of higher education that the State can supply.' " *Williams v. McNair*, *supra*, at 138, n. 15, quoting *Heaton v. Bristol*, *supra*, at 100.

In arguing to the contrary, the Court suggests that the MUW is so operated as to "perpetuate the stereotyped view of nursing as an exclusively women's job." *Ante*, at 3339. But as the Court itself acknowledges, *ante*, at 3334, MUW's School of Nursing was not created until 1971-about 90 years after the single-sex campus itself was founded. This hardly supports a link between nursing as a woman's profession and MUW's single-sex admission policy. Indeed, MUW's School of Nursing was not instituted until more than a decade *after* a separate School of Nursing was established at the coeducational University of Mississippi at Jackson. See University of Mississippi, 1982 Undergraduate Catalog 162. The School of Nursing makes up only one part-a relatively small part [FN13]-of MUW's diverse modern university campus and curriculum. The other departments on the MUW campus offer a typical range of degrees [FN14] and a typical range of subjects.***744** [FN15] There is no indication that women suffer fewer opportunities at other Mississippi state campuses because of MUW's admission policy.[FN16]

FN13. For instance, the School of Nursing takes up 15 pages of MUW's 234-page course catalog. See Mississippi University for Women, 81/82 Bulletin 185-200.

FN14. *E.g.*, Bachelor of Arts; Bachelor of Science; Master of Arts; Master of Science. See *id.*, at 40. MUW also offers special pre-

professional programs in law, dentistry, medicine, pharmacy, physical therapy, and veterinary medicine. *Ibid.*

FN15. MUW's Bulletin in its Table of Contents lists the following subjects (offered in its School of Arts and Sciences): Air Force ROTC; Art; Behavioral Sciences; Biological Sciences; Business and Economics; Cooperative Education; English and Foreign Languages; Health, Physical Education, Recreation, and Dance; History, Journalism and Broadcasting; Mathematics; Music; Physical Sciences; and Speech Communication. See *id.*, at 3.

FN16. For instance, the catalog for the coeducational University of Mississippi lists in its general description the "Sarah Isom Center for Women's Studies," which is described as "dedicated to the development of curriculum and scholarship about women, the dissemination of information about their expanding career opportunities, and the establishment of mutual support networks for women of all ages and backgrounds." University of Mississippi, 1982 Undergraduate Catalog 13-14. This listing precedes information about the University's Law and Medical Centers. *Id.*, at 14-15.

In sum, the practice of voluntarily chosen single-sex education is an honored tradition in our country, even if it now rarely exists in state colleges and universities. Mississippi's accommodation of such student choices is legitimate because it is completely consensual and is important because it permits students to decide for themselves the type of college education they think will benefit them most. Finally, Mississippi's policy is substantially related to its long-respected objective.[FN17]

FN17. The Court argues that MUW's means are not sufficiently related to its goal because it has allowed men to audit classes. The extent of record information is that men have audited 138 courses in the last 10 years. Brief for Respondent 21. On average, then, men have audited 14 courses a year. MUW's current annual catalog lists 913 courses offered in *one* year. See Mississippi University for Women, 81/82 Bulletin *passim.*

It is understandable that MUW might believe that it could allow men to audit courses without materially affecting its environment. MUW charges tuition but gives no academic credit for auditing. The University evidently is correct in believing that few men will choose to audit under such circumstances. This deviation from a perfect relationship between means and ends is insubstantial.

***745 **3347** IV

A distinctive feature of America's tradition has been respect for diversity. This has been characteristic of the peoples from numerous lands who have built our country. It is the essence of our democratic system. At stake in this case as I see it is the preservation of a small aspect of this diversity. But that aspect is by no means insignificant, given our heritage of available choice between single-sex and coeducational institutions of higher learning. The Court answers that there is discrimination-not just that which may be tolerable, as for example between those candidates for admission able to contribute most to an educational institution and those able to contribute less-but discrimination of constitutional dimension. But, having found "discrimination," the Court finds it difficult to identify the victims. It hardly can claim that women are discriminated against. A constitutional case is held to exist solely because one man found it inconvenient to travel to any of the other institutions made available to him by the State of Mississippi. In essence he insists that he has a right to attend a college in his home community. This simply is not a sex discrimination case. The Equal Protection Clause was never intended to be applied to this kind of case. [FN18]

FN18. The Court, in the opening and closing sentences and note 7 of its opinion, states the issue in terms only of a "professional nursing school" and "decline[s] to address the question of whether MUW's admissions policy, as applied to males seeking admission to schools other than the School of Nursing, violates the Fourteenth Amendment." This would be a welcome limitation if, in fact, it leaves MUW free to remain an all-women's university in each of its other schools and departments-which include four schools and

more than a dozen departments. Cf. nn. 13-15, *supra*. The question the Court does not answer is whether MUW may remain a women's university in every respect except its School of Nursing. This is a critical question for this University and its responsible board and officials. The Court holds today that they have deprived Hogan of constitutional rights because MUW is adjudged guilty of sex discrimination. The logic of the Court's entire opinion, apart from its statements mentioned above, appears to apply sweepingly to the entire University. The exclusion of men from the School of Nursing is repeatedly characterized as "gender-based discrimination," subject to the same standard of analysis applied in previous sex discrimination cases of this Court. Nor does the opinion anywhere deny that this analysis applies to the entire University.

> The Court nevertheless purports to decide this case "narrow[ly]." Normally and properly we decide only the question presented. It seems to me that in fact the issue properly before us is the single-sex policy of the University, and it is this issue that I have addressed in this dissent. The Court of Appeals so viewed this case, and unambiguously held that a single-sex state institution of higher education no longer is permitted by the Constitution. I see no principled way-in light of the Court's rationale-to reach a different result with respect to other MUW schools and departments. But given the Court's insistence that its decision applies only to the School of Nursing, it is my view that the Board and officials of MUW may continue to operate the remainder of the University on a single-sex basis without fear of personal liability. The standard of such liability is whether the conduct of the official "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The Court today leaves in doubt the reach of its decision.

U.S.Miss.,1982.
Mississippi University for Women v. Hogan
458 U.S. 718, 102 S.Ct. 3331, 29 Empl. Prac. Dec. P 32,868, 73 L.Ed.2d 1090, 5 Ed. Law Rep. 103

END OF DOCUMENT

125 F.3d 702, 97 Cal. Daily Op. Serv. 7099, 97 Daily Journal D.A.R. 11,464
(Cite as: 125 F.3d 702)

United States Court of Appeals,
Ninth Circuit.
MONTEREY MECHANICAL CO., Plaintiff-Appellant,
v.
Pete WILSON; Gray Davis; Curt Pringle; Delaine Easton; Barry Munitz; Roland E. Arnall; Marian Bagdasarian; William D. Campbell; Ronald L. Cedillos; Jim Considine; Martha C. Fallgatter; Bernard Goldstein, Jr.; James H. Gray; William Hauck; Joan Otomo-Corgel, Dr.; Ralph R. Pesqueira; Ali C. Razi; Ted J. Saenger; Michael D. Stennis; Anthony M. Vitti; Stanley T. Wang; Frank Y. Wada, Individually and as Trustee of the California State University; Swinerton and Walberg Co., a California Corporation, Defendants-Appellees.

No. 96-16729.
Argued and Submitted Feb. 10, 1997.
Decided Sept. 3, 1997.

Unsuccessful bidder for construction project at state university brought action against university trustees and successful bidder, alleging that statute which required general contractors to subcontract percentages of work to subcontractors owned by women or minorities, or demonstrate good faith effort to do so, violated equal protection clause. The United States District Court for the Eastern District of California, Edward J. Garcia, J., denied preliminary injunction, and unsuccessful bidder appealed. The Court of Appeals, Kleinfeld, Circuit Judge, held that: (1) unsuccessful bidder had standing to challenge statute; (2) statute created classification subject to equal protection analysis, and (3) statute violated equal protection clause.

Reversed and remanded.

West Headnotes

[1] Federal Courts 170B 815

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk814 Injunction
170Bk815 k. Preliminary Injunction; Temporary Restraining Order. Most Cited Cases

While Court of Appeals reviews district court's decision not to enter preliminary injunction for abuse of discretion, district court is deemed to abuse its discretion when it bases its decision on erroneous legal standard; thus, abuse of discretion is established if district court applied incorrect substantive law.

[2] Constitutional Law 92 925

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)11 Equal Protection
92k925 k. Government Contracts. Most Cited Cases
(Formerly 92k42.2(2))

Unsuccessful bidder for state construction project had standing to challenge, under equal protection clause, statute which required general contractors to subcontract percentages of work to subcontractors owned by women or minorities, or demonstrate good faith effort to do so, as unsuccessful bidder was prevented by statute from competing on equal footing with general contractors in designated classes, who were excused from statute's requirements. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Pub.Con.Code §§ 10115(c), 10115.2.

[3] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

Standing is question of law reviewed de novo.

[4] Constitutional Law 92 915

92 Constitutional Law
92VI Enforcement of Constitutional Provisions

92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)11 Equal Protection
92k915 k. In General. Most Cited Cases
(Formerly 92k42.2(2))

Person required by government to discriminate by ethnicity or sex against others has standing to challenge validity of requirement, under equal protection clause, even though government does not discriminate against that person. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 3289

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3287 Contracts
92k3289 k. Public Contracts. Most Cited Cases
(Formerly 92k215.2)

Constitutional Law 92 3402

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3400 Contracts
92k3402 k. Public Contracts. Most Cited Cases
(Formerly 92k224(2))

Public Contracts 316A 2

316A Public Contracts
316AI In General
316Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases

Statute which required general contractors to subcontract percentages of work to subcontractors owned by women or minorities, or demonstrate good faith effort to do so, created classification, for purpose of equal protection challenge, as statute did not treat all contractors alike, since contractors that were owned by women and minorities were excused from requirements if they proposed to keep specified percentage of work for themselves, and different treatment of businesses owned by women or minorities did not have de minimis effect. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Pub.Con.Code §§ 10115(c), 10115.2(a).

[6] Constitutional Law 92 3289

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3287 Contracts
92k3289 k. Public Contracts. Most Cited Cases
(Formerly 92k215.2)

Constitutional Law 92 3402

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3400 Contracts
92k3402 k. Public Contracts. Most Cited Cases
(Formerly 92k224(2))

Public Contracts 316A 2

316A Public Contracts
316AI In General
316Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases

Fact that statute which required general contractors to subcontract percentages of work to subcontractors owned by women or minorities did not impose rigid quotas but, rather, allowed general contractors to meet requirements by showing good faith effort to comply with set goals, did not preclude finding that statute created classification, for purpose of equal protection challenge to statute. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Pub.Con.Code §§ 10115(c), 10115.2(a).

[7] Constitutional Law 92 3000

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)1 In General
92k3000 k. In General. Most Cited Cases

(Formerly 92k211(1))

There is no de minimis exception to Equal Protection Clause. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law 92 3289

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3287 Contracts
92k3289 k. Public Contracts. Most Cited Cases
(Formerly 92k215.2)

Constitutional Law 92 3402

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3400 Contracts
92k3402 k. Public Contracts. Most Cited Cases
(Formerly 92k224(2))

Public Contracts 316A 2

316A Public Contracts
316AI In General
316Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases

Statute which required general contractors to subcontract percentages of work to subcontractors owned by women or minorities, or demonstrate good faith effort to do so, which provided exception for businesses owned by women or minorities which proposed to keep specified percentage of work for themselves, violated equal protection clause, because there was no evidence that state had discriminated against benefitted groups in the past, and statute was not narrowly tailored to serve government interest. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Pub.Con.Code §§ 10115(c), 10115.2(a).

[9] Constitutional Law 92 3250

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3250 k. In General. Most Cited Cases
(Formerly 92k215)

Constitutional Law 92 3380

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)11 Sex or Gender
92k3380 k. In General. Most Cited Cases
(Formerly 92k224(1))

Burden of justifying different treatment by ethnicity or sex, in face of equal protection challenge, is always on government. U.S.C.A. Const.Amend. 14.

***703** Marcia L. Augsburger,McDonough, Holland & Allen, Sacramento, CA, for plaintiffs-appellants.

Karen L. Robinson, California State University, Legal Division, Long Beach, CA, for defendants-appellees.

Dana M. Rudnick and Barbara GadboisGibbs, Giden, Locher & Acret, Los Angeles, CA, for defendants-appellees.

Anthony T. Caso, Pacific Legal Foundation, Sacramento, CA, for defendant-appellee.

Appeal from the United States District Court for the Eastern District of California; Edward J. Garcia, District Judge, Presiding. D.C. No. CV-96-01279-EJG.

Before: O'SCANNLAIN, LEAVY and KLEINFELD, Circuit Judges.

KLEINFELD, Circuit Judge:

We review denial of a preliminary injunction, regarding a state program setting goals for ethnic and sex characteristics of construction subcontractors.

***704 FACTS**

California Polytechnic State University, San Luis Obispo (the University) solicited bids for a utilities upgrade. This construction project, expected to take almost two years, will connect all buildings to a central heating and air conditioning plant and install a new electrical distribution system. Monterey Mechanical, the plain-

tiff-appellant, submitted the low bid, $21,698,000.00, but did not get the job. The second lowest bidder, Swinerton and Walberg, won the contract, with a bid $318,000 higher than Monterey Mechanical's.

Monterey Mechanical's bid was disqualified because the company did not comply with a state statute. The statute requires general contractors to subcontract percentages of the work to minority, women, and disabled veteran owned subcontractors, or demonstrate good faith efforts to do so. The required "goals" are "not less than" 15% for minority business enterprises, 5% women, 3% disabled veteran. Cal. Public Contract Code § 10115(c). To count towards fulfilling the goal, a subcontractor must be at least 51% owned and controlled by members of those classes. Cal. Public Contract Code § 10115.1(e).

There were two ways Monterey Mechanical might have complied with the statute. It could have used minority, women and disabled veteran business enterprises for the designated 23% (15% plus 5% plus 3%) "of the contract dollar amount." Its bid was $21,698,000, so compliance by this means would require subcontracting $4,990,540 to subcontractors of the designated classes.

Alternatively, Monterey Mechanical could comply by demonstrating "good faith effort" to meet the "goals." The statute requires a bidder using "good faith" as its means of qualifying to contact government agencies and organizations to identify potential subcontractors in the designated classes, advertise in papers "focusing on M/W/DVBEs," [FN1] and solicit bids from "potential M/W/DVBE subcontractors and suppliers." The contractor must document its efforts within two days following the opening of the bids, so as a practical matter the solicitation must be fully accomplished prior to bidding. Dates, times, organizations contacted, contact names, and phone numbers are "needed to corroborate the information."

> FN1. "M/W/DVBEs" is the designation on the University's forms for "Minority/Woman/Disabled Veteran Business Enterprises."

Monterey Mechanical did not fully comply with the statute by either method. Its President acknowledges that "Monterey is not eligible for classification as an MBE or a WBE." It did not subcontract out the required 23% of the contract amount.[FN2] Nor did Monterey Mechanical fully comply with the "good faith" requirement. Monterey Mechanical contacted state and federal agencies and minority and women organizations, advertised to minority and women owned firms, and invited and considered bids from them. But it did not document contact with the University physical planning and development office to identify minority, women, and disabled veteran business enterprises.

> FN2. Monterey Mechanical put in 13 times as much money for black subcontractors as Swinerton and Walberg, and a slightly higher amount for women subcontractors, though the total percentages were not very high for either of them. Neither company proposed to subcontract anything to disabled veteran subcontractors. Swinerton and Walberg had a higher total for total minority participation because of a $3,000,000 item for "Pacific Asian" minority participation.

Swinerton and Walberg, which won the contract, did not subcontract out at least 23% of the work to firms in the designated classes (and does not claim to be a minority, women, or disabled veteran enterprise). It differed materially from Monterey Mechanical only in that it fully complied with the "good faith" requirement. Unlike Monterey Mechanical, it provided documentation of its contact with the University physical planning and development office to identify minority, women, and disabled veteran business enterprises.

When the University rejected Monterey Mechanical's bid as non-responsive, Monterey Mechanical requested whatever disparity study California State University had used to justify the goals for the designated classes. The University replied that there was no such study. It took the position that because ***705** the "goal requirements" of the scheme "do not involve racial or gender quotas, set-asides or preferences," the University needed no such disparity documentation.

Monterey Mechanical protested the contract award, then sued the University's trustees and Swinerton and Walberg for a declaratory judgment, injunction, and damages. The theory of the lawsuit is that the statute that caused Monterey Mechanical to lose the contract violates the Equal Protection Clause of the United States Constitution.

The district judge denied the preliminary injunction. Monterey Mechanical has appealed. The denial was based on a legal conclusion that Monterey Mechanical had a low probability of success on the merits.[FN3] No findings of fact

were made, nor were any necessary, because there was no dispute as to any of the facts. The facts recited above, from the documents submitted by the parties, are uncontested.

> FN3. Here is the relevant portion of the district court decision:
>
> The motion for preliminary injunction will be denied. I find that plaintiff has little likelihood of success on the merits on the equal protection claim as pled. The Fourteenth Amendment's equal protection clause requires the State to justify the differential treatment of similarly situated individuals.
>
> . . . . .
>
> On its motion plaintiff argues that California has not made sufficient findings of past discrimination to support Minority Women Enterprise participation goal requirements. In so arguing plaintiff immediately focuses on strict scrutiny analysis without considering what I believe a necessary first step.
>
> By that I mean that plaintiff apparently assume without analysis that California's Minority and Women Enterprise participation goals treat general contractors differently on the basis of race and gender. I'm not satisfied that this is the case. In fact, it's plain that the participation goals require all general contractors, regardless of race or gender, to either submit bids with a set percentage of Minority Women Enterprise participation or to actively seek out and solicit bids from Minority Women Enterprise subcontractors.
>
> Thus the statute does not appear to treat general contractors differently. It might be argued that the statute does treat non-minority women enterprise general contractors differently in one respect. A minority business enterprises that will perform 15% of the contract with its own labor and equipment is under no obligation to seek out minority business enterprises subcontractors since it already meets the minority business participation goal.
>
> The same is true of women business enterprises general contractors who intend to perform five percent of the contract themselves. However, this possible difference in treatment appears to me to be de minimis. In fact, the extra step of soliciting bids from minority business enterprises where a minority business enterprise general contractor might not have to seems hardly worth mentioning.
>
> This is especially so, given that the minority business enterprise would still be required to solicit bids from women business enterprises, nor is there any showing that this possible extra step which might have to be performed by non-minority women enterprises makes it more likely that a minority women business enterprise will be awarded a contract over a non-minority women business enterprise. More importantly, however, even if it is conceded that this possible difference in treatment among general contractors is sufficient to confer standing upon plaintiff to challenge the constitutionality of California's minority women business enterprise participation goal requirements, that possible difference in treatment would not entitle plaintiff to the relief he seeks here.
>
> . . . . .
>
> The record shows that the state let the contract to a non-minority women business enterprise general contractor who solicited bids from minority women business enterprise contractors, but did not meet the participation goals. Accordingly, there is no causal relationship between the manner in which the statute might treat general contractors differently and plaintiff's failure to win the contract. Here in fact, the statute treated plaintiff and defendant Swinerton exactly the same.

ANALYSIS

[1] We have jurisdiction to review "[i]nterlocutory orders ... refusing ... injunctions" under 28 U.S.C. § 1292(a)(1). While we review its decision not to enter a preliminary injunction for an abuse of discretion, the district court is deemed to abuse its discretion when it "bases its decision on an erroneous legal standard." *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1062 (9th Cir.1995). Thus an abuse of discretion is established if the district court applied the incorrect substantive law. *International Molders' and Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 551 (9th

Cir.1986).[FN4]

FN4. California's Proposition 209, *see* *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431, 1997 WL 160667 (9th Cir. April 8, 1997), was passed after Monterey Mechanical was disqualified and the contract was awarded to Swinerton and Walberg, and after the district court denied Monterey Mechanical a preliminary injunction. The parties have not argued that the subsequent change in state law affects this case. They have not made any arguments regarding Proposition 209. We therefore do not consider what effect if any Proposition 209 or *Coalition for Economic Equity* might have on this case.

***706 A. Standing.**

[2][3] The district court concluded that Monterey Mechanical lacked standing. Because Swinerton and Walberg was not a women or minority business enterprise,[FN5] and all general contractors, not just non-minority non-women contractors, were bound by the same requirements, the district court concluded that unconstitutional discrimination, even if it existed, did not cause Monterey Mechanical to lose the contract. The idea is that if the government does not discriminate against A, but requires that A discriminate against B, B has standing but A does not. Appellees[FN6] do not argue that Monterey Mechanical lacked standing. We nevertheless consider standing sua sponte, because it goes to jurisdiction. "Standing is a question of law reviewed de novo." *Snake River Farmers' Assn. v. Department of Labor*, 9 F.3d 792, 795 (9th Cir.1993).

FN5. None of the parties have presented any arguments regarding the statutory provision relating to disabled veterans, Cal. Public Contract Code § 10115 et. seq., so we disregard it in our discussion. Monterey Mechanical does not challenge its constitutionality, and the University does not make any arguments relating to it. Accordingly, we do not consider the disabled veterans provisions of the statute, and our decision has no bearing on the provisions of the statute regarding disabled veterans.

FN6. Governor Pete Wilson was nominally a defendant in the case, and as such prevailed in district court. He has accordingly filed an appellee's brief rather than an appellant's brief. But his position is the same as appellant's, that the statute is unconstitutional. Though nominally an appellee, Governor Wilson is in substance an appellant. Our references to appellees arguments do not include the arguments made by Governor Wilson.

The issue of standing is controlled by *Northeastern Florida Contractors v. Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993). That was another contracting set-aside case. The plaintiff made no showing that it or any of its members would have received particular contracts but for the challenged set-aside ordinance. The Court held that to establish standing in challenges to set-aside laws, a bidder need only demonstrate that a discriminatory policy prevents it from competing on an equal footing, not that the discrimination caused its failure to win a contract:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.... And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract.... To establish standing, therefore, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.[5]
>
> FN[5] It follows from our definition of "injury in fact" that petitioner has sufficiently alleged both that the city's ordinance is the "cause" of its injury and that a judicial decree directing the city to discontinue its program would "redress" the injury.

Id. at 666, 113 S.Ct. at 2303.

Monterey Mechanical was prevented by the statute from competing on an equal footing with general contractors in the designated classes. Had it been a minority or women business enterprise (or both), and proposed to keep those classes' work rather than subcontract it out, it would have been excused to that extent from both the subcontracting and "good faith" requirements. *See* Cal. Public Contract Code §§ 10115(c), 10115.2.

***707** We construed *Northeastern Florida Contractors* in *Bras v. California Public Utilities Commission*, 59 F.3d 869 (9th Cir.1995). We held that in a challenge to an affirmative action program, "plaintiffs did not have to prove that they would lose any bids or identifiable contracts in order to sustain actual injury." *Id.* at 873. "An injury results not only when [the bidder] actually loses a bid, but every time the company simply places a bid." *Id.* at 873, quoting *Coral Construction Company v. King County*, 941 F.2d 910 (9th Cir.1991). Our analysis of standing in *Coral Construction* was approved of by the Court in *Northeastern Florida Contractors*, 508 U.S. at 660, 113 S.Ct. at 2300. A bidder need not establish that the discriminatory policy caused it to lose the contract. To establish standing bidders "need only show that they are forced to compete on an unequal basis." *Bras*, 59 F.3d at 873. Being forced to compete on an unequal basis because of race (or sex) is an injury under the Equal Protection Clause. *See Northeastern Florida Contractors*, 508 U.S. at 665-67, 113 S.Ct. at 2303.

The Tenth Circuit applied *Northeastern Florida Contractors* to standing under an ordinance substantially similar to the statute before us in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513 (10th Cir.1994). *Concrete Works* held that because minority and women business enterprises could use their own work to satisfy goals for their classes while firms not in these classes would have to subcontract the work out or show "good faith," a non-minority and non-women bidder satisfied all elements of the standing requirement. The injury in fact was that "the extra requirements imposed costs and burdens on non-minority firms that preclude them from competing with MBEs and WBEs on an equal basis." *Id.* at 1518, 1519. The case at bar is indistinguishable from *Concrete Works*, and there is no justification for creating an intercircuit split of authority on this point.

Monterey Mechanical established injury in fact traceable to the challenged statute, and established redressability, for several reasons. One is that a minority-owned or women-owned bidder could keep the work for its class (and a firm owned and controlled by women who were minorities could keep the work for both classes). Keeping the work would avoid the loss of profits to subcontractors, and the time and expense of complying with the "good faith" requirements. Though Swinerton and Walberg subsequently won the contract, Monterey Mechanical did not know that when it submitted its bid. The time of bidding was the relevant time for determining whether Monterey Mechanical was unable "to compete on an equal footing in the bidding process." *Northeastern Florida Contractors*, 508 U.S. at 666, 113 S.Ct. at 2303. When it prepared and submitted its bid, Monterey Mechanical had to do so in the face of a statute conferring advantages on whatever competing bidders might be in groups identified by ethnicity and sex. The burden of bidding in a discriminatory context established by statute is, under *Northeastern Florida Contractors*, injury in fact caused by the challenged statute.

[4] Standing is also established in this case independently of whether minority or female competitors, if there were any, would have competed against Monterey Mechanical on a privileged basis. Standing doctrine "requires us to ask ... 'Was this person hurt by the claimed wrongs?' " *Snake River Farmers' Assn. v. Department of Labor*, 9 F.3d 792, 798 (9th Cir.1993). Even if a general contractor suffers no discrimination itself, it is hurt by a law requiring it to discriminate, or try to discriminate, against others on the basis of their ethnicity or sex. A person required by the government to discriminate by ethnicity or sex against others has standing to challenge the validity of the requirement, even though the government does not discriminate against him.

A person suffers injury in fact if the government requires or encourages as a condition of granting him a benefit that he discriminate against others based on their race or sex. Americans view ethnic or sex discrimination as "odious," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214, 115 S.Ct. 2097, 2106, 132 L.Ed.2d 158 (1995). The principle that ethnic discrimination is wrong is what makes discrimination against groups of which we are not members wrong, and by that principle, discrimination is wrong ***708** even if the beneficiaries are members of groups whose fortunes we would like to advance. The person required by government to engage in discrimination suffers injury in fact, albeit of a different kind, as does the person suffering the discrimination. A "law compelling persons to discriminate against other persons because of race" is a "palpable violation of the Fourteenth Amendment," regardless of whether the persons required to discriminate would have acted the same way regardless of the law. *Peterson v. City of Greenville*, 373 U.S. 244, 248, 83 S.Ct. 1119, 1121, 10 L.Ed.2d 323 (1963).

The contractor required to discriminate also suffers injury in fact because the statute exposes him to risk of liability for the discrimination. A private actor may be subject to section 1983 liability for discriminating against

persons based on their ethnicity or sex pursuant to a state law requiring it. *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 148, 152, 90 S.Ct. 1598, 1603, 26 L.Ed.2d 142 (1970). For example, the plaintiff in *Bras v. California Public Utilities Commission*, 59 F.3d 869 (9th Cir.1995), brought a section 1983 claim for damages against Pacific Bell for discriminating against the plaintiff in the course of complying with a state statutory scheme to increase minority and women owned businesses shares of utility contracting.

The contractor required to discriminate also suffers injury in fact because of the increased expense and difficulty of performing the contract. A construction contract is not completed when the winning bid is announced. The work must be done. A general contractor often uses the same specialty subcontractors on many jobs, because of successful past experience with them, so it would be a waste of time and money to solicit bids from strangers, and risky to accept them. The statute allows a women- and minority-owned contractor to subcontract out a fifth of the work to whomever it chooses, or keep the work itself, but denies this flexibility to contractors not in those groups.

Appellees have not argued absence of redressability. But for the minority and women enterprise goals and "good faith" requirements, Monterey Mechanical would have won the contract. The statute imposed injury in fact on Monterey Mechanical. Monterey Mechanical has standing to challenge the statute pursuant to which its bid was rejected.

B. Classification.

[5] Appellees argue that Monterey Mechanical's equal protection challenge has to fail, because the statute treats all general contractors bidding on state jobs alike. They argue that because general contractors are treated alike, there is no unequal treatment to which any scrutiny need be applied, that is, no classification. There are two aspects to this argument. One is that all general contractors are treated alike. To the extent that minority or women contractors could avoid the subcontracting and good faith requirements for their groups, the argument goes, the difference is de minimis. The second is that the scheme has enough flexibility, because a contractor can avoid the percentages by "good faith" efforts, so that its ethnicity and sex aspects cannot violate the Equal Protection Clause. The district court adopted the first of these arguments. Appellees' argument that the statute does not classify general contractors by ethnicity or sex is in some respects the standing argument in a slightly different form. Because it is made separately, and addresses the Equal Protection Clause rather than the case or controversy requirement in Article III, we discuss classification independently of standing.

1. Different treatment.

The argument that all general contractors are treated alike, regardless of sex or ethnicity, is mistaken. They are not. The statute requires that state contracts have "participation goals" of at least 15% minority, 5% women, and 3% disabled veteran enterprises:

[C]ontracts awarded by any state agency, department, officer, or other state governmental entity for construction, professional services ..., materials, supplies, equipment, alteration, repair, or improvement shall have statewide participation goals of not less than 15 percent for minority business enterprises, not less than 5 percent for women business enterprises and 3 percent***709** for disabled veteran business enterprises. These goals apply to the overall dollar amount expended each year by the awarding department....

Cal. Public Contract Code § 10115(c). A state agency making a contract award is required to award the contract to the low bidder "meeting or making good faith efforts to meet these goals":

(a) In awarding contracts to the lowest responsible bidder, the awarding department shall consider the efforts of a bidder to meet minority business enterprise, women business enterprise, and disabled veteran business enterprise goals set forth in this article. The awarding department shall award the contract to the lowest responsible bidder meeting or making good faith efforts to meet these goals.

(b) A bidder shall be deemed to have made good faith efforts upon submittal, within time limits specified by the awarding department, of documentary evidence that all of the following actions were taken:

(1) Contact was made with the awarding department to identify minority, women, and disabled veteran business enterprises.

(2) Contact was made with other state and federal agencies, and with local minority, women, and disabled veteran business enterprise organizations to identify minority, women, and disabled veteran business enterprises.

(3) Advertising was published in trade papers and papers focusing on minority, women, and disabled veteran business enterprises, unless time limits imposed by the awarding department do not permit that advertising.

(4) Invitations to bid were submitted to potential minority, women, and disabled veteran business enterprise contractors.

(5) Available minority, women, and disabled veteran business enterprises were considered.

Cal. Public Contract Code § 10115.2(a).

The statute allows a minority or women business enterprise to satisfy the goals by allocating the percentage of work for its group to itself. The statute requires the state to award the contract to the "bidder meeting ... the goals," Cal. Public Contract Code § 10115.2(a). It does not say that the "bidder" should meet the goals by subcontracting the work to someone else instead of keeping it for itself. It would be nonsensical to disqualify, for example, a minority enterprise's bid for not meeting the 15% minority goal, when the minority bidder proposed to do at least 15% of the work itself. The university bid documents accordingly say that one way to meet the goals is that, "[t]he bidder is an MBE and committed to performing not less that 15% of the contract dollar amount *with its own forces* or in combination with those of other MBEs and is committed to using WBEs for not less than five (5) percent of the contract dollar amount, and DVBEs for not less than three (3) percent of the contract dollar amount." Supplementary General Conditions § 1(b) (emphasis added). Likewise for women and disabled veteran bidders.

Under these provisions, a bidder not in any of the designated groups must subcontract out at least 23% of the job, or make good faith efforts to do so, to subcontractors in the designated groups. But a minority or female bidder can avoid that requirement by keeping that group's work for itself. Thus not all general contractors bidding on state projects are treated the same way. An enterprise in all the designated categories can, by keeping at least 23% of the work for itself, avoid any of the requirements of the statute.

The district court considered this difference, but concluded that it was *de minimis. De minimis non curat lex* means that the law does not concern itself with trifles. *Black's Law Dictionary* 482 (4th ed.1957); *Ballentine's Law Dict.* 330 (3d ed.1969). On this $21,698,000 job, it would be worth $3,254,700 of the gross to be a minority as compared with a non-minority bidder, if the bidder were to keep as much as possible of the work for itself. A bidder in all three categories could keep $4,990,540 that a bidder in none would have to subcontract out or demonstrate a good faith effort to do so. There is nothing *de minimis* about that kind of money.

***710 2. Good faith efforts.**

[6] Appellees argue that the classifications the statute makes are not subject to heightened levels of scrutiny, because they require only good faith attempts to satisfy goals, and do not impose rigid quotas. Thus a bidder may satisfy the goals without being in one of the designated classes, and without subcontracting 23% of the work to businesses in the designated classes, so long as it shows good faith.

Analysis of this argument requires that a distinction be drawn between whether the classifications themselves are permissible, considered in section D, and whether a softer system of discrimination avoids the Equal Protection Clause. For now, we are discussing only the latter proposition, whether there is a classification at all, not the former, whether the classification is permissible.

Appellees are correct in their argument that the statute does not impose rigid quotas. A bidder in none of the designated classes can get a contract even though it subcontracts none of the work whatsoever to anyone in the designated classes. Indeed, the University's analysis says that Swinerton and Walberg's winning bid had this breakdown, well under 23%:

Minority Participation		MWDVBE Breakdown	
African American:	$ 19,980	**MBE:**	13.92 %
Pacific Asian:	$ 3,000,000	**WBE:**	1.25 %

Anglo:	$18,678,000	**DVBE:**	0.00 %

Total Contract Amount: $21,698,000
[7]

Minority Participation		MWDVBE Breakdown	
African American	$ 262,000	**MBE:**	3.49 %
Hispanic	$ 306,700	**WBE:**	1.29 %
Native American	$ 15,788	**DVBE:**	0.0%
Asian Indian	$ 162,000		
“Anglo”	$20,633,512		

Total Contract Amount: $21,380,000

FN7. Here are the University's categories and numbers for Monterey Mechanical:

But the statute still has firm requirements, enforced by rejection of low bids like Monterey Mechanical's, unless all the requirements are met. State agencies “shall award the contract to the lowest responsible bidder meeting or making good faith efforts to meet” the percentage “goals.” Cal. Public Contract Code § 10115.2(a). That means that the state will not award a contract to a bidder which does neither. The “good faith efforts” have specific content. They require documented efforts to identify, focus advertising on, and solicit and consider bids from, firms in the designated classes:

(b) A bidder shall be deemed to have made good faith efforts upon submittal within time limits specified by the awarding department of documentary evidence that all of the following actions were taken:

(1) Contact was made with the awarding department to identify minority, women, and disabled veteran business enterprises.

(2) Contact was made with other state and federal agencies, and with local minority, women, and disabled veteran business enterprise organizations to identify minority, women, and disabled veteran business enterprises.

(3) Advertising was published in trade papers and papers focusing on minority, women, and disabled veteran business enterprises, unless time limits imposed by the awarding department do not permit that advertising.

(4) Invitations to bid were submitted to potential minority, women, and disabled veteran business enterprise contractors.

(5) Available minority, women, and disabled veteran business enterprises were considered.

Cal. Public Contract Code § 10115.2(b). Adherence is monitored, Calif. Public Contract Code § 10115.3(a). Though the requirements allow for awards to bidders who do not meet the percentage goals, they are rigid in requiring precisely described and monitored efforts to attain those goals.

The question whether a non-rigid system of goals and good faith efforts, as opposed to rigid quotas, is treated as a classification under the Equal Protection Clause, is settled by existing precedent. *Bras v. California Public Utilities*

Commission, 59 F.3d 869 (9th Cir.1995), dealt with a similar law, providing for "goals" and "methods for encouraging" minority and women subcontracts, and expressly abjuring "quotas." ***711**Cal. Pub. Util.Code § 8283(b). The state argued that a challenger lacked standing because of the absence of rigid requirements. We held that the provisions were not "immunized from scrutiny because they purport to establish goals rather than quotas." *Bras*, 59 F.3d at 874. We construed *Northeastern Florida Contractors* to mean that "the relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." *Bras*, 59 F.3d at 875.

Bras controls. In the case at bar, the statute does not require set-asides, but it encourages them. A bidder can avoid disqualification by seeing to it that 23% of the work goes to the designated classes, or showing that it tried to bring about that result. The Tenth Circuit has reached the same conclusion in an indistinguishable case, *Concrete Works of Colorado v. Denver*, 36 F.3d, 1513 (10th Cir.1994). The Denver ordinance at issue in that case was almost identical in material respects to the statute at issue here. It provided only for "goals" and "good faith" efforts to meet them, not quotas or rigid set-asides. Appellees do not cite any cases going the other way. We have no basis for setting up an intercircuit conflict on this settled issue.

It is much easier to imagine that good faith compliance, as opposed to meeting the goals by subcontracting out 23% of the work, might be *de minimis.* Good faith compliance does not cost millions of dollars. It does not seem much to ask of a bidder that it get the names of firms in the designated classes, advertise to them, and consider their bids. There is much appeal to enlarging the participation of minority-owned and women-owned firms by assuring that they as well as others receive full information on opportunities to bid.

But the question we are considering in this section of our opinion is whether the statute classifies, that is, whether it treats people differently by ethnicity or sex, not whether the purpose of the classification is attractive. The statute treats contractors differently according to their ethnicity and sex, with respect to the "good faith" requirement. It does not say that all contractors must assure that the opportunity to bid is advertised to all prospective subcontractors, including minority-owned and women-owned firms. Only those firms not minority or women owned must advertise to those respective groups, and only minority and women owned firms are entitled to receive the bid solicitation. A firm which is both minority and women owned, and keeps at least a fifth of the work, does not have to solicit any bids from firms identified by ethnicity or sex. If a minority and women owned firm does solicit bids from subcontractors, the firm is free under the statute before us to exclude non-minority, non-women owned firms from the solicitation.

We are not faced with a non-discriminatory outreach program, requiring that advertisements for bids be distributed in such a manner as to assure that all persons, including women-owned and minority-owned firms, have a fair opportunity to bid. The Equal Protection Clause as construed in *Adarand* applies only when the government subjects a "person to unequal treatment." There might be a non-discriminatory outreach program which did not subject anyone to unequal treatment. But this statute is not of that type.

Though worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness. The scheme requires the bid solicitation in the context of requiring "good faith efforts to meet [percentage] goals." Cal. Public Contract Code § 10115.2(a). It requires distribution of information only to members of designated groups, without any requirement or condition that persons in other groups receive the same information. Thus the statute may be satisfied by distribution of information exclusively to persons in the designated groups. Bidders in the designated groups are relieved, to the extent they keep the required percentages of work, of the obligation to advertise to people in their groups. The outreach the statute requires is not from all equally, or to all equally.

It is heuristically useful, in sorting out the question of whether a classification is made from the question whether the classification is permissible, to hypothesize the same provision in favor of white male firms. That way we can separate the question of whether the ***712** discrimination is permissible, which it would not be for white male firms, from the question whether there is discrimination at all. If the statute required solicitation of subcontract bids only to white male-owned firms, and did not require that white-male-owned firms make any solicitation if they kept the work, a court might well find that the scheme "discriminate[d] against MBEs and WBEs and continued to operate under 'the old boy network' in awarding contracts." *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1414 (9th Cir.1991). We would certainly conclude that the statute classified by ethnicity and sex.

The statutory classification also imposes higher compliance expenses on some firms than others, according to ethnicity and sex. To demonstrate "good faith," the bidder must contact the awarding department, state agencies, federal agencies, and minority and women organizations, to identify prospective subcontractors, locate and prepare advertisements for advertisements in papers focusing on those groups, and distribute invitations to bid to potential minority and women subcontractors. Cal. Public Contract Code § 10115.2(b). These efforts require time, which must be paid for, effort, and expense-they do not happen by themselves. The expenses-perhaps a few hundred or a few thousand dollars for wages and salaries, communications, and advertisements-are avoidable for firms in the designated classes to the extent they keep the required percentages of work for themselves.

[7] More important, we can find no authority, and appellees have cited none, for a *de minimis* exception to the Equal Protection Clause. The Supreme Court has held that, "*any* person, of whatever race, has the right to demand that *any* governmental actor subject to the Constitution justify *any* racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224, 115 S.Ct. at 2111 (emphasis added). We conclude that there is no *de minimis* exception to the Equal Protection Clause. Race discrimination is never a "trifle."

C. Heightened Scrutiny.

[8] We have concluded so far that Monterey Mechanical had standing to challenge the constitutionality of the statute, and that the statute makes a classification subject to Equal Protection analysis. That does not end the inquiry into probability of success on the merits. The next question is whether the classification is permissible.

The Equal Protection Clause protects "persons, not groups, so group classifications are in most circumstances prohibited, and are subjected to detailed judicial inquiry to insure that the *personal* right to equal protection of the laws has not been infringed." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 2112-13, 132 L.Ed.2d 158 (1995). Likewise, "parties who seek to defend gender based government action must demonstrate an exceedingly persuasive justification for that action." *United States v. Virginia*, 518 U.S. 515, ----, 116 S.Ct. 2264, 2274, 135 L.Ed.2d 735 (1996).

The Constitution entitles "any person" to equal protection of the laws. U.S. Const. Amend. 14, § 1. It draws no distinction by ethnicity or sex. The scrutiny applied to racial classifications "is not dependent on the race of those burdened or benefitted." *Adarand*, 515 U.S. at 222, 115 S.Ct. at 2110. An "exceedingly persuasive justification" must be presented for a sex classification, even if it "discriminates against males rather than against females." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-24, 102 S.Ct. 3331, 3335, 73 L.Ed.2d 1090 (1982).

Racial classifications are subject to "strict scrutiny," and "are Constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 226, 115 S.Ct. at 2113. Classifications based on sex must be justified by an "exceedingly persuasive justification," serve "important governmental objectives" and the means must be "substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, ----, ----, 116 S.Ct. 2264, 2274, 2275, 135 L.Ed.2d 735 (1996).

The statute benefits bidders and subcontractors who fit the classification "minority ***713** business enterprise" and "women business enterprise." Cal. Public Contract Code § 10115.2(a). A "women business enterprise" must be "at least 51% owned by one or more women," "whose management and daily operations are controlled by one or more women who own the business." Cal. Public Contract Code § 10115.1(f). A "minority business enterprise" must meet the same criteria with respect to the designated minorities. Cal. Public Contract Code § 10115.1(e).

For a racial classification to survive strict scrutiny in the context before us, it must be a narrowly tailored remedy for past discrimination, active or passive, by the governmental entity making the classification. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 482-84, 490-91, 109 S.Ct. 706, 716, 720, 102 L.Ed.2d 854 (1989). "Findings of societal discrimination will not suffice; the findings must concern prior discrimination by the government unit involved." *Id.* at 485, 109 S.Ct. at 716-17; *and see Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922, 930 (9th Cir.1987).

[9] The burden of justifying different treatment by ethnicity or sex is always on the government. "[A]ny person of whatever race has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224, 115 S.Ct. at 2111. For laws that classify by sex, "The burden of justification is demanding and it

rests entirely on the State." *United States v. Virginia*, 518 U.S. at ----, 116 S.Ct. at 2275.

In the case before us, the University offered no evidence whatsoever to justify the race and sex discrimination. When asked by Monterey Mechanical for statistics, the University said there were none. In their opposition papers to Monterey Mechanical's motion for preliminary injunction, the University and Swinerton & Walberg offered no evidence whatsoever that the University or the state had previously discriminated, actively or passively, against the groups benefitted by the statute. They never proposed to offer evidence of past discrimination in any form at any time. There are legislative findings, but they do not say that California State University, or the California state government, has in the past actively or passively discriminated against the benefitted groups. Cal. Public Contract Code § 10115(a). There are no legislative findings, and no fact findings by the district court, of past discrimination against the benefitted groups by the state or the University.

Instead, the legislative findings say that markets, prices and personal opportunities will be advanced by "the policy of the state to aid the interests of minority, women and disabled veteran business enterprises." *Id.* Phrases in the legislative findings say and imply that these enterprises have an "economically disadvantaged position." Cal. Public Contract Code § 10115(a)(4). But the legislative findings do not say whether the "economically disadvantaged position" has to do with past active or passive discrimination by the State, other entities, general societal discrimination, or factors other than discrimination.

Because the state made absolutely no attempt to justify the ethnic and sex discrimination it imposed, we do not reach the questions of how much proof, or what kinds of legislative findings, suffice. Unlike *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1414 (9th Cir.1991), there were no "detailed findings of prior discrimination" and no extensive evidence of discrimination submitted. Because appellees offered no evidence or argument justifying discrimination, we do not reach the question whether a more tolerant constitutional regime for sex discrimination would permit the part of the statute favoring women owned businesses to survive constitutional analysis if the part favoring minority businesses does not. *See United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735; *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922, 940-41 (9th Cir.1987). Even sex discrimination against males requires the state to bear the burden of justification. Likewise, because no justification has been offered for the group classifications at issue, ***714** we do not reach the question whether group discrimination *ipso facto* violates individuals' rights to equal protection of the laws. *See Adarand*, 515 U.S. at 239, 240, 115 S.Ct. at 2118, 2119 (Scalia, concurring, and Thomas, concurring).

Even if the purpose of a discriminatory scheme is legitimate, the scheme can survive strict scrutiny only if it is "narrowly tailored" to serve a compelling governmental interest. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 283, 106 S.Ct. 1842, 1852, 90 L.Ed.2d 260 (1986); *Adarand*, 515 U.S. at 235-37, 115 S.Ct. at 2117. The statute at issue is not "narrowly tailored." That it is not is shown by the same overbreadth in its definition of "minority" that the Supreme Court has noted for years in similar statutes. *Wygant*, 476 U.S. at 284 n. 13, 106 S.Ct. at 1852 n. 13; *City of Richmond v. J.A. Croson, Co.*, 488 U.S. at 505-06, 109 S.Ct. at 728:

(d) "Minority," for purposes of this section, means a citizen or lawful permanent resident of the United States is an ethnic person of color and who is: Black (a person having origins in any of the Black racial groups of Africa); Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race); Native American (an American Indian, Eskimo, Aleut, or Native Hawaiian); Pacific-Asian (a person whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, or the United States Trust Territories of the Pacific including the Northern Marianas); Asian-Indian (a person whose origins are from India, Pakistan, or Bangladesh); or any other group of natural persons identified as minorities in the respective project specifications of an awarding department or participating local agency.

Cal. Public Contract Code § 10115.1(d).

In *Croson*, 488 U.S. at 505-06, 109 S.Ct. at 728, the Court was struck by the inclusion of Aleuts and Eskimos in a Richmond, Virginia, ordinance. Likewise, in *Wygant* the court said that the inclusion of groups highly unlikely to have been the victims of past discrimination by the school board "illustrate[ ] the undifferentiated nature of the plan." *Wygant*, 476 U.S. at 284 n. 13, 106 S.Ct. at 1852 n. 13. The statute before us also lists groups highly unlikely to have been discriminated against in the California construction industry. The Aleuts, for example, a distinct people native

to the western part of the Alaska peninsula and the Aleutian Islands, have suffered brutal oppression repeatedly in their history. But it would be frivolous to suggest that California State Polytechnic University at San Luis Obispo, or the State of California, have actively or passively discriminated against Aleuts in the award of construction contracts. In *Croson,* the Court observed in reference to Aleuts and Eskimos that "the gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation." *Id.* at 506, 109 S.Ct. at 728. Likewise here, some of the groups designated are, in the context of a California construction industry statute, red flags signalling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.

The list in the statute before us might be explained by a laudable desire to improve the social position of various groups perceived to be less well off. Or conceivably those who drafted the statute for the legislature copied from a model form and neglected to strike its inapplicable portions. One explanation which is not plausible is the one needed as a justification, that the list is narrowly tailored to remedy past discrimination, active or passive, by the State of California. Appellees submitted no evidence and offer no argument to the contrary. "A broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny." *Hopwood v. State of Texas,* 78 F.3d 932, 951 (5th Cir.1996).

We are compelled by firmly established law to conclude that the statute violates the Equal Protection Clause. The state has not even attempted to show that the statute is narrowly tailored to remedy past discrimination. The laudable legislative goal, that "the actual and potential capacity of minority, women, and disabled veteran business enterprises [be] encouraged and developed," Calif. Public Contract Code § 10115(a)(1), cannot ***715** be achieved by ethnic and sex discrimination against individuals excluded by ethnicity or sex from these groups, in the absence of Constitutionally required justification.

D. Irreparable Harm.

The district court concluded that Monterey Mechanical's probable success on the merits was low, so gave very limited consideration to whether it would suffer irreparable harm if interlocutory equitable relief were denied, and whether granting a preliminary injunction would impose hardship on the University and Swinerton and Walberg. *See Stanley v. University of Southern California*, 13 F.3d 1313 (9th Cir.1994); *Martin v. International Olympic Committee*, 740 F.2d 670, 674-75 (9th Cir.1984). The district court found that the balance of hardships did not tip "sufficiently" in favor of Monterey Mechanical, "especially in view of the possibility of loss of funding if the construction contract is not completed speedily."

The University argues that Monterey Mechanical was properly denied a preliminary injunction, even if its probability of success on the merits was high, because Monterey Mechanical demonstrated no irreparable harm, and the balance of hardships tipped in the University's favor. The University's evidence of hardship was that if a preliminary injunction stopped the project from proceeding while the litigation was pending, completion would probably be delayed until past the date when unencumbered funding would revert to a state bond reserve. Further, the University filed evidence that faculty and staff would be delayed in obtaining the benefits of the project, and the University would be delayed in enjoying the benefits of saving money on electricity because of the project. Monterey Mechanical showed two kinds of harm: (1) loss of the contract, and (2) unconstitutional discrimination in the bidding process based on race and sex. While money damages might remedy the first harm, it is not apparent to us how they would remedy the second.

"We have stated that an alleged constitutional infringement will often alone constitute irreparable harm." *Associated General Contractors v. Coalition For Economic Equity*, 950 F.2d, 1401, 1412 (9th Cir.1991). We have been compelled to conclude that the statute, insofar as it classifies by ethnicity and sex, is unconstitutional. That makes Monterey's probability of success much higher than it was when preliminary injunctive relief was considered in district court. We therefore remand so that the district court may reconsider preliminary equitable relief in light of our determination of unconstitutionality.

CONCLUSION

All persons, of either sex and any ethnicity, are entitled to equal protection of the law. That principle, and only that principle, guarantees individuals that their ethnicity or sex will not turn into legal disadvantages as the political power of one or another group waxes or wanes. The statute at issue in this case violates the Equal Protection Clause, so the plaintiff's probability of success on the merits in their challenge to the ethnic and sex provisions of the statute is high. The district court must therefore reconsider the motion for preliminary injunction in light of the unconstitutionality of the statute.

REVERSED AND REMANDED.

125 F.3d 702, 97 Cal. Daily Op. Serv. 7099, 97 Daily Journal D.A.R. 11,464
(Cite as: 125 F.3d 702)

C.A.9 (Cal.),1997.
Monterey Mechanical Co. v. Wilson
125 F.3d 702, 97 Cal. Daily Op. Serv. 7099, 97 Daily Journal D.A.R. 11,464

END OF DOCUMENT

THE PEOPLE, Plaintiff,
v.
HARRY OKEN et al., Defendants; TONY ALARCON, Appellant; EL MONTE SCHOOL DISTRICT et al., Respondents.

Civ. No. 22496.

District Court of Appeal, Second District, Division 3, California.
Apr. 17, 1958.

HEADNOTES

(1) Appeal and Error § 41--Decisions Appealable--Orders on Motion to Strike.

While an order striking a pleading is not ordinarily appealable, the rule is otherwise where a cross-complaint is directed against cross-defendants not otherwise parties to the action.

(2) Pleading § 171--Amendment--On Leave of Court.

An attempted incorporation of counts or causes of action in an amended cross-complaint without leave of court is ineffective and may not be treated as a part of the pleading in the case.
See **Cal.Jur.2d,** Pleading, § 232; **Am.Jur.,** Pleading, § 291.

(3) Schools § 56, 57--Buildings and Construction.

A private citizen may not maintain an action for a judgment declaring that the public interest and necessity require the construction by a school district of a school building and "the acquisition and appropriation by said school district of a site upon which said building may be erected within that certain tract of land" described in the pleading; where, when or how, if at all, a school district shall construct school buildings is within the sole competency of its governing board to determine.

(4) Eminent Domain § 11, 150(1)--Who May Exercise Right-- IndividualsPleadings.

A private person seeking to exercise the right of eminent domain must not only allege that he proposes to devote the property sought to be acquired to one of the public uses provided in Code Civ. Proc., § 1238, but must also make it appear that he is authorized to devote the property to the public use in question or that he is a person authorized to administer or have "charge of such use."
See **Cal.Jur.2d,** Eminent Domain, §§ 229, 282; **Am.Jur.,** Eminent Domain, § 28.

(5) Pleading § 13--Subject Matter--Facts Judicially Noticed.

An allegation by way of conclusion that the pleader "is a person, competent and qualified to acquire the real property" described in his pleading "as agent of the state and/or person in charge of the uses" therein set forth, should be disregarded, where the appellate court judicially knows it is untrue.

(6) Schools § 2--Legislative Power and Duty.

Const., art. IX, §§ 5, 6, declaring that the Legislature shall provide for "a system of common schools" and "a public school system," make the school system a matter of state care and supervision; the term "system" itself imports a unity of purpose as well as entirety of operation, and the direction to the Legislature to provide "a" system of common schools means one system applicable to all common schools; this duty, so far as the state has by the adoption of the Constitution undertaken it, cannot be delegated to any agency.
See **Cal.Jur.,** Schools, §§ 2, 4.

(7) Pleading § 254--Motion to Strike--Amended Pleading.

An amended cross-complaint was properly stricken by the trial court where it wholly failed to state a cause of action and was patently frivolous and sham.

(8) Pleading § 254--Motion to Strike--Amended Pleading.

Though there is no statutory provision for striking complaints from the files as there is with respect to sham or frivolous answers (Code Civ. Proc., § 453), a court may, by virtue of its inherent power to prevent frustration or abuse of its processes, strike a purported complaint that fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration.

SUMMARY

APPEAL from an order of the Superior Court of Los Angeles County striking a third amended

cross-complaint. Aubrey N. Irwin, Judge. Affirmed.

COUNSEL

Alexander Ruiz and Manuel Ruiz, Jr., for Appellant.

Harold W. Kennedy, County Counsel (Los Angeles), and Edwin P. Martin, Deputy County Counsel, for Respondents.

PATROSSO, J. pro tem. [FN*]

FN* Assigned by Chairman of Judicial Council.

This is an appeal by cross-complainant Tony Alarcon from an order striking his third amended cross-complaint as against the cross-defendants El Monte School District and county of Los Angeles. (1) While an order striking a pleading is not ordinarily appealable, the rule is otherwise where, as here, the cross-complaint is directed against cross-defendants not otherwise parties to the action. (*Trask v. Moore* (1944), 24 Cal.2d 365, 373 [149 P.2d 854].)

The action in which the cross-complaint was filed is one instituted on behalf of the People of the State of California by ***458** the district attorney of Los Angeles County against numerous defendants, including cross-defendant, alleged to be the owners or occupants of properties within an area comprising some 24 acres located in the county of Los Angeles and commonly known as "Hick's Camp," to abate a public nuisance alleged to exist upon the properties located therein by reason of the maintenance thereon of dilapidated buildings and unsanitary conditions therein more particularly described.

A demurrer having been sustained with leave to amend to the original cross-complaint, appellant filed a second amended cross-complaint containing four separate causes of action. Demurrers interposed by the respondents to the latter complaint were sustained without leave to amend as to the first, second and fourth cause of action thereof. Thereafter appellant filed a third amended cross-complaint which was stricken upon motion of the respondents as hereinbefore stated.

The third amended cross-complaint, as is likewise true of its predecessors, is in many respects a remarkable document. It purports to incorporate therein by reference, the first, second and fourth causes of action of the second amended cross-complaint to which, as previously stated, demurrers had been sustained without leave to amend. It then alleges that the action is brought by the appellant "on behalf of apprximately [sic] 35 persons similarly situated, named defendants, in the second amended complaint of nuisance on file herein, and also as agent for the State of California, and the person in charge of the public uses hereinafter set forth and requested." It then alleges that the El Monte School District and numerous individually named cross-defendants claim an interest in the property described in Exhibit "A," attached to the cross-complaint, which apparently comprises a portion of the property described in plaintiff's complaint, whereon are located the conditions which are sought to be abated as a public nuisance. It further alleges "that the public interest and necessity require that the said property be acquired by cross complainant as agent of the State of California, as provided in section 1001 of the California Civil Code. That cross complainant, Tony Alarcon, is a person, competent and qualified to acquire the real property and improvements thereon, described herein, as agent of the State and/or person in charge of the uses hereinafter set forth. That cross complainant seeks to take and condemn private property, to wit: Real Estate and improvements, for the public uses hereinafter ***459** set forth. That the plaintiff and cross defendants, El Monte School District, Ernest Roll, District Attorney for Los Angeles County and the County of Los Angeles, are public bodies within the purview of subsection 21 of the section 1238 of the California Code of Civil Procedure, ... to wit: To demolish, clear, abate or remove buildings from the area known as 'Hicks Camp' and herein described in exhibit 'A,' for the reason that the same are detrimental to the health, safety and morals of the people, and because of dilapidation, overcrowding, faulty arrangement or design, or lack of ventilation or sanitary facilities of the dwellings predominating in said area. That the public interest and necessity require the construction by the El Monte School District of a school building and also the acquisition and appropriation by said school district of a site upon which said building may be erected within that certain tract of land hereinabove described. In conjunction therewith, said public interest and necessity require, that buildings, dwellings and structures within said tract of land be demolished, cleared, abated and/or removed, in the interest of the

health, safety and morals of the people, because of dilapidation, overcrowding, faulty arrangement or design, or lack of ventilation or sanitary facilities of the dwellings therein, in a manner that will be most compatible with the greatest public good and the least private injury. ... That there is grave danger of the creation of a public nuisance, unless the public uses herein referred to are provided for and the public interest and necessity stated above be adjuticated [sic]."

The cross-complaint closes with a prayer that the cross-defendants be required to set forth the nature, character, extent and value of their several estates or interest in the parcels of real property sought to be condemned and the severance damage, if any, accruing thereto; that the value of each separate interest or estate sought to be condemned and the severance damages, if any, be ascertained, and that upon payment to the defendants entitled to compensation of the several amounts so ascertained, the court make and enter a final order of condemnation, "conveying to cross complainant, as agent for the state, the properties for the public use above set forth."

We have ignored the allegations contained in the first, second and fourth causes of action, contained in the second amended cross-complaint, which were attempted to be incorporated ***460** by reference in the third amended cross-complaint in view of the fact that the demurrers interposed to these causes of action had, as noted, been sustained without leave to amend. (2) The attempted incorporation of these counts in the third amended cross-complaint without leave of the court is ineffective and they may not be treated as a part of the pleading in the case. (39 Cal.Jur.2d p. 339.) Moreover, without here undertaking to set forth in detail the voluminous allegations of said counts, we are completely satisfied that the trial court properly sustained the demurrers thereto without leave to amend. Each of these three causes of action seemingly undertakes to state a cause of action for monetary and injunctive relief against the respondents upon some undiscernible theory for damages which the cross-complainant and others similarly situated allegedly will sustain if the plaintiff prevails in its action to abate the nuisances alleged to exist upon the properties owned by them.

(3) From the allegations of appellant's pleadings which we have above summarized in some detail, it would appear that the relief which he seeks thereby as against the respondents is a judgment declaring that the public interest and necessity require the construction by the respondent El Monte School District of a school building and "the acquisition and appropriation by said school district of a site upon which said building may be erected within that certain tract of land" in the cross-complaint described. We know of no law, and none has been called to our attention, which authorizes a private citizen to maintain such an action. Where, when or how, if at all, a school district shall construct school buildings is a matter within the sole competency of its governing board to determine. (*Montebello Unified School Dist. v. Keay* (1942), 55 Cal.App.2d 839, 843-844 [131 P.2d 384].)

If, however, the third amended cross-complaint be construed as one whereby appellant as a private citizen seeks to acquire property for the purpose of constructing and operating a public school, it is likewise unauthorized by law. Section 1001 of the Civil Code, upon which appellant assertedly seeks to predicate his action, while authorizing any person, as "an agent of the State" or as "a person in charge of such use" to acquire private property under the power of eminent domain for any of the public uses provided in section 1238 of the Code of Civil Procedure is wholly without application. (4) A private person seeking to exercise the right of eminent domain must not only allege that he proposes to devote the ***461** property sought to be acquired to one of the public uses provided in section 1238, but it must likewise be made to appear that he is authorized to devote the property to the public use in question, or otherwise stated, that he is a person authorized to administer or have "charge of such use." (*Beveridge v. Lewis* (1902), 137 Cal. 619, 621 [67 P. 1040, 70 P. 1083, 92 Am.St.Rep. 188, 58 L.R.A. 581].) (5) While appellant alleges by way of conclusion that he "is a person, competent and qualified to acquire the real property" described in his pleading "as agent of the State and/or person in charge of the uses" therein set forth, the allegation must be disregarded, because we judicially know it is untrue. (*Wilson v. Loew's Inc.* (1956), 142 Cal.App.2d 183, 187-188 [298 P.2d 152].) (6) "The constitution declares that the legislature shall provide 'for a system of common schools,' or, as expressed elsewhere in the organic law, 'a public school system.' " (23 Cal.Jur. p. 18; Cal. Const., art. IX, §§ 5-6.) "By these two sections, the constitution makes the school system a matter of state care and supervision. The term 'system' itself imports a unity of purpose as well as an entirety of operation, and the direction to the legislature to

provide 'a' system of common schools means one system which shall be applicable to all the common schools. And this duty to provide for the education of the children of the state, so far as the state has, by the adoption of the constitution, undertaken it, cannot be delegated to any agency." (23 Cal.Jur. 21-22.) As said in *Piper v. Big Pine School Dist.*, 193 Cal. 664, 669 [226 P. 926]:

"It is in a sense exclusively the function of the state which cannot be delegated to any other agency. The education of the children of the state is an obligation which the state took over to itself by the adoption of the constitution. To accomplish the purposes therein expressed the people must keep under their exclusive control, through their representatives, the education of those whom it permits to take part in directing the affairs of state."

From the allegations of the cross-complaint, it affirmatively appears that "(i)n this case it is the school district, acting through its governing board, that is the agent of the State in charge of the use for which the land was sought." (*Montebello Unified School Dist. v. Keay, supra.*)

(7) The third amended cross-complaint wholly fails to state a cause of action and is patently frivolous and sham. ***462** It was therefore properly stricken by the trial court. (8) As said by this court in *Neal v. Bank of America* (1949), 93 Cal.App.2d 678, 682-683 [209 P.2d 825]:

"It may be conceded that there is no statutory provision for striking complaints from the files, as there is in respect to sham or frivolous answers. (Code Civ. Proc., § 453.) However, the courts have inherent power, by summary means, to prevent frustration, abuse, or disregard of their processes. (41 Am.Jur. §§ 346, 347, p. 527; anno., 13 Am.St.Rep. 640.) ... In *Santa Barbara County v. Janssens*, 44 Cal.App. 318 [186 P. 372], it was held that an order striking an amended cross-complaint from the files was within the jurisdiction of the trial court, and presumably correct in the absence of error disclosed by the record. The fundamental principle running through the cases is that a court is not required to tolerate a purported amended complaint which fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration. ... It cannot be doubted that the court had jurisdiction to strike plaintiff's amended complaint on the ground that it was frivolous and a sham and the order clearly was not an abuse of discretion."

The order appealed from is affirmed.

Shinn, P. J., and Wood (Parker), J., concurred.

A petition for a rehearing was denied May 7, 1958, and appellant's petition for a hearing by the Supreme Court was denied June 11, 1958. Carter, J., was of the opinion that the petition should be granted. ***463**

Cal.App.2.Dist.
People v. Oken
159 Cal.App.2d 456, 324 P.2d 58

END OF DOCUMENT

Supreme Court of the United States
REGENTS OF the UNIVERSITY OF CALIFORNIA, Petitioner,
v.
Allan BAKKE.

No. 76–811.
Argued Oct. 12, 1977.
Decided June 28, 1978.

White male whose application to state medical school was rejected brought action challenging legality of the school's special admissions program under which 16 of the 100 positions in the class were reserved for "disadvantaged" minority students. School cross-claimed for declaratory judgment that its program was legal. The trial court declared the program illegal but refused to order the school to admit the applicant. The California Supreme Court, 18 Cal.3d 34, 132 Cal.Rptr. 680, 553 P.2d 1152, affirmed the finding that the program was illegal and ordered the student admitted and the school sought certiorari. The Supreme Court, Mr. Justice Powell, held that: (1) the special admissions program was illegal, but (2) race may be one of a number of factors considered by school in passing on applications, and (3) since the school could not show that the white applicant would not have been admitted even in the absence of the special admissions program, the applicant was entitled to be admitted.

Affirmed in part and reversed in part.

Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall and Mr. Justice Blackmun filed an opinion concurring in the judgment in part and dissenting.

Mr. Justice White filed a separate opinion.

Mr. Justice Marshall filed a separate opinion.

Mr. Justice Blackmun filed a separate opinion.

Mr. Justice Stevens concurred in the judgment in part and dissented in part and filed an opinion in which Mr. Chief Justice Burger, Mr. Justice Stewart and Mr. Justice Rehnquist joined.

West Headnotes

[1] Federal Courts 170B 511.1

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk511 Scope and Extent of Review
170Bk511.1 k. In General. Most Cited Cases
(Formerly 170Bk511)

Where, in action brought by white applicant to medical school for declaratory and injunctive relief against the school's denial of admission, the school had cross-claimed for declaratory judgment that its special admissions program for minority applicants was constitutional and where the lower court had determined, as a reason for its judgment in favor of the applicant, that the school's use of race in its consideration of any candidate's application was unlawful, it was proper for the Supreme Court to deal not only with the issue of the denial of admission to the white applicant but also to deal with the propriety of the use of race as a factor in reviewing applications generally.

[2] Federal Courts 170B 511.1

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk511 Scope and Extent of Review
170Bk511.1 k. In General. Most Cited Cases
(Formerly 170Bk511)

Although the petitioner for certiorari did not object to respondent's standing, where several amici had suggested that the respondent had lacked standing to bring the suit, Supreme Court was required to consider the issue of standing because it related to that court's jurisdiction under the Constitution. U.S.C.A.Const. art. 3, § 1 et seq.

[3] Stipulations 363 3

363 Stipulations
363k3 k. Matters Which May Be Subject of Stipula-

tion. Most Cited Cases

Medical school's concession that white applicant who challenged his rejection on the ground that it was based on improper racial considerations had standing to challenge his rejection and to challenge the school's special admissions programs for minority students was not an improper attempt to stipulate to a conclusion of law or to disguise actual facts of record.

[4] Federal Civil Procedure 170A 103.3

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.3 k. Causation; Redressability. Most Cited Cases
(Formerly 92k42(2))

The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. U.S.C.A.Const. art. 3, § 1 et seq.

[5] Civil Rights 78 1331(2)

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1331 Persons Aggrieved, and Standing in General
78k1331(2) k. Education. Most Cited Cases
(Formerly 78k201, 78k13.6)

Even though unsuccessful white applicant to medical school could not show that he would have been admitted to the school except for the school's special admissions program which reserved 16 of the 100 places for minority students, he had standing to maintain an action challenging the legality of the special admissions program since the program had precluded the applicant from competing for all 100 places because of his race. U.S.C.A.Const. art. 3, § 1 et seq.

[6] Civil Rights 78 1331(2)

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1331 Persons Aggrieved, and Standing in General
78k1331(2) k. Education. Most Cited Cases
(Formerly 78k201, 78k13.6)

Fact that white applicant to medical school was not a "disadvantaged" applicant did not preclude him from having standing to challenge the school's special admissions program which reserved 16 of the 100 places for "disadvantaged" minority students where the special admissions program was a minority enrollment program with a secondary "disadvantage" element and where white "disadvantaged" students were never considered under the special program. U.S.C.A.Const. art. 3, § 1 et seq.

[7] Civil Rights 78 1055

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1055 k. Publicly Assisted Programs. Most Cited Cases
(Formerly 78k102.1, 78k102, 78k2)

Purpose of Title VI of the Civil Rights Act is the halting of federal funding of entities which violate a prohibition of racial discrimination similar to that of the Constitution. Civil Rights Act of 1964, § 601 et seq. as amended 42 U.S.C.A. § 2000d et seq.

[8] Civil Rights 78 1055

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1055 k. Publicly Assisted Programs. Most Cited Cases
(Formerly 78k126, 78k111, 78k3)

Title VI of the Civil Rights Act proscribes only those racial classifications which would violate the equal protection clause of the Fourteenth Amendment or the Fifth Amendment. Civil Rights Act of 1964, § 601 et seq. as amended 42 U.S.C.A. § 2000d et seq.; U.S.C.A.Const. Amends. 5, 14.

[9] Constitutional Law 92 3250

92 Constitutional Law
92XXVI Equal Protection

92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3250 k. In General. Most Cited Cases
(Formerly 92k215)

The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color; if both are not accorded the same protection, then it is not equal. (Per Mr. Justice Powell with the Chief Justice and three Justices concurring in the judgment in part.)

[10] Civil Rights 78 1009

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1007 Bases of Discrimination and Classes Protected
78k1009 k. Race, Color, Ethnicity, or National Origin. Most Cited Cases
(Formerly 78k104.2, 78k104.1, 78k104, 78k3)

Civil Rights 78 1033(3)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1030 Acts or Conduct Causing Deprivation
78k1033 Discrimination in General
78k1033(3) k. Affirmative Action and Reverse Discrimination. Most Cited Cases
(Formerly 78k104.2, 78k104.1, 78k104, 78k3)

Racial and ethnic distinctions of any sort are inherently suspect and call for the most exacting judicial examination; such suspect classifications are subject to strict scrutiny and can be justified only if they further a compelling government purpose and, even then, only if no less restrictive alternative is available.

[11] Civil Rights 78 1009

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1007 Bases of Discrimination and Classes Protected
78k1009 k. Race, Color, Ethnicity, or National Origin. Most Cited Cases
(Formerly 78k104.2, 78k104.1, 78k104, 78k3)

Civil Rights 78 1033(3)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1030 Acts or Conduct Causing Deprivation
78k1033 Discrimination in General
78k1033(3) k. Affirmative Action and Reverse Discrimination. Most Cited Cases
(Formerly 78k104.2, 78k104.1, 78k104, 78k3)

Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake and is forbidden by the Constitution. (Per Mr. Justice Powell with the Chief Justice and three Justices concurring in the judgment in part.)

[12] Civil Rights 78 1033(3)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1030 Acts or Conduct Causing Deprivation
78k1033 Discrimination in General
78k1033(3) k. Affirmative Action and Reverse Discrimination. Most Cited Cases
(Formerly 78k111, 78k3)

A classification which aids persons who are perceived as members of relatively victimized groups at the expense of other innocent individuals is permissible only when there are judicial, legislative, or administrative findings of constitutional or statutory violations; after such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated.

[13] Civil Rights 78 1061

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1061 k. Admission. Most Cited Cases
(Formerly 78k127.1, 78k127, 78k3)

The purpose of helping certain groups whom the fa-

culty of state medical school perceived as being victims of societal discrimination did not justify a classification, for admissions purposes, which imposed disadvantages upon white applicants who bore no responsibility for whatever harm the beneficiaries of the special admissions program were thought to have suffered. (Per Mr. Justice Powell with the Chief Justice and three Justices concurring in the judgment in part.)

[14] Colleges and Universities 81 9.15

81 Colleges and Universities
81k9 Students
81k9.15 k. Admission or Matriculation. Most Cited Cases
(Formerly 81k9)

The attainment of a diverse student body is a constitutionally permissible goal for an institution of higher education; however, ethnic diversity is only one element in a range of factors which a university may properly consider in attaining the goal of a heterogeneous student body; although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. (Per Mr. Justice Powell with four Justices concurring in the judgment in part and with the Chief Justice and three Justices concurring in the judgment in part.)

[15] Colleges and Universities 81 9.15

81 Colleges and Universities
81k9 Students
81k9.15 k. Admission or Matriculation. Most Cited Cases
(Formerly 81k9)

A plan for achieving educational and student body diversity, such as used by Harvard College, in which race is a factor in some admission decisions and in which target quotas are not set for the number of students of any particular background and in which each applicant is treated as an individual in the admissions process is constitutional, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination. U.S.C.A.Const. Amends. 1, 5, 14.

[16] Colleges and Universities 81 9.15

81 Colleges and Universities
81k9 Students
81k9.15 k. Admission or Matriculation. Most Cited Cases
(Formerly 81k9)

The denial to white applicant to medical school of his right to individual consideration without regard to race was the principal evil of medical school's special admissions program which reserved 16 of the 100 places in each class for “disadvantaged” members of minority groups; the fatal flaw in a preferential program was its disregard of individual rights. (Per Mr. Justice Powell with the Chief Justice and three Justices concurring in the judgment in part.) U.S.C.A.Const. Amend. 14.

[17] Colleges and Universities 81 9.15

81 Colleges and Universities
81k9 Students
81k9.15 k. Admission or Matriculation. Most Cited Cases
(Formerly 81k9)

The state has a substantial interest which may legitimately be served by a properly devised admissions program for its medical school which involves the competitive consideration of race and ethnic origin; medical school need not forego all considerations of race of applicants in determining which applicants will be admitted to the school.

[18] Civil Rights 78 1448

78 Civil Rights
78III Federal Remedies in General
78k1448 k. Judgment and Relief in General. Most Cited Cases
(Formerly 78k261, 78k13.16)

Since medical school could not show that, were it not for the existence of its unlawful special admissions program which reserved 16 of the 100 places in the class for “disadvantaged” minority students, white applicant still would not have been admitted, white applicant who successfully challenged the legality of the special admissions program was entitled to relief admitting him to the school. (Per Mr. Justice Powell with the Chief Justice and three Justices concurring in the judgment in part.)

[19] Federal Courts 170B 513

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk513 k. Determination and Disposition of Cause. Most Cited Cases

Where medical school had rejected white male's application in part because it had reserved 16 of the 100 places in the class for "disadvantaged" minority group members, and where the special admissions program was found to be illegal, school was not entitled to attempt to reconstruct what might have happened with respect to the white male's application had the school been operating a legitimate admissions program so that there was no need for the Supreme Court to remand the case for that purpose rather than affirming an order directing that the white male be admitted. (Per Mr. Justice Powell with the Chief Justice and three Justices concurring in the judgment in part.)

*****2735 *265** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The Medical School of the University of California at Davis (hereinafter Davis) had two admissions programs for the entering ****2736** class of 100 students—the regular admissions program and the special admissions program. Under the regular procedure, candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. About one out of six applicants was then given an interview, following which he was rated on a scale of 1 to 100 by each of the committee members (five in 1973 and six in 1974), his rating being based on the interviewers' summaries, his overall grade point average, his science courses grade point average, his Medical College Admissions Test (MCAT) scores, letters of recommendation, extracurricular activities, and other biographical data, all of which resulted in a total "benchmark score." The full admissions committee then made offers of admission on the basis of their review of the applicant's file and his score, considering and acting upon applications as they were received. The committee chairman was responsible for placing names on the waiting list and had discretion to include persons with "special skills." A separate committee, a majority of whom were members of minority groups, operated the special admissions program. The 1973 and 1974 application forms, respectively, asked candidates whether they wished to be considered as "economically and/or educationally disadvantaged" applicants and members of a "minority group" (blacks, Chicanos, Asians, American Indians). If an applicant of a minority group was found to be "disadvantaged," he would be rated in a manner similar to the one employed by the general admissions committee. Special candidates, however, did not have to meet the 2.5 grade point cutoff and were not ranked against candidates in the general admissions process. About one-fifth of the special applicants were invited for interviews in 1973 and 1974, following which they were given benchmark scores, and the top choices were then given to the general admissions committee, which could reject special candidates for failure to meet course requirements or other specific deficiencies. The special committee continued to recommend candidates until 16 special admission selections had been made. During a four-year period 63 minority ***266** students were admitted to Davis under the special program and 44 under the general program. No disadvantaged whites were admitted under the special program, though many applied. Respondent, a white male, applied to Davis in 1973 and 1974, in both years being considered only under the general admissions program. Though he had a 468 out of 500 score in 1973, he was rejected since no general applicants with scores less than 470 were being accepted after respondent's application, which was filed late in the year, had been processed and completed. At that time four special admission slots were still unfilled. In 1974 respondent applied early, and though he had a total score of 549 out of 600, he was again rejected. In neither year was his name placed on the discretionary waiting list. In both years special applicants were admitted with significantly lower scores than respondent's. After his second rejection, respondent filed this action in state court for mandatory, injunctive, and declaratory relief to compel his admission to Davis, alleging that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964, which provides, *inter alia*, that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance. Petitioner cross-claimed for a declaration that its special admissions program was lawful. The trial court found that the special program operated as a racial quota, because minority applicants in that program were rated only against one another, and 16 places in the class of 100 were reserved for

them. Declaring that petitioner could not take race into account in making admissions decisions, the program was held to violate the Federal and State Constitutions and Title VI. Respondent's admission was not ordered, however, for lack of proof that he would have ****2737** been admitted but for the special program. The California Supreme Court, applying a strict-scrutiny standard, concluded that the special admissions program was not the least intrusive means of achieving the goals of the admittedly compelling state interests of integrating the medical profession and increasing the number of doctors willing to serve minority patients. Without passing on the state constitutional or federal statutory grounds the court held that petitioner's special admissions program violated the Equal Protection Clause. Since petitioner could not satisfy its burden of demonstrating that respondent, absent the special program, would not have been admitted, the court ordered his admission to Davis.

Held: The judgment below is affirmed insofar as it orders respondent's admission to Davis and invalidates petitioner's special admissions program,***267** but is reversed insofar as it prohibits petitioner from taking race into account as a factor in its future admissions decisions.

18 Cal.3d 34, 132 Cal.Rptr. 680, 553 P.2d 1152, affirmed in part and reversed in part.

Mr. Justice POWELL concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. 2744–2747.

2. Racial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny. While the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, petitioner's special admissions program, which forecloses consideration to persons like respondent, is unnecessary to the achievement of this compelling goal and therefore invalid under the Equal Protection Clause. Pp. 2747–2764.

3. Since petitioner could not satisfy its burden of proving that respondent would not have been admitted even if there had been no special admissions program, he must be admitted. P. 2764.

Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. 2768–2781.

2. Racial classifications call for strict judicial scrutiny. Nonetheless, the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession is sufficiently important to justify petitioner's remedial use of race. Thus, the judgment below must be reversed in that it prohibits race from being used as a factor in university admissions. Pp. 2782–2794.

Mr. Justice STEVENS, joined by THE CHIEF JUSTICE, Mr. Justice STEWART, and Mr. Justice REHNQUIST, being of the view that whether race can ever be a factor in an admissions policy is not an issue here; that Title VI applies; and that respondent was excluded from Davis in violation of Title VI, concurs in the Court's judgment insofar as it affirms the judgment of the court below ordering respondent admitted to Davis. Pp. 2809–2815.

***268** Archibald Cox, Cambridge, Mass., for petitioner.

Sol. Gen. Wade H. McCree, Jr., Washington, D. C., for United States, as amicus curiae, by special leave of Court.

Reynold H. Colvin, San Francisco, Cal., for respondent.

***269** Mr. Justice POWELL announced the judgment of the Court.

[1] This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission***270** of a specified number of students from certain minority groups. The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and the Equal Protection Clause of the Fourteenth****2738** Amendment. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. It refused, however, to order respondent's admission to the Medical School, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations. The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program un-

lawful and enjoining petitioner from considering the race of any applicant.[FN**] ***271** It modified that portion of the judgment denying respondent's requested injunction and directed the trial court to order his admission.

FN** Mr. Justice STEVENS views the judgment of the California court as limited to prohibiting the consideration of race only in passing upon Bakke's application. *Post*, at 2809–2810. It must be remembered, however, that petitioner here cross-complained in the trial court for a declaratory judgment that its special program was constitutional and it lost. The trial court's judgment that the special program was unlawful was affirmed by the California Supreme Court in an opinion which left no doubt that the reason for its holding was petitioner's use of race in consideration of *any candidate's* application. Moreover, in explaining the scope of its holding, the court quite clearly stated that petitioner was prohibited from taking race into account in any way in making admissions decisions:

"In addition, the University may properly as it in fact does, consider other factors in evaluating an applicant, such as the personal interview, recommendations, character, and matters relating to the needs of the profession and society, such as an applicant's professional goals. In short, the standards for admission employed by the University are not constitutionally infirm except to the extent that they are utilized in a racially discriminatory manner. Disadvantaged applicants of all races must be eligible for sympathetic consideration, and no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race. We reiterate, in view of the dissent's misinterpretation, that we do not compel the University to utilize only 'the highest objective academic credentials' as the criterion for admission." 18 Cal.3d 34, 54–55, 132 Cal.Rptr. 680, 693–694, 553 P.2d 1152, 1166 (1976) (footnote omitted).

This explicit statement makes it unreasonable to assume that the reach of the California court's judgment can be limited in the manner suggested by Mr. Justice STEVENS.

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers THE CHIEF JUSTICE, Mr. Justice STEWART, Mr. Justice REHNQUIST and Mr. Justice STEVENS concur in this judgment.

***272** I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN concur in this judgment.

Affirmed in part and reversed in part.

I [FN*]

FN* Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN join Parts I and V–C of this opinion. Mr. Justice WHITE also joins Part III–A of this opinion.

The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class was increased to 100 students, a level at which it remains. No admissions program for disadvantaged or minority students existed when the school opened, and the first class contained three Asians but no blacks, no Mexican-Americans, and no American Indians. Over the next two years, the faculty devised a special admissions program to increase the representation of "disadvantaged" students in each Medical School class.[FN1] The special ****2739** program consisted of ***273** a separate admissions system operating in coordination with the regular admissions process.

FN1. Material distributed to applicants for the class entering in 1973 described the special admissions program as follows:

"A special subcommittee of the Admissions Committee, made up of faculty and medical students from minority groups, evaluates applications from economically and/or educationally disadvantaged backgrounds. The applicant may designate on the application form that he or she

requests such an evaluation. Ethnic minorities are not categorically considered under the Task Force Program unless they are from disadvantaged backgrounds. Our goals are: 1) A short range goal in the identification and recruitment of potential candidates for admission to medical school in the near future, and 2) Our long-range goal is to stimulate career interest in health professions among junior high and high school students.

"After receiving all pertinent information selected applicants will receive a letter inviting them to our School of Medicine in Davis for an interview. The interviews are conducted by at least one faculty member and one student member of the Task Force Committee. Recommendations are then made to the Admissions Committee of the medical school. Some of the Task Force Faculty are also members of the Admissions Committee.

"Long-range goals will be approached by meeting with counselors and students of schools with large minority populations, as well as with local youth and adult community groups.

"Applications for financial aid are available only *after* the applicant has been accepted and can only be awarded after registration. Financial aid is available to students in the form of scholarships and loans. In addition to the Regents' Scholarships and President's Scholarship programs, the medical school participates in the Health Professions Scholarship Program, which makes funds available to students who otherwise might not be able to pursue a medical education. Other scholarships and awards are available to students who meet special eligibility qualifications. Medical students are also eligible to participate in the Federally Insured Student Loan Program and the American Medical Association Education and Research Foundation Loan Program.

"Applications for Admissions are available from:

"Admissions Office

School of Medicine

University of California

Davis, California 95616"

Record 195. The letter distributed the following year was virtually identical, except that the third paragraph was omitted.

Under the regular admissions procedure, a candidate could submit his application to the Medical School beginning in July of the year preceding the academic year for which admission was sought. Record 149. Because of the large number of applications,[FN2] the admissions committee screened each one to select candidates for further consideration. Candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. *Id.*, at 63. About ***274** one out of six applicants was invited for a personal interview. *Ibid.* Following the interviews, each candidate was rated on a scale of 1 to 100 by his interviewers and four other members of the admissions committee. The rating embraced the interviewers' summaries, the candidate's overall grade point average, grade point average in science courses, scores on the Medical College Admissions Test (MCAT), letters of recommendation, extracurricular activities, and other biographical data. *Id.*, at 62. The ratings were added together to arrive at each candidate's "benchmark" score. Since five committee members rated each candidate in 1973, a perfect score was 500; in 1974, six members rated each candidate, so that a perfect score was 600. The full committee then reviewed the file and scores of each applicant and made offers of admission on a "rolling" basis.[FN3] The chairman was responsible for placing names on the waiting list. They were not placed in strict numerical order; instead, the chairman had discretion to include persons with "special skills." *Id.*, at 63–64.

FN2. For the 1973 entering class of 100 seats, the Davis Medical School received 2,464 applications. *Id.*, at 117. For the 1974 entering class, 3,737 applications were submitted. *Id.*, at 289.

FN3. That is, applications were considered and acted upon as they were received, so that the process of filling the class took place over a period of months, with later applications being considered against those still on file from earlier in the year. *Id.*, at 64.

The special admissions program operated with a separate committee, a majority of whom were members of minority groups. *Id.*, at 163. On the 1973 application form,

****2740** candidates were asked to indicate whether they wished to be considered as "economically and/or educationally disadvantaged" applicants; on the 1974 form the question was whether they wished to be considered as members of a "minority group," which the Medical School apparently viewed as "Blacks," "Chicanos," "Asians," and "American Indians." *Id.*, at 65–66, 146, 197, 203–205, 216–218. If these questions were answered affirmatively, the application was forwarded to the special admissions committee. No formal definition of "disadvantaged***275** " was ever produced, *id.*, at 163–164, but the chairman of the special committee screened each application to see whether it reflected economic or educational deprivation.[FN4] Having passed this initial hurdle, the applications then were rated by the special committee in a fashion similar to that used by the general admissions committee, except that special candidates did not have to meet the 2.5 grade point average cutoff applied to regular applicants. About one-fifth of the total number of special applicants were invited for interviews in 1973 and 1974.[FN5] Following each interview, the special committee assigned each special applicant a benchmark score. The special committee then presented its top choices to the general admissions committee. The latter did not rate or compare the special candidates against the general applicants, *id.*, at 388, but could reject recommended special candidates for failure to meet course requirements or other specific deficiencies. *Id.*, at 171–172. The special committee continued to recommend special applicants until a number prescribed by faculty vote were admitted. While the overall class size was still 50, the prescribed number was 8; in 1973 and 1974, when the class size had doubled to 100, the prescribed number of special admissions also doubled, to 16. *Id.*, at 164, 166.

FN4. The chairman normally checked to see if, among other things, the applicant had been granted a waiver of the school's application fee, which required a means test; whether the applicant had worked during college or interrupted his education to support himself or his family; and whether the applicant was a member of a minority group. *Id.*, at 65–66.

FN5. For the class entering in 1973, the total number of special applicants was 297, of whom 73 were white. In 1974, 628 persons applied to the special committee, of whom 172 were white. *Id.*, at 133–134.

From the year of the increase in class size—1971—through 1974, the special program resulted in the admission of 21 black students, 30 Mexican-Americans, and 12 Asians, for a total of 63 minority students. Over the same period, the regular admissions program produced 1 black, 6 Mexican-Americans, ***276** and 37 Asians, for a total of 44 minority students.[FN6] Although disadvantaged whites applied to the special program in large numbers, see n. 5, *supra*, none received an offer of admission through that process. Indeed, in 1974, at least, the special committee explicitly considered only "disadvantaged" special applicants who were members of one of the designated minority groups. Record 171.

FN6. The following table provides a year-by-year comparison of minority admissions at the Davis Medical School:

	Special Admissions Program				General Admissions				Total
	Blacks	Chicanos	Asians	Total	Blacks	Chicanos	Asians	Total	
1970....	5	3	0	8	0	0	4	4	12
1971....	4	9	2	15	1	0	8	9	24
1972....	5	6	5	16	0	0	11	11	27
1973....	6	8	2	16	0	2	13	15	31
1974....	6	7	3	16	0	4	5	9	25

Id., at 216–218. Sixteen persons were admitted under the special program in 1974, *ibid.*, but one Asian withdrew before the start of classes, and the vacancy was filled by a candidate from the general admissions waiting list. Brief for Petitioner 4 n. 5.

****2741** Allan Bakke is a white male who applied to the Davis Medical School in both 1973 and 1974. In both years Bakke's application was considered under the gen-

eral admissions program, and he received an interview. His 1973 interview was with Dr. Theodore C. West, who considered Bakke "a very desirable applicant to [the] medical school." *Id.*, at 225. Despite a strong benchmark score of 468 out of 500, Bakke was rejected. His application had come late in the year, and no applicants in the general admissions process with scores below 470 were accepted after Bakke's application was completed. *Id.*, at 69. There were four special admissions slots unfilled at that time however, for which Bakke was not considered. *Id.*, at 70. After his 1973 rejection, Bakke wrote to Dr. George H. Lowrey, Associate Dean and Chairman of the Admissions Committee, protesting that the special admissions program operated as a racial and ethnic quota. *id.*, AT 259.

***277** Bakke's 1974 application was completed early in the year. *Id.*, at 70. His student interviewer gave him an overall rating of 94, finding him "friendly, well tempered, conscientious and delightful to speak with." *Id.*, at 229. His faculty interviewer was, by coincidence, the same Dr. Lowrey to whom he had written in protest of the special admissions program. Dr. Lowrey found Bakke "rather limited in his approach" to the problems of the medical profession and found disturbing Bakke's "very definite opinions which were based more on his personal viewpoints than upon a study of the total problem." *Id.*, at 226. Dr. Lowrey gave Bakke the lowest of his six ratings, an 86; his total was 549 out of 600. *Id.*, at 230. Again, Bakke's application was rejected. In neither year did the chairman of the admissions committee, Dr. Lowrey, exercise his discretion to place Bakke on the waiting list. *Id.*, at 64. In both years, applicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's.[FN7]

FN7. The following table compares Bakke's science grade point average, overall grade point average, and MCAT scores with the average scores of regular admittees and of special admittees in both 1973 and 1974. Record 210, 223, 231, 234:

Class Entering in 1973

			MCAT (Percentiles)			
	SGPA	OGPA	Verbal	Quantitative	Science	Gen. Infor.
Bakke.....	3.44	3.46	96	94	97	72
Average of regular admittees.....	3.51	3.49	81	76	83	69
Average of special admittees.....	2.62	2.88	46	24	35	33

Class Entering in 1974

			MCAT (Percentiles)			Gen.
	SGPA	OGPA	Verbal	Quantitative	Science	Infor.
Bakke.....	3.44	3.46	96	94	97	72
Average of regular admittees.....	3.36	3.29	69	67	82	72
Average of special admittees.....	2.42	2.62	34	30	37	18

> Applicants admitted under the special program also had benchmark scores significantly lower than many students, including Bakke, rejected under the general admissions program, even though the special rating system apparently gave credit for overcoming "disadvantage." *Id.*, at 181, 388.

After the second rejection, Bakke filed the instant suit in the Superior Court of California.[FN8] He sought mandatory, injunctive,****2742** and declaratory relief compelling his admission to the Medical School. He alleged that the Medical School's special admissions program operated to exclude him from the ***278** school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment,[FN9] Art. I, § 21, of the California Constitution,[FN10] and § 601 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d.[FN11] The University cross-complained for a declaration that its special admissions program was lawful. The trial ***279** court found that the special program operated as a racial quota, because minority applicants in the special program were rated only against one another. Record 388 and 16 places in the class of 100 were reserved for them. *Id.*, at 295–296. Declaring that the University could not take race into account in making admissions decisions, the trial court held the challenged program violative of the Federal Constitution, the State Constitution, and Title VI. The court refused to order Bakke's admission, however, holding that he had failed to carry his burden of proving that he would have been admitted but for the existence of the special program.

FN8. Prior to the actual filing of the suit, Bakke discussed his intentions with Peter C. Storandt, Assistant to the Dean of Admissions at the Davis Medical School. *Id.*, at 259–269. Storandt expressed sympathy for Bakke's position and offered advice on litigation strategy. Several *amici* imply that these discussions render Bakke's suit "collusive." There is no indication, however, that Storandt's views were those of the Medical School or that anyone else at the school even was aware of Storandt's correspondence and conversations with Bakke. Storandt is no longer with the University.

FN9. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

FN10. "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

This section was recently repealed and its provisions added to Art. I, § 7, of the State Constitution.

FN11. Section 601 of Title VI, 78 Stat. 252, provides as follows:

"No person in the United States shall, on the

> ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Bakke appealed from the portion of the trial court judgment denying him admission, and the University appealed from the decision that its special admissions program was unlawful and the order enjoining it from considering race in the processing of applications. The Supreme Court of California transferred the case directly from the trial court, "because of the importance of the issues involved." 18 Cal.3d 34, 39, 132 Cal.Rptr. 680, 684, 553 P.2d 1152, 1156 (1976). The California court accepted the findings of the trial court with respect to the University's program.[FN12] Because the special admissions program involved a racial classification, the Supreme Court held itself bound to apply strict scrutiny. *Id.*, at 49, 132 Cal.Rptr., at 690, 553 P.2d, at 1162–1163. It then turned to the goals the University presented as justifying the special program. Although the court agreed that the goals of integrating the medical profession and increasing the number of physicians willing to serve members of minority groups were compelling state interests, *id.*, at 53, 132 Cal.Rptr., at 693, 553 P.2d, at 1165, it concluded that the special admissions program was not the least intrusive means of achieving those goals. Without passing on the state constitutional or the federal statutory grounds cited in the trial court's judgment, the California court held ***280** that the Equal Protection Clause of the Fourteenth Amendment required that "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race." *Id.*, at 55, 132 Cal.Rptr., at 694, 553 P.2d, at 1166.

> FN12. Indeed, the University did not challenge the finding that applicants who were not members of a minority group were excluded from consideration in the special admissions process. 18 Cal.3d, at 44, 132 Cal.Rptr., at 687, 553 P.2d, at 1159.

****2743** [2][3][4][5][6] Turning to Bakke's appeal, the court ruled that since Bakke had established that the University had discriminated against him on the basis of his race, the burden of proof shifted to the University to demonstrate that he would not have been admitted even in the absence of the special admissions program.[FN13] *Id.*, at 63–64, 132 Cal.Rptr., at 699–700, 553 P.2d, at 1172. The court analogized Bakke's situation to that of a plaintiff under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–17 (1970 ed., Supp. V), see, *e. g., Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772, 96 S.Ct. 1251, 1267, 47 L.Ed.2d 444 (1976). 18 Cal.3d, at 63–64, 132 Cal.Rptr., at 700, 553 P.2d, at 1172. On this basis, the court initially ordered a remand for the purpose of determining whether, under the newly allocated burden of proof, Bakke would have been admitted to either the 1973 or the 1974 entering class in the absence of the special admissions program. App. A to Application for Stay 48. In its petition for rehearing below, however, the University conceded its inability to carry that burden. App. B to Application for Stay A19–A20.[FN14] The ***281** California court thereupon amended its opinion to direct that the trial court enter judgment ordering Bakke's admission to the Medical School. 18 Cal.3d, at 64, 132 Cal.Rptr., at 700, 553 P.2d, at 1172. That order was stayed pending review in this Court. 429 U.S. 953, 97 S.Ct. 573, 50 L.Ed.2d 321 (1976). We granted certiorari to consider the important constitutional issue. 429 U.S. 1090, 97 S.Ct. 1098, 51 L.Ed.2d 535 (1977).

> FN13. Petitioner has not challenged this aspect of the decision. The issue of the proper placement of the burden of proof, then, is not before us.

> FN14. Several *amici* suggest that Bakke lacks standing, arguing that he never showed that his injury—exclusion from the Medical School—will be redressed by a favorable decision, and that the petitioner "fabricated" jurisdiction by conceding its inability to meet its burden of proof. Petitioner does not object to Bakke's standing, but inasmuch as this charge concerns our jurisdiction under Art. III, it must be considered and rejected. First, there appears to be no reason to question the petitioner's concession. It was not an attempt to stipulate to a conclusion of law or to disguise actual facts of record. Cf. *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281, 37 S.Ct. 287, 61 L.Ed. 722 (1917).

Second, even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 243 (1975). The trial court found such an injury, apart from failure to be admitted, in the

University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Record 323. Hence the constitutional requirements of Art. III were met. The question of Bakke's admission *vel non* is merely one of relief.

Nor is it fatal to Bakke's standing that he was not a "disadvantaged" applicant. Despite the program's purported emphasis on disadvantage, it was a minority enrollment program with a secondary disadvantage element. White disadvantaged students were never considered under the special program, and the University acknowledges that its goal in devising the program was to increase minority enrollment.

II

In this Court the parties neither briefed nor argued the applicability of Title VI of the Civil Rights Act of 1964. Rather, as had the California court, they focused exclusively upon the validity of the special admissions program under the Equal Protection Clause. Because it was possible, however, that a decision on Title VI might obviate resort to constitutional interpretation, see *Ashwander v. TVA*, 297 U.S. 288, 346–348, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (concurring opinion), we requested supplementary briefing on the statutory issue. 434 U.S. 900, 98 S.Ct. 293, 54 L.Ed.2d 186 (1977).

A

At the outset we face the question whether a right of action for private parties exists under Title VI. Respondent argues that there is a private right of action, invoking****2744** the test set forth in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). He contends ***282** that the statute creates a federal right in his favor, that legislative history reveals an intent to permit private actions,[FN15] that such actions would further the remedial purposes of the statute, and that enforcement of federal rights under the Civil Rights Act generally is not relegated to the States. In addition, he cites several lower court decisions which have recognized or assumed the existence of a private right of action.[FN16] Petitioner denies the existence of a private right of action, arguing that the sole function of § 601, see n. 11, *supra*, was to establish a predicate for administrative action under § 602, 78 Stat. 252, 42 U.S.C. § 2000d–1. [FN17] In its view, administrative curtailment of federal funds under that section was the only sanction to be imposed upon recipients that ***283** violated § 601. Petitioner also points out that Title VI contains no explicit grant of a private right of action, in contrast to Titles II, III, IV, and VII, of the same statute, 42 U.S.C. §§ 2000a–3(a), 2000b–2, 2000c–8, and 2000e–5(f) (1970 ed. and Supp. V).[FN18]

FN15. See, *e. g.*, 110 Cong.Rec. 5255 (1964) (remarks of Sen. Case).

FN16. *E. g., Bossier Parish School Board v. Lemon*, 370 F.2d 847, 851–852 (CA5), cert. denied, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967); *Natonabah v. Board of Education*, 355 F.Supp. 716, 724 (NM 1973); cf. *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284–1287 (C.A.7 1977) (Title V of Rehabilitation Act of 1973, 29 U.S.C. § 790 *et seq.* (1976 ed.)); *Piascik v. Cleveland Museum of Art*, 426 F.Supp. 779, 780 n. 1 (N.D.Ohio 1976) (Title IX of Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (1976 ed.)).

FN17. Section 602, as set forth in 42 U.S.C. § 2000d–1, reads as follows:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Pro-*

vided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

FN18. Several comments in the debates cast doubt on the existence of any intent to create a private right of action. For example, Representative Gill stated that no private right of action was contemplated:

"Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim." 110 Cong.Rec. 2467 (1964).

Accord, *id.*, at 7065 (remarks of Sen. Keating); 6562 (remarks of Sen. Kuchel).

We find it unnecessary to resolve this question in the instant case. The question of respondent's right to bring an action under Title VI was neither argued nor decided in either of the courts below, and this Court has been hesitant to review questions not addressed below. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434–435, 60 S.Ct. 670, 672–673, 84 L.Ed. 849 (1940). See also ****2745***Massachusetts v. Westcott*, 431 U.S. 322, 97 S.Ct. 1755, 52 L.Ed.2d 349 (1977); *Cardinale v. Louisiana*, 394 U.S. 437, 439, 89 S.Ct. 1161, 1163, 22 L.Ed.2d 398 (1969). Cf. *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). We therefore do not address this difficult issue. Similarly, we need not pass ***284** upon petitioner's claim that private plaintiffs under Title VI must exhaust administrative remedies. We assume, only for the purposes of this case, that respondent has a right of action under Title VI. See *Lau v. Nichols*, 414 U.S. 563, 571 n. 2, 94 S.Ct. 786, 790, 39 L.Ed.2d 1 (1974) (STEWART, J., concurring in result).

B

[7] The language of § 601, 78 Stat. 252, like that of the Equal Protection Clause, is majestic in its sweep:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The concept of "discrimination," like the phrase "equal protection of the laws," is susceptible of varying interpretations, for as Mr. Justice Holmes declared, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372 (1918). We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us. *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434 (1976), quoting *United States v. American Trucking Assns.*, 310 U.S. 534, 543–544, 60 S.Ct. 1059, 1063–1064, 84 L.Ed. 1345 (1940). Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution. Although isolated statements of various legislators taken out of context, can be marshaled in support of the proposition that § 601 enacted a purely color-blind scheme,[FN19] without regard to the reach of the Equal Protection***285** Clause, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.

FN19. For example, Senator Humphrey stated as follows:

"Racial discrimination or segregation in the administration of disaster relief is particularly shocking; and offensive to our sense of justice and fair play. Human suffering draws no color lines, and the administration of help to the sufferers should not." *Id.*, at 6547.

See also *id.*, at 12675 (remarks of Sen. Allott); 6561 (remarks of Sen. Kuchel); 2494, 6047 (re-

marks of Sen. Pastore). But see *id.*, at 15893 (remarks of Rep. MacGregor); 13821 (remarks of Sen. Saltonstall); 10920 (remarks of Sen. Javits); 5266, 5807 (remarks of Sen. Keating).

The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys. Indeed, the color blindness pronouncements cited in the margin at n. 19, generally occur in the midst of extended remarks dealing with the evils of segregation in federally funded programs. Over and over again, proponents of the bill detailed the plight of Negroes seeking equal treatment in such programs.[FN20] There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment.

FN20. See, *e. g.*, *id.*, at 7064–7065 (remarks of Sen. Ribicoff); 7054–7055 (remarks of Sen. Pastore); 6543–6544 (remarks of Sen. Humphrey); 2595 (remarks of Rep. Donohue); 2467–2468 (remarks of Rep. Celler); 1643, 2481–2482 (remarks of Rep. Ryan); H.Rep.No.914, 88th Cong., 1st Sess., pt. 2, pp. 24–25 (1963), U.S.Code Cong. & Admin.News 1964, p. 2355.

In addressing that problem, supporters of Title VI repeatedly declared that the bill enacted constitutional principles. For example,****2746** Representative Celler, the Chairman of the House Judiciary Committee and floor manager of the legislation in the House, emphasized this in introducing the bill:

"The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food ***286** surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of high[er] education financed by Federal funds. It would, in short, *assure the existing right to equal treatment* in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association." 110 Cong.Rec. 1519 (1964) (emphasis added).

Other sponsors shared Representative Celler's view that Title VI embodied constitutional principles.[FN21]

FN21. See, *e. g.*, 110 Cong.Rec. 2467 (1964) (remarks of Rep. Lindsay). See also *id.*, at 2766 (remarks of Rep. Matsunaga); 2731–2732 (remarks of Rep. Dawson); 2595 (remarks of Rep. Donohue); 1527–1528 (remarks of Rep. Celler).

In the Senate, Senator Humphrey declared that the purpose of Title VI was "to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." *Id.*, at 6544. Senator Ribicoff agreed that Title VI embraced the constitutional standard: "Basically, there is a constitutional restriction against discrimination in the use of federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction." *Id.*, at 13333. Other Senators expressed similar views. [FN22]

FN22. See, *e. g.*, *id.*, at 12675, 12677 (remarks of Sen. Allott); 7064 (remarks of Sen. Pell); 7057, 7062–7064 (remarks of Sen. Pastore); 5243 (remarks of Sen. Clark).

Further evidence of the incorporation of a constitutional standard into Title VI appears in the repeated refusals of the legislation's supporters precisely to define the term "discrimination." Opponents sharply criticized this failure,[FN23] but proponents of the bill merely replied that the meaning of ***287** "discrimination" would be made clear by reference to the Constitution or other existing law. For example, Senator Humphrey noted the relevance of the Constitution:

FN23. See, *e. g.*, *id.*, at 6052 (remarks of Sen. Johnston); 5863 (remarks of Sen. Eastland); 5612 (remarks of Sen. Ervin); 5251 (remarks of Sen. Talmadge); 1632 (remarks of Rep. Dowdy); 1619 (remarks of Rep. Abernethy).

"As I have said, the bill has a simple purpose. That purpose is to give fellow citizens—Negroes—the same rights and opportunities that white people take for granted. This is no more than what was preached by the prophets, and by Christ Himself. It is no more than what our Constitution guarantees." *Id.*, at 6553.[FN24]

FN24. See also *id.*, at 7057, 13333 (remarks of Sen. Ribicoff); 7057 (remarks of Sen. Pastore); 5606–5607 (remarks of Sen. Javits); 5253, 5863–5864, 13442 (remarks of Sen. Humphrey).

[8] In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.

III

A

Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment. See, *e. g., Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938); *Sipuel v. Board of Regents*, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247 (1948); *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950). For his part, respondent does not argue that all racial or ethnic classifications are *per se* invalid. See, *e. g., Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943); *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944); ****2747***Lee v. Washington*, 390 U.S. 333, 334, 88 S.Ct. 994, 995, 19 L.Ed.2d 1212 (1968) (Black, Harlan, and Stewart, JJ., concurring); *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977). The parties do disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been ***288** applied in our cases. That level of review, petitioner asserts, should be reserved for classifications that disadvantage "discrete and insular minorities." See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783, 82 L.Ed. 1234 (1938). Respondent, on the other hand, contends that the California court correctly rejected the notion that the degree of judicial scrutiny accorded a particular racial or ethnic classification hinges upon membership in a discrete and insular minority and duly recognized that the "rights established [by the Fourteenth Amendment] are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948).

En route to this crucial battle over the scope of judicial review,[FN25] the parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a "goal" of minority representation in the Medical School. Respondent, echoing the courts below, labels it a racial quota.[FN26]

FN25. That issue has generated a considerable amount of scholarly controversy. See, *e. g.*, Ely, The Constitutionality of Reverse Racial Discrimination, 41 U.Chi.L.Rev. 723 (1974); Greenawalt, Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions, 75 Colum.L.Rev. 559 (1975); Kaplan, Equal Justice in an Unequal World: Equality for the Negro, 61 Nw.U.L.Rev. 363 (1966); Karst & Horowitz, Affirmative Action and Equal Protection, 60 Va.L.Rev. 955 (1974); O'Neil, Racial Preference and Higher Education: The Larger Context, 60 Va.L.Rev. 925 (1974); Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 Sup.Ct.Rev. 1; Redish, Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments, 22 UCLA L.Rev. 343 (1974); Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U.Chi.L.Rev. 653 (1975); Sedler, Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California, 17 Santa Clara L.Rev. 329 (1977); Seeburger, A Heuristic Argument Against Preferential Admissions, 39 U.Pitt.L.Rev. 285 (1977).

FN26. Petitioner defines "quota" as a requirement which must be met but can never be exceeded, regardless of the quality of the minority applicants. Petitioner declares that there is no "floor" under the total number of minority students admitted; completely unqualified students will not be admitted simply to meet a "quota." Neither is there a "ceiling," since an unlimited number could be admitted through the general admissions process. On this basis the special admissions program does not meet petitioner's definition of a quota.

The court below found—and petitioner does not deny—that white applicants could not compete for the 16 places reserved solely for the special admissions program. 18 Cal.3d, at 44, 132 Cal.Rptr., at 687, 553 P.2d, at 1159. Both courts below characterized this as a "quota" system.

***289** This semantic distinction is beside the point: The special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats,

white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status. [FN27]

> FN27. Moreover, the University's special admissions program involves a purposeful, acknowledged use of racial criteria. This is not a situation in which the classification on its face is racially neutral, but has a disproportionate racial impact. In that situation, plaintiff must establish an intent to discriminate. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264–265, 97 S.Ct. 555, 562–563, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976); see *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

[9] The guarantees of the Fourteenth Amendment extend to all persons. Its language****2748** is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer, supra,* at 22, 68 S.Ct., at 846. Accord, *Missouri ex rel. Gaines v. Canada, supra,* 305 U.S., at 351, 57 S.Ct., at 237; *McCabe v. Atchison, T. & S.F.R. Co.*, 235 U.S. 151, 161–162, 35 S.Ct. 69, 71, 59 L.Ed. 169 (1914). The guarantee of equal protection cannot mean one thing when applied to one individual and something else when ***290** applied to a person of another color. If both are not accorded the same protection, then it is not equal.

[10] Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. *Carolene Products Co., supra,* 304 U.S., at 152–153 n. 4, 58 S.Ct., at 783–784. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious.[FN28] See, *e. g., Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942); *Carrington v. Rash*, 380 U.S. 89, 94–97, 85 S.Ct. 775, 779–780, 13 L.Ed.2d 675 (1965). These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of "suspect" categories or whether a particular classification survives close examination. See, *e. g., Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976) (age); *San Antonio Independent School Dist. v. Rodriquez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 1293, 36 L.Ed.2d 16 (1973) (wealth); *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971) (aliens). Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics. We declared as much in the first cases explicitly to recognize racial distinctions as suspect:

> FN28. After *Carolene Products*, the first specific reference in our decisions to the elements of "discreteness and insularity" appears in *Minersville School District v. Gobitis*, 310 U.S. 586, 606, 60 S.Ct. 1010, 1018, 84 L.Ed. 1375 (1940) (Stone, J., dissenting). The next does not appear until 1970. *Oregon v. Mitchell*, 400 U.S. 112, 295 n. 14, 91 S.Ct. 260, 349, 27 L.Ed.2d 91 (STEWART, J., concurring in part and dissenting in part). These elements have been relied upon in recognizing a suspect class in only one group of cases, those involving aliens. *E. g., Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971).

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people ***291** whose institutions are founded upon the doctrine of equality." *Hirabayashi*, 320 U.S., at 100, 63 S.Ct., at 1385.

"[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Korematsu*, 323 U.S., at 216, 65 S.Ct., at 194.

The Court has never questioned the validity of those pronouncements. Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

B

This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history. The Court's initial view of the Fourteenth

Amendment was that its "one pervading purpose" was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the ****2749** oppressions of those who had formerly exercised dominion over him." *Slaughter-House Cases*, 16 Wall. 36, 71, 21 L.Ed. 394 (1873). The Equal Protection Clause, however, was "[v]irtually strangled in infancy by post-civil-war judicial reactionism." [FN29] It was relegated to decades of relative desuetude while the Due Process Clause of the Fourteenth Amendment, after a short germinal period, flourished as a cornerstone in the Court's defense of property and liberty of contract. See, *e. g., Mugler v. Kansas*, 123 U.S. 623, 661, 8 S.Ct. 273, 297, 31 L.Ed. 205 (1887); *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897); *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). In that cause, the Fourteenth Amendment's "one pervading purpose" was displaced. See, *e. g., Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). It was only as the era of substantive due process came to a close, see, *e. g.*, ***292***Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937), that the Equal Protection Clause began to attain a genuine measure of vitality, see, *e. g., United States v. Carolene Products*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938); *Skinner v. Oklahoma ex rel. Williamson, supra*.

FN29. Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif.L.Rev. 341, 381 (1949).

By that time it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities.[FN30] Each had to struggle [FN31]—and to some extent struggles still [FN32]—to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups.[FN33] As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. See *Strauder v. West Virginia*, 100 U.S. 303, 308, 25 L.Ed. 664 (1880) (Celtic Irishmen) (dictum); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (Chinese); *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915) (Austrian resident aliens); *Korematsu, supra* (Japanese); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954) (Mexican-Americans). The guarantees of equal protection, said the Court in ***293** *Yick Wo*, "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." 118 U.S., at 369, 6 S.Ct., at 1070.

FN30. M. Jones, American Immigration 177–246 (1960).

FN31. J. Higham, Strangers in the Land (1955); G. Abbott, The Immigrant and the Community (1917); P. Roberts, The New Immigration 66–73, 86–91, 248–261 (1912). See also E. Fenton, Immigrants and Unions: A Case Study 561–562 (1975).

FN32. "Members of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin." 41 CFR § 60–50.1(b) (1977).

FN33. *E. g.*, Roberts, *supra* n. 31, at 75; Abbott, *supra* n. 31, at 270–271. See generally n. 31, *supra*.

Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority," *Slaughter-House Cases, supra*, the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude. As this Court recently remarked in interpreting the 1866 Civil Rights Act to extend to claims of racial discrimination against white persons, "the 39th Congress was intent upon establishing ****2750** in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 296, 96 S.Ct. 2574, 2586, 49 L.Ed.2d 493 (1976). And that legislation was specifically broadened in 1870 to ensure that "all persons," not merely "citizens," would enjoy equal rights under the law. See *Runyon v. McCrary*, 427 U.S. 160, 192–202, 96 S.Ct. 2586, 2605–2609, 49 L.Ed.2d 415 (1976) (WHITE, J., dissenting). Indeed, it is not unlikely that among the Fra-

mers were many who would have applauded a reading of the Equal Protection Clause that states a principle of universal application and is responsive to the racial, ethnic, and cultural diversity of the Nation. See, *e. g.*, Cong.Globe, 39th Cong., 1st Sess., 1056 (1866) (remarks of Rep. Niblack); *id.*, at 2891–2892 (remarks of Sen. Conness); *id.*, 40th Cong., 2d Sess., 883 (1868) (remarks of Sen. Howe) (Fourteenth Amendment "protect[s] classes from class legislation"). See also Bickel, The Original Understanding and the Segregation Decision, 69 Harv.L.Rev. 1, 60–63 (1955).

Over the past 30 years, this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons "the protection of ***294** equal laws," *Yick Wo, supra*, 118 U.S., at 369, 6 S.Ct., at 1070, in a Nation confronting a legacy of slavery and racial discrimination. See, *e. g., Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Hills v. Gautreaux*, 425 U.S. 284, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976). Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the "majority" white race against the Negro minority. But they need not be read as depending upon that characterization for their results. It suffices to say that "[o]ver the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' " *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967), quoting *Hirabayashi*, 320 U.S., at 100, 63 S.Ct., at 1385.

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign." [FN34] ***295** The clock of our liberties, however, cannot be turned back to 1868. *Brown v. Board of Education, supra*, 347 U.S., at 492, 74 S.Ct., at 690; accord, *Loving v. Virginia, supra*, 388 U.S., at 9, 87 S.Ct., at 1822. It is far too late to argue that the guarantee of equal protection****2751** to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. [FN35] "The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro." *Hernandez*, 347 U.S., at 478, 74 S.Ct., at 670.

FN34. In the view of Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN, the pliable notion of "stigma" is the crucial element in analyzing racial classifications. See, *e. g., post*, at 2785. The Equal Protection Clause is not framed in terms of "stigma." Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. *All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin. Moreover, Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN offer no principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification, since they are willing in this case to accept mere *post hoc* declarations by an isolated state entity—a medical school faculty—unadorned by particularized findings of past discrimination, to establish such a remedial purpose.

FN35. Professor Bickel noted the self-contradiction of that view:

"The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial

> equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution." A. Bickel, The Morality of Consent 133 (1975).

Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance***296** of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not.[FN36] Courts would be asked to evaluate the extent of the prejudice and consequent ***297** harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political****2752** analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.[FN37]

> FN36. As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I agree with my Brothers BRENNAN, WHITE, MARSHALL, and BLACKMUN that the portion of the judgment that would proscribe all consideration of race must be reversed. See Part V, *infra.* But I disagree with much that is said in their opinion.
>
> They would require as a justification for a program such as petitioner's, only two findings: (i) that there has been some form of discrimination against the preferred minority groups by "society at large," *post,* at 2789 (it being conceded that petitioner had no history of discrimination), and (ii) that "there is reason to believe" that the disparate impact sought to be rectified by the program is the "product" of such discrimination:
>
> "If it was reasonable to conclude—as we hold that it was—that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis' special admissions program." *Post,* at 2787.
>
> The breadth of this hypothesis is unprecedented in our constitutional system. The first step is easily taken. No one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups. The second step, however, involves a speculative leap: but for this discrimination by society at large, Bakke "would have failed to qualify for admission" because Negro applicants—nothing is said about Asians, cf., *e. g., post,* at 2791 n. 57—would have made better scores. Not one word in the record supports this conclusion, and the authors of the opinion offer no standard for courts to use in applying such a presumption of causation to other racial or ethnic classifications. This failure is a grave one, since if it may be concluded *on this record* that each of the minority groups preferred by the petitioner's special program is entitled to the benefit of the presumption, it would seem difficult to determine that any of the dozens of minority groups that have suffered "societal discrimination" cannot also claim it, in any area of social intercourse. See Part IV–B, *infra.*
>
> FN37. Mr. Justice Douglas has noted the problems associated with such inquiries:
>
> "The reservation of a proportion of the law school class for members of selected minority groups is fraught with . . . dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a

member of a favored group. [Cf. *Plessy v. Ferguson*, 163 U.S. 537, 549, 552, 16 S.Ct. 1138, 1142, 1143, 41 L.Ed. 256 (1896).] There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to blacks, or to blacks and Chicanos. Once the Court sanctioned racial preferences such as these, it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 620, and allowed imposition of a 'zero' allocation. But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also constitute 2% of the Bar, but that had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner. See, *e. g., Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249. This Court has not sustained a racial classification since the wartime cases of *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194, and *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774, involving curfews and relocations imposed upon Japanese-Americans.

"Nor obviously will the problem be solved if next year the Law School included only Japanese and Chinese, for then Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints." *DeFunis v. Odegaard*, 416 U.S. 312, 337–340, 94 S.Ct. 1704, 1716, 1717, 40 L.Ed.2d 164 (1974) (dissenting opinion) (footnotes omitted).

***298** Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest. See *United Jewish Organizations v. Carey*, 430 U.S., at 172–173, 97 S.Ct., at 1013. (BRENNAN, J., concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. See *DeFunis v. Odegaard*, 416 U.S. 312, 343, 94 S.Ct. 1704, 1719, 40 L.Ed.2d 164 (1974) (Douglas, J., dissenting). Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.

By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such classifications well may serve to exacerbate ***299** racial and ethnic antagonisms rather than alleviate them. *United Jewish Organizations, supra*, 430 U.S., at 173–174, 97 S.Ct., at 1013–1014 (BRENNAN, J., concurring in part). Also, the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from ****2753** one generation to the next, a critical feature of its coherent interpretation. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 650–651, 15 S.Ct. 673, 716, 39 L.Ed. 759 (1895) (White, J., dissenting). In expounding the Constitution, the Court's role is to discern "principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place." A. Cox, The Role of the Supreme Court in American Government 114 (1976).

If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon

personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process.[FN38] When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background. *Shelley v. Kraemer*, 334 U.S., at 22, 68 S.Ct., at 846; *Missouri ex rel. Gaines v. Canada*, 305 U.S., at 351, 59 S.Ct., at 237.

FN38. R. Dahl, A Preface to Democratic Theory (1956); Posner, *supra* n. 25, at 27.

***300** C

Petitioner contends that on several occasions this Court has approved preferential classifications without applying the most exacting scrutiny. Most of the cases upon which petitioner relies are drawn from three areas: school desegregation, employment discrimination, and sex discrimination. Each of the cases cited presented a situation materially different from the facts of this case.

The school desegregation cases are inapposite. Each involved remedies for clearly determined constitutional violations. *E. g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *McDaniel v. Barresi*, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971); *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968). Racial classifications thus were designed as remedies for the vindication of constitutional entitlement.[FN39] Moreover, the scope of the remedies was not permitted to exceed the extent of the ***301** violations. ****2754***E. g., Dayton Board of Education v. Brinkman*, 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977); *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974); see *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976). See also *Austin Independent School Dist. v. United States*, 429 U.S. 990, 991–995, 97 S.Ct. 517–519, 50 L.Ed.2d 603 (1976) (POWELL, J., concurring). Here, there was no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification.

FN39. Petitioner cites three lower court decisions allegedly deviating from this general rule in school desegregation cases: *Offermann v. Nitkowski*, 378 F.2d 22 (C.A.2 1967); *Wanner v. County School Board*, 357 F.2d 452 (C.A.4 1966); *Springfield School Committee v. Barksdale*, 348 F.2d 261 (C.A.1 1965). Of these, *Wanner* involved a school system held to have been *de jure* segregated and enjoined from maintaining segregation; racial districting was deemed necessary. 357 F.2d, at 454. Cf. *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977). In *Barksdale* and *Offermann*, courts did approve voluntary districting designed to eliminate discriminatory attendance patterns. In neither, however, was there any showing that the school board planned extensive pupil transportation that might threaten liberty or privacy interests. See *Keyes v. School District No. 1*, 413 U.S. 189, 240–250, 93 S.Ct. 2686, 2713, 2718, 37 L.Ed.2d 548 (1973) (POWELL, J., concurring in part and dissenting in part). Nor were white students deprived of an equal opportunity for education.

Respondent's position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education.

The employment discrimination cases also do not advance petitioner's cause. For example, in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), we approved a retroactive award of seniority to a class of Negro truckdrivers who had been the victims of discrimination—not just by society at large, but by the respondent in that case. While this relief imposed some burdens on other employees, it was held necessary " 'to make [the victims] whole for injuries suffered on account of unlawful employment discrimination.' " *Id.*, at 763, 96 S.Ct., at 1264, quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975). The Courts of Appeals have fashioned various types of racial preferences as remedies for consti-

tutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. *E. g., Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333 (CA2 1973); *Carter v. Gallagher*, 452 F.2d 315 (CA8 1972), modified on rehearing en banc, *id.*, at 327. Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. *E. g., Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (C.A.3), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971); [FN40] ***302***Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (C.A.1 1973), cert. denied, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974); cf. *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966). But we have never approved preferential classifications in the absence of proved constitutional or statutory violations.[FN41]

FN40. Every decision upholding the requirement of preferential hiring under the authority of Exec. Order No. 11246, 3 CFR 339 (1964–1965 Comp.), has emphasized the existence of previous discrimination as a predicate for the imposition of a preferential remedy. *Contractors Association of Eastern Pennsylvania; Southern Illinois Builders Assn. v. Ogilvie*, 471 F.2d 680 (C.A.7 1972); *Joyce v. McCrane*, 320 F.Supp. 1284 (NJ 1970); *Weiner v. Cuyahoga Community College District*, 19 Ohio St.2d 35, 249 N.E.2d 907, cert. denied, 396 U.S. 1004, 90 S.Ct. 554, 24 L.Ed.2d 495 (1970). See also *Rosetti Contracting Co. v. Brennan*, 508 F.2d 1039, 1041 (C.A.7 1975); *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (C.A.1 1973), cert. denied, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974); *Northeast Constr. Co. v. Romney*, 157 U.S.App.D.C. 381, 383, 390, 485 F.2d 752, 754, 761 (1973).

FN41. This case does not call into question congressionally authorized administrative actions, such as consent decrees under Title VII or approval of reapportionment plans under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970 ed., Supp. V). In such cases, there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations, *e. g., South Carolina v. Katzenbach*, 383 U.S. 301, 308–310, 86 S.Ct. 803, 808–809, 15 L.Ed.2d 769 (1966) (§ 5), and particular administrative bodies have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103, 96 S.Ct. 1895, 1905, 48 L.Ed.2d 495 (1976).

Furthermore, we are not here presented with an occasion to review legislation by Congress pursuant to its powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to remedy the effects of prior discrimination. *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968). We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures.

Nor is petitioner's view as to the applicable standard supported by the fact that ****2755** gender-based classifications are not subjected to this level of scrutiny. *E.G., Califano v. Webster*, 430 U.S. 313, 316–317, 97 S.Ct. 1192, 1194–1195, 51 L.Ed.2d 360 (1977); *Craig v. Boren*, 429 U.S. 190, 211, 97 S.Ct. 451, 464, 50 L.Ed.2d 397 (1976) (POWELL, J., concurring). Gender-based distinctions are less likely to create the analytical and practicalproblems ***303** present in preferential programs premised on racial or ethnic criteria. With respect to gender there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear. There are no rival groups which can claim that they, too, are entitled to preferential treatment. Classwide questions as to the group suffering previous injury and groups which fairly can be burdened are relatively manageable for reviewing courts. See, *e. g., Califano v. Goldfarb*, 430 U.S. 199, 212–217, 97 S.Ct. 1021, 1029–1032, 51 L.Ed.2d 270 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645, 95 S.Ct. 1225, 1231, 43 L.Ed.2d 514 (1975). The resolution of these same questions in the context of racial and ethnic preferences presents far more complex and intractable problems than gender-based classifications. More importantly, the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. In sum, the Court has never viewed such classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis.

Petitioner also cites *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), in support of the proposition that discrimination favoring racial or ethnic minorities has received judicial approval without the exacting inquiry ordinarily accorded "suspect" classifications. In *Lau*, we held that the failure of the San Francisco school system to provide remedial English instruction for some 1,800 students of oriental ancestry who spoke no English amounted to a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the regulations promulgated thereunder. Those regulations required remedial instruction where inability to understand English excluded children of foreign ancestry from participation in educational programs. 414 U.S., at 568, 94 S.Ct., at 789. Because we found that the students in *Lau* were denied "a meaningful opportunity to participate in the educational program," *ibid.*, we remanded for the fashioning of a remedial order.

***304** *Lau* provides little support for petitioner's argument. The decision rested solely on the statute, which had been construed by the responsible administrative agency to reach educational practices "which have the effect of subjecting individuals to discrimination," *ibid.* We stated: "Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *Id.*, at 566, 94 S.Ct., at 788. Moreover, the "preference" approved did not result in the denial of the relevant benefit—"meaningful opportunity to participate in the educational program"—to anyone else. No other student was deprived by that preference of the ability to participate in San Francisco's school system, and the applicable regulations required similar assistance for all students who suffered similar linguistic deficiencies. *Id.*, at 570–571, 94 S.Ct., at 790 (STEWART, J., concurring in result).

In a similar vein,[FN42] petitioner contends that our recent decision in ****2756***United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977), indicates a willingness to approve racial classifications designed to benefit certain minorities, without denominating the classifications as "suspect." The State of New York had redrawn its reapportionment plan to meet objections of the Department of Justice under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970 ed., Supp. V). Specifically, voting districts were redrawn to enhance the electoral power ***305** of certain "nonwhite" voters found to have been the victims of unlawful "dilution" under the original reapportionment plan. *United Jewish Organizations*, like *Lau*, properly is viewed as a case in which the remedy for an administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate, without excluding individuals belonging to any other group from enjoyment of the relevant opportunity—meaningful participation in the electoral process.

FN42. Petitioner also cites our decision in *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari*, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of the BIA is *sui generis*. *Id.*, at 554, 94 S.Ct., at 2484. Indeed, we found that the preference was not racial at all, but "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent . . . groups . . . whose lives and activities are governed by the BIA in a unique fashion." *Ibid.*

In this case, unlike *Lau* and *United Jewish Organizations*, there has been no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts. Moreover, the operation of petitioner's special admissions program is quite different from the remedial measures approved in those cases. It prefers the designated minority groups at the expense of other individuals who are totally foreclosed from competition for the 16 special admissions seats in every Medical School class. Because of that foreclosure, some individuals are excluded from enjoyment of a state-provided benefit—admission to the Medical School—they otherwise would receive. When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect. *E. g., McLaurin v. Oklahoma State Regents*, 339 U.S., at 641–642, 70 S.Ct., at 853–854.

IV

We have held that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the

accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths*, 413 U.S. 717, 721–722, 93 S.Ct. 2851, 2855, 37 L.Ed.2d 910 (1973) (footnotes omitted); *Loving v. Virginia*, 388 U.S., at 11, 87 S.Ct., at 1823; *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222 (1964). The special admissions ***306** program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," Brief for Petitioner 32; (ii) countering the effects of societal discrimination; [FN43] (iii) increasing****2757** the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification.

FN43. A number of distinct subgoals have been advanced as falling under the rubric of "compensation for past discrimination." For example, it is said that preferences for Negro applicants may compensate for harm done them personally, or serve to place them at economic levels they might have attained but for discrimination against their forebears. Greenawalt, *supra* n. 25, at 581–586. Another view of the "compensation" goal is that it serves as a form of reparation by the "majority" to a victimized group as a whole. B. Bittker, The Case for Black Reparations (1973). That justification for racial or ethnic preference has been subjected to much criticism. *E. g.*, Greenawalt, *supra* n. 25, at 581; Posner, *supra*, n. 25 at 16–17, and n. 33. Finally, it has been argued that ethnic preferences "compensate" the group by providing examples of success whom other members of the group will emulate, thereby advancing the group's interest and society's interest in encouraging new generations to overcome the barriers and frustrations of the past. Redish, *supra* n. 25, at 391. For purposes of analysis these subgoals need not be considered separately.

Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no "preference" at all. Nothing in this record, however, suggests either that any of the quantitative factors considered by the Medical School were culturally biased or that petitioner's special admissions program was formulated to correct for any such biases. Furthermore, if race or ethnic background were used solely to arrive at an unbiased prediction of academic success, the reservation of fixed numbers of seats would be inexplicable.

***307** A

[11] If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids. *E. g.*, *Loving v. Virginia*, *supra*, 388 U.S., at 11, 87 S.Ct., at 1823; *McLaughlin v. Florida*, *supra*, 379 U.S., at 196, 85 S.Ct., at 290; *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

B

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown*, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.

[12] We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. See, *e. g.*, *Teamsters v. United States*, 431 U.S. 324, 367–376, 97 S.Ct. 1843, 1870–1875, 52 L.Ed.2d 396 (1977); *United Jewish Organizations*, 430 U.S., at 155–156, 97 S.Ct., at 1004–1005; *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 808, 15 L.Ed.2d 769 (1966). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims

must be vindicated. In such a case, the ***308** extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations,[FN44] it cannot be ***309** said that ****2758** the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

FN44. Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN misconceive the scope of this Court's holdings under Title VII when they suggest that "disparate impact" alone is sufficient to establish a violation of that statute and, by analogy, other civil rights measures. See *post*, at 2786–2787, and n. 42. That this was not the meaning of Title VII was made quite clear in the seminal decision in this area, *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971):

"*Discriminatory preference* for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of *artificial, arbitrary, and unnecessary barriers* to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.*, at 431, 91 S.Ct., at 853 (emphasis added).

Thus, disparate impact is a basis for relief under Title VII only if the practice in question is not founded on "business necessity," *ibid.*, or lacks "a manifest relationship to the employment in question," *id.*, at 432, 91 S.Ct., at 854. See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–803, 805–806, 93 S.Ct. 1817, 1824, 1825, 1826, 36 L.Ed.2d 668 (1973). Nothing *in this record* —as opposed to some of the general literature cited by Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN—even remotely suggests that the disparate impact of the general admissions program at Davis Medical School, resulting primarily from the sort of disparate test scores and grades set forth in n. 7, *supra*, is without educational justification.

Moreover, the presumption in *Griggs* —that disparate impact without any showing of business justification established the existence of discrimination in violation of the statute—was based on legislative determinations, wholly absent here, that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination:

"[Congress sought] to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs, supra*, 401 U.S., at 429–430, 91 S.Ct., at 853.

See, *e. g.*, H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 26 (1963) ("Testimony supporting the fact of discrimination in employment is overwhelming"). See generally Vaas, Title VII: The Legislative History, 7 B.C.Ind. & Com.L.Rev. 431 (1966). The Court emphasized that "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." 401 U.S., at 430–431, 91 S.Ct., at 853. Indeed, § 703(j) of the Act makes it clear that preferential treatment for an individual or minority group to correct an existing "imbalance" may not be required under Title VII. 42 U.S.C. § 2000e–2(j). Thus, Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.

Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined crite-

ria.[FN45] Cf. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976); n. 41, *supra*. Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. See, *e. g., Califano v. Webster*, 430 U.S., at 316–321, 97 S.Ct., at 1194–1197; ***310***Califano v. Goldfarb*, 430 U.S., at 212–217, 97 S.Ct., at 1029–1032. Lacking this capability, petitioner has not carried its burden of justification on this issue.

FN45. For example, the University is unable to explain its selection of only the four favored groups—Negroes, Mexican-Americans, American-Indians, and Asians—for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process. See also n. 37, *supra*.

[13] Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved. Cf. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976).

C

Petitioner identifies, as another purpose of its program, improving the delivery of ****2759** health-care services to communities currently underserved. It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal.[FN46] The court below addressed this failure of proof:

FN46. The only evidence in the record with respect to such underservice is a newspaper article. Record 473.

"The University concedes it cannot assure that minority doctors who entered under the program, all of whom expressed an 'interest' in practicing in a disadvantaged community, will actually do so. It may be correct to assume that some of them will carry out this intention, and that it is more likely they will practice in minority ***311** communities than the average white doctor. (See Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role* (1975) 42 U.Chi.L.Rev. 653, 688). Nevertheless, there are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race. An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage. In short, there is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive." 18 Cal.3d, at 56, 132 Cal.Rptr., at 695, 553 P.2d, at 1167.

Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health-care delivery to deprived citizens. Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem.[FN47]

FN47. It is not clear that petitioner's two-track system, even if adopted throughout the country, would substantially increase representation of blacks in the medical profession. That is the finding of a recent study by Sleeth & Mishell, Black Under-Representation in United States Medical Schools, 297 New England J. of Med. 1146 (1977). Those authors maintain that the cause of black underrepresentation lies in the small size of the national pool of qualified black applicants. In their view, this problem is traceable to the poor premedical experiences of black undergraduates, and can be remedied effectively only by developing remedial programs for black students before they enter college.

D

[14] The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible***312** goal for an institution of

higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom:

" 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' " *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S.Ct. 1203, 1218, 1 L.Ed.2d 1311 (1957) (concurring in result).

Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967):

****2760** "Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' *United States v. Associated Press*, D.C., 52 F.Supp. 362, 372."

The atmosphere of "speculation, experiment and creation"—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.[FN48] As the Court ***313** noted in *Keyishian*, it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.

> FN48. The president of Princeton University has described some of the benefits derived from a diverse student body:
>
> "[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, 'People do not learn very much when they are surrounded only by the likes of themselves.'
>
> "In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth." Bowen, Admissions and the Relevance of Race, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977).

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

It may be argued that there is greater force to these views at the undergraduate level than in a medical school where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. In *Sweatt v. Painter*, 339 U.S., at 634, 70 S.Ct., at 850, the ***314** Court made a similar point with specific reference to legal education:

"The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.[FN49]

FN49. Graduate admissions decisions, like those at the undergraduate level, are concerned with "assessing the potential contributions to the society of each individual candidate following his or her graduation—contributions defined in the broadest way to include the doctor and the poet, the most active participant in business or government affairs and the keenest critic of all things organized, the solitary scholar and the concerned parent." *Id.*, at 10.

Ethnic diversity, however, is only one element in a range of factors a university ****2761** properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. Respondent urges—and the courts below have held—that petitioner's dual admissions program is a racial classification that impermissibly infringes his rights under the Fourteenth Amendment. As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the ***315** program's racial classification is necessary to promote this interest. *In Re Griffiths*, 413 u.s., at 721–722, 93 s.ct., at 2854–2855.

V
A

It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.[FN50]

FN50. See Manning, The Pursuit of Fairness in Admissions to Higher Education, in Carnegie Council on Policy Studies in Higher Education, Selective Admissions in Higher Education 19, 57–59 (1977).

Nor would the state interest in genuine diversity be served by expanding petitioner's two-track system into a multitrack program with a prescribed number of seats set aside for each identifiable category of applicants. Indeed, it is inconceivable that a university would thus pursue the logic of petitioner's two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants.

***316** [15] The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program:

"In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. . . .

"In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. [See Appendix hereto.] . . .

"In Harvard College admissions the Committee has

not set target-quotas for ****2762** the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. . . . But that awareness [of the necessity of including more than a token number of black students] does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only 'admissible' academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many ***317** types and categories of students." App. to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as *Amici Curiae* 2–3.

In such an admissions program,[FN51] race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a ***318** particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

> FN51. The admissions program at Princeton has been described in similar terms:
>
> "While race is not in and of itself a consideration in determining basic qualifications, and while there are obviously significant differences in background and experience among applicants of every race, in some situations race can be helpful information in enabling the admission officer to understand more fully what a particular candidate has accomplished—and against what odds. Similarly, such factors as family circumstances and previous educational opportunities may be relevant, either in conjunction with race or ethnic background (with which they may be associated) or on their own." Bowen, *supra* n. 48, at 8–9.
>
> For an illuminating discussion of such flexible admissions systems, see Manning, *supra* n. 50, at 57–59.

[16] This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.[FN52]

> FN52. The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program. Nowhere in the opinion of Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN is this denial even addressed.

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions****2763** program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process. "A boundary line," as Mr. Justice Frankfurter remarked in another connection, "is none the worse for being narrow." *McLeod v. Dilworth*, 322 U.S. 327, 329, 64 S.Ct. 1023, 1025, 88 L.Ed. 1304 (1944). And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith ***319** would be presumed in the absence of a showing to the contrary in the manner permitted by our cases. See *e. g., Arlington*

Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).[FN53]

FN53. Universities, like the prosecutor in *Swain*, may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process. If an applicant can establish that the institution does not adhere to a policy of individual comparisons, or can show that a systematic exclusion of certain groups results, the presumption of legality might be overcome, creating the necessity of proving legitimate educational purpose.

There also are strong policy reasons that correspond to the constitutional distinction between petitioner's preference program and one that assures a measure of competition among all applicants. Petitioner's program will be viewed as inherently unfair by the public generally as well as by applicants for admission to state universities. Fairness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic. Indeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual. As Mr. Justice Frankfurter declared in another connection, "[j]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954).

B

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred ***320** applicants have the opportunity to compete for every seat in the class.

The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S., at 22, 68 S.Ct., at 846. Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.

C

[17] In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

VI

[18][19] With respect to respondent's entitlement to an injunction directing his admission****2764** to the Medical School, petitioner has conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted. Hence, respondent is entitled to the injunction, and that portion of the judgment must be affirmed.[FN54]

FN54. There is no occasion for remanding the case to permit petitioner to reconstruct what might have happened if it had been operating the type of program described as legitimate in Part V, *supra*. Cf. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 284–287, 97 S.Ct. 568, 575–576, 50 L.Ed.2d 471 (1977). In *Mt. Healthy*, there was considerable doubt whether protected First Amendment activity had been the "but for" cause of Doyle's protested discharge. Here, in contrast, there is no question as to the sole reason for respondent's rejection—purposeful racial discrimination in the form of the special admissions program. Having injured respondent solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result.

See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S., at 265–266, 97 S.Ct., at 563–564. No one can say how—or even if—petitioner would have operated its admissions process if it had known that legitimate alternatives were available. Nor is there a record revealing that legitimate alternative grounds for the decision existed, as there was in *Mt. Healthy*. In sum, a remand would result in fictitious recasting of past conduct.

***321** APPENDIX TO OPINION OF POWELL, J.
Harvard College Admissions Program [FN55]

FN55. This statement appears in the Appendix to the Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as *Amici Curiae*.

For the past 30 years Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years the Committee on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and that the quality of the educational***322** experience offered to all students would suffer. Final Report of W. J. Bender, Chairman of the Admission and Scholarship Committee and Dean of Admissions and Financial Aid, pp. 20 *et seq.* (Cambridge, 1960). Consequently, after selecting those students whose intellectual potential will seem extraordinary to the faculty—perhaps 150 or so out of an entering class of over 1,100—the Committee seeks—

variety in making its choices. This has seemed important . . . in part because it adds a critical ingredient to the effectiveness of the educational experience [in Harvard College]. . . . *The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements.* (Dean of Admissions Fred L. Glimp, Final Report to the Faculty of Arts and Sciences, 65 Official Register of Harvard University No. 25, 93, 104–105 (1968) (emphasis supplied).

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result****2765** was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, ***323** minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the

Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But ***324** that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only "admissible" academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

The further refinements sometimes required help to illustrate the kind of significance attached to race. The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.

Opinion of Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN, concurring in the judgment in part and dissenting in part.

[12] The Court today, in reversing in part the judgment of the Supreme Court of ****2766** California, affirms the constitutional power of Federal and State Governments to act affirmatively to achieve equal opportunity for all. The difficulty of the issue presented—whether government may use race-conscious programs to redress the continuing effects of past discrimination— ***325** and the mature consideration which each of our Brethren has brought to it have resulted in many opinions, no single one speaking for the Court. But this should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

THE CHIEF JUSTICE and our Brothers STEWART, REHNQUIST, and STEVENS, have concluded that Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. § 2000d *et seq.*, prohibits programs such as that at the Davis Medical School. On this statutory theory alone, they would hold that respondent Allan Bakke's rights have been violated and that he must, therefore, be admitted to the Medical School. Our Brother POWELL, reaching the Constitution, concludes that, although race may be taken into account in university admissions, the particular special admissions program used by petitioner, which resulted in the exclusion of respondent Bakke, was not shown to be necessary to achieve petitioner's stated goals. Accordingly, these Members of the Court form a majority of five affirming the judgment of the Supreme Court of California insofar as it holds that respondent Bakke "is entitled to an order that he be admitted to the University." 18 Cal.3d 34, 64, 132 Cal.Rptr. 680, 700, 553 P.2d 1152, 1172 (1976).

[8][1][15] We agree with Mr. Justice POWELL that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself. We also agree that the effect of the California Supreme Court's affirmance of the judgment of the Superior Court of California would be to prohibit the University from establishing in the future affirmative-action programs that take race into account. See *ante*, at 2738 n. **. Since we conclude that the affirmative admissions program at the Davis ***326** Medical School is constitutional, we would reverse the judgment below in all respects. Mr. Justice POWELL agrees that some uses of race in university admissions are permissible and, therefore, he joins with us to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future.[FN1]

FN1. We also agree with Mr. Justice POWELL that a plan like the "Harvard" plan, see *ante*, at 2762–2763, is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the

lingering effects of past discrimination.

I

Our Nation was founded on the principle that "all Men are created equal." Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known and have aptly been called our "American Dilemma." Still, it is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.

The Fourteenth Amendment, the embodiment in the Constitution of our abiding belief in human equality, has been the law of our land for only slightly more than half its 200 years. And for half of that half, the Equal Protection Clause of the Amendment was largely moribund so that, as late as ****2767** 1927, Mr. Justice Holmes could sum up the importance of that Clause by remarking that it was the "last resort of constitutional arguments." *Buck v. Bell*, 274 U.S. 200, 208, 47 S.Ct. 584, 585, 71 L.Ed. 1000 (1927). Worse than desuetude, the Clause was early turned against those whom it was intended to set free, condemning them to a "separate but equal" [FN2] status before the law, a status ***327** always separate but seldom equal. Not until 1954—only 24 years ago—was this odious doctrine interred by our decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (*Brown I*), and its progeny,[FN3] which proclaimed that separate schools and public facilities of all sorts were inherently unequal and forbidden under our Constitution. Even then inequality was not eliminated with "all deliberate speed." *Brown v. Board of Education*, 349 U.S. 294, 301, 75 S.Ct. 753, 756, 99 L.Ed. 1083 (1955). In 1968 [FN4] and again in 1971,[FN5] for example, we were forced to remind school boards of their obligation to eliminate racial discrimination root and branch. And a glance at our docket [FN6] and at dockets of lower courts will show that even today officially sanctioned discrimination is not a thing of the past.

FN2. See *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

FN3. *New Orleans City Park Improvement Assn. v. Detiege*, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46 (1958); *Muir v. Louisville Park Theatrical Assn.*, 347 U.S. 971, 74 S.Ct. 783, 98 L.Ed. 1112 (1954); *Mayor of Baltimore v. Dawson*, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (1955); *Holmes v. Atlanta*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955); *Gayle v. Browder*, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956).

FN4. See *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

FN5. See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Davis v. School Comm'rs of Mobile County*, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971); *North Carolina Board of Education v. Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971).

FN6. See, *e. g.*, cases collected in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 663 n. 5, 98 S.Ct. 2018, 2022, 56 L.Ed.2d 611 (1978).

Against this background, claims that law must be "color-blind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot—and, as we shall demonstrate, need not under our Constitution or Title VI, which merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds—let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

***328** II

The threshold question we must decide is whether Title VI of the Civil Rights Act of 1964 bars recipients of federal funds from giving preferential consideration to disadvantaged members of racial minorities as part of a program designed to enable such individuals to surmount the obstacles imposed by racial discrimination.[FN7] We join Parts I and V–C of our Brother POWELL's opinion and three of us agree with his conclusion in Part II that this case does not require us to resolve the question whether there is a private right of action under Title VI.[FN8]

FN7. Section 601 of Title VI provides:

"No person in the United States shall, on the

ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

FN8. Mr. Justice WHITE believes we should address the private-right-of-action issue. Accordingly, he has filed a separate opinion stating his view that there is no private right of action under Title VI. See *post*, p. 2794.

In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a ****2768** State or its agencies; it does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment. The legislative history of Title VI, administrative regulations interpreting the statute, subsequent congressional and executive action, and the prior decisions of this Court compel this conclusion. None of these sources lends support to the proposition that Congress intended to bar all race-conscious efforts to extend the benefits of federally financed programs to minorities who have been historically excluded from the full benefits of American life.

A

[7] The history of Title VI—from President Kennedy's request that Congress grant executive departments and agencies authority***329** to cut off federal funds to programs that discriminate against Negroes through final enactment of legislation incorporating his proposals—reveals one fixed purpose: to give the Executive Branch of Government clear authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government.

This purpose was first expressed in President Kennedy's June 19, 1963, message to Congress proposing the legislation that subsequently became the Civil Rights Act of 1964.[FN9] ***330** Representative Celler, the Chairman of the House Judiciary Committee, and the floor manager of the legislation in the House, introduced Title VI in words unequivocally expressing the intent to provide the Federal Government with the means of assuring that its funds were not used to subsidize racial discrimination inconsistent with the standards imposed by the Fourteenth and Fifth Amendments upon state and federal action.

FN9. "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination. Direct discrimination by Federal, State or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation. Congress and the Executive have their responsibilities to uphold the Constitution also . . ..

"Many statutes providing Federal financial assistance, however, define with such precision both the Administrator's role and the conditions upon which specified amounts shall be given to designated recipients that the amount of administrative discretion remaining—which might be used to withhold funds if discrimination were not ended—is at best questionable. No administrator has the unlimited authority to invoke the Constitution in opposition to the mandate of the Congress. Nor would it always be helpful to require unconditionally—as is often proposed—the withdrawal of all Federal funds from programs urgently needed by Negroes as well as whites; for this may only penalize those who least deserve it without ending discrimination.

"Instead of permitting this issue to become a political device often exploited by those opposed to social or economic progress, it would be better at this time to pass a single comprehensive provision making it clear that the Federal Government is not required, under any statute, to furnish any kind of financial assistance—by way of grant, loan, contract, guaranty, insurance, or otherwise—to any program or activity in which racial discrimination occurs. This would not permit the Federal Government to cut off all Federal aid of all kinds as a means of punishing an area for the discrimination occurring therein—but it would clarify the authority of any administrator with respect to Federal funds or financial assistance and discriminatory practices." 109 Cong.Rec. 11161 (1963).

"The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution pro-

grams whereby Negroes have been known to be denied food surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of high[er] education financed by Federal funds. It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association." 110 Cong.Rec. 1519 (1964).

****2769** It was clear to Representative Celler that Title VI, apart from the fact that it reached all federally funded activities even in the absence of sufficient state or federal control to invoke the Fourteenth or Fifth Amendments, was not placing new substantive limitations upon the use of racial criteria, but rather was designed to extend to such activities "the existing right to equal treatment" enjoyed by Negroes under those Amendments, and he later specifically defined the purpose of Title VI in this way:

"In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color, or national origin by granting money ***331** and other kinds of financial aid. It seems rather shocking, moreover, that while we have on the one hand the 14th amendment, which is supposed to do away with discrimination since it provides for equal protection of the laws, on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination.

"It is for these reasons that we bring forth title VI. The enactment of title VI will serve to override specific provisions of law which contemplate Federal assistance to racially segregated institutions." *Id.*, at 2467.

Representative Celler also filed a memorandum setting forth the legal basis for the enactment of Title VI which reiterated the theme of his oral remarks: "In exercising its authority to fix the terms on which Federal funds will be disbursed . . ., Congress clearly has power to legislate so as to insure that the Federal Government does not become involved in a violation of the Constitution." *Id.*, at 1528.

Other sponsors of the legislation agreed with Representative Celler that the function of Title VI was to end the Federal Government's complicity in conduct, particularly the segregation or exclusion of Negroes, inconsistent with the standards to be found in the antidiscrimination provisions of the Constitution. Representative Lindsay, also a member of the Judiciary Committee, candidly acknowledged, in the course of explaining why Title VI was necessary, that it did not create any new standard of equal treatment beyond that contained in the Constitution:

"Both the Federal Government and the States are under constitutional mandates not to discriminate. Many have raised the question as to whether legislation is required at all. Does not the Executive already have the power in the distribution of Federal funds to apply those conditions which will enable the Federal Government itself to live up to the mandate of the Constitution and to require ***332** States and local government entities to live up to the Constitution, most especially the 5th and 14th amendments?" *Id.*, at 2467.

He then explained that legislation was needed to authorize the termination of funding by the Executive Branch because existing legislation seemed to contemplate the expenditure of funds to support racially segregated institutions. *Ibid.* The views of Representatives Celler and Lindsay concerning the purpose and function of Title VI were shared by other sponsors and proponents of the legislation in the House.[FN10] Nowhere is there any suggestion that Title VI was intended to terminate federal funding for any reason other than consideration of race or national origin by the recipient institution in a manner inconsistent with the standards incorporated in the Constitution.

FN10. See, *e. g.*, 110 Cong.Rec. 2732 (1964) (Rep. Dawson); *id.*, at 2481–2482 (Rep. Ryan); *id.*, at 2766 (Rep. Matsunaga); *id.*, at 2595 (Rep. Donahue).

The Senate's consideration of Title VI reveals an identical understanding concerning the purpose and scope of the legislation. Senator Humphrey, the Senate floor manager, opened the Senate debate with a section-by-section analysis of the Civil Rights Act in which he succinctly stated the purpose of Title VI:

"The purpose of title VI is to make sure that funds of the United States are ****2770** not used to support racial discrimination. In many instances the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. This is clearly so wherever Federal funds go to a State agency which engages in racial discrimination. It may also be so where Federal funds go to support private, segregated institutions, under the decision in *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (C.A.4, 1963), [cert. denied, 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659 (1964)]. In all cases, such discrimination is

contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply ***333** designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." *Id.*, at 6544.

Senator Humphrey, in words echoing statements in the House, explained that legislation was needed to accomplish this objective because it was necessary to eliminate uncertainty concerning the power of federal agencies to terminate financial assistance to programs engaging in racial discrimination in the face of various federal statutes which appeared to authorize grants to racially segregated institutions. *Ibid.* Although Senator Humphrey realized that Title VI reached conduct which, because of insufficient governmental action, might be beyond the reach of the Constitution, it was clear to him that the substantive standard imposed by the statute was that of the Fifth and Fourteenth Amendments.

Senate supporters of Title VI repeatedly expressed agreement with Senator Humphrey's description of the legislation as providing the explicit authority and obligation to apply the standards of the Constitution to all recipients of federal funds. Senator Ribicoff described the limited function of Title VI:

"Basically, there is a constitutional restriction against discrimination in the use of Federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction." *Id.*, at 13333.

Other strong proponents of the legislation in the Senate repeatedly expressed their intent to assure that federal funds would only be spent in accordance with constitutional standards. See remarks of Senator Pastore, *id.*, at 7057, 7062; Senator Clark, *id.*, at 5243; Senator Allott, *id.*, at 12675, 12677.[FN11]

> FN11. There is also language in 42 U.S.C. § 2000d–5, enacted in 1966, which supports the conclusion that Title VI's standard is that of the Constitution. Section 2000d–5 provides that "for the purpose of determining whether a local educational agency is in compliance with [Title VI], compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with [Title VI], insofar as the matters covered in the order or judgment are concerned." This provision was clearly intended to avoid subjecting local educational agencies simultaneously to the jurisdiction of the federal courts and the federal administrative agencies in connection with the imposition of remedial measures designed to end school segregation. Its inclusion reflects the congressional judgment that the requirements imposed by Title VI are identical to those imposed by the Constitution as interpreted by the federal courts.

***334** Respondent's contention that Congress intended Title VI to bar affirmative-action programs designed to enable minorities disadvantaged by the effects of discrimination to participate in federally financed programs is also refuted by an examination of the type of conduct which Congress thought it was prohibiting by means of Title VI. The debates reveal that the legislation was motivated primarily by a desire to eradicate a very specific evil: federal financial support of programs which disadvantaged Negroes by excluding them from participation or providing them with separate facilities. Again and again supporters of Title VI emphasized that the purpose of the statute was to end segregation in federally funded activities and to end other discriminatory uses of race disadvantaging Negroes. Senator Humphrey set the theme in his speech presenting Title VI to the Senate:

"Large sums of money are contributed by the United States each year for the construction, operation, and maintenance of segregated schools.

****2771** "Similarly, under the Hill-Burton Act, Federal grants are made to hospitals which admit whites only or Negroes only. . . .

"In higher education also, a substantial part of the Federal grants to colleges, medical schools and so forth, in the South is still going to segregated institutions.

***335** "Nor is this all. In several States, agricultural extension services, supported by Federal funds, maintain racially segregated offices for Negroes and whites. . . .

". . . Vocational training courses, supported with Federal funds, are given in segregated schools and institutions and often limit Negroes to training in less skilled occupations. In particular localities it is reported that Negroes have been cut off from relief rolls, or denied surplus agricultural commodities, or otherwise deprived of the benefit of federally assisted programs, in retaliation for their participation in voter registration drives, sit-in dem-

onstrations and the like." *Id.*, at 6543–6544.

See also the remarks of Senator Pastore (*id.*, at 7054–7055); Senator Ribicoff (*id.*, at 7064–7065); Senator Clark (*id.*, at 5243, 9086); Senator Javits (*id.*, at 6050, 7102).[FN12]

> FN12. As has already been seen, the proponents of Title VI in the House were motivated by the identical concern. See remarks of Representative Celler (110 Cong. Rec. at 2467 (1964)); Representative Ryan (*id.*, at 1643, 2481–2482); H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 2, Additional Views of Seven Representatives 24–25 (1963).

The conclusion to be drawn from the foregoing is clear. Congress recognized that Negroes, in some cases with congressional acquiescence, were being discriminated against in the administration of programs and denied the full benefits of activities receiving federal financial support. It was aware that there were many federally funded programs and institutions which discriminated against minorities in a manner inconsistent with the standards of the Fifth and Fourteenth Amendments but whose activities might not involve sufficient state or federal action so as to be in violation of these Amendments. Moreover, Congress believed that it was questionable whether the Executive Branch possessed legal authority to terminate the funding of activities on the ground that they discriminated racially against Negroes in a manner violative of the standards contained in the Fourteenth and Fifth ***336** Amendments. Congress' solution was to end the Government's complicity in constitutionally forbidden racial discrimination by providing the Executive Branch with the authority and the obligation to terminate its financial support of any activity which employed racial criteria in a manner condemned by the Constitution.

Of course, it might be argued that the Congress which enacted Title VI understood the Constitution to require strict racial neutrality or color blindness, and then enshrined that concept as a rule of statutory law. Later interpretation and clarification of the Constitution to permit remedial use of race would then not dislodge Title VI's prohibition of race-conscious action. But there are three compelling reasons to reject such a hypothesis.

First, no decision of this Court has ever adopted the proposition that the Constitution must be colorblind. See *infra*, at 2781–2782.

Second, even if it could be argued in 1964 that the Constitution might conceivably require color blindness, Congress surely would not have chosen to codify such a view unless the Constitution clearly required it. The legislative history of Title VI, as well as the statute itself, reveals a desire to induce voluntary compliance with the requirement of nondiscriminatory treatment.[FN13] See § 602 of the Act, 42 U.S.C. § 2000d–1 (no funds shall be terminated unless and until it has been "determined that compliance cannot be secured by voluntary means"); H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. ****2772** 25 (1963), U.S.Code Cong. & Admin.News 1964, p. 2355; 110 Cong.Rec. 13700 (1964) (Sen. Pastore); *id.*, at 6546 (Sen. Humphrey). It is inconceivable that Congress intended to encourage voluntary efforts to eliminate the evil of racial discrimination while at the same time forbidding the voluntary use of race-conscious remedies to cure acknowledged or obvious statutory violations. Yet a reading of Title VI as prohibiting all action predicated upon race which adversely ***337** affects any individual would require recipients guilty of discrimination to await the imposition of such remedies by the Executive Branch. Indeed, such an interpretation of Title VI would prevent recipients of federal funds from taking race into account even when necessary to bring their programs into compliance with federal constitutional requirements. This would be a remarkable reading of a statute designed to eliminate constitutional violations, especially in light of judicial decisions holding that under certain circumstances the remedial use of racial criteria is not only permissible but is constitutionally required to eradicate constitutional violations. For example, in *Board of Education v. Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971), the Court held that a statute forbidding the assignment of students on the basis of race was unconstitutional because it would hinder the implementation of remedies necessary to accomplish the desegregation of a school system: "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *Id.*, at 46, 91 S.Ct., at 1286. Surely Congress did not intend to prohibit the use of racial criteria when constitutionally required or to terminate the funding of any entity which implemented such a remedy. It clearly desired to encourage all remedies, including the use of race, necessary to eliminate racial discrimination in violation of the Constitution rather than requiring the recipient to await a judicial adjudication of unconstitutionality and the judicial imposition of a racially oriented remedy.

FN13. See separate opinion of Mr. Justice WHITE, *post*, at 2795–2796, n. 2.

Third, the legislative history shows that Congress specifically eschewed any static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial doctrine. Although it is clear from the debates that the supporters of Title VI intended to ban uses of race prohibited by the Constitution and, more specifically, the maintenance of segregated***338** facilities, they never precisely defined the term "discrimination," or what constituted an exclusion from participation or a denial of benefits on the ground of race. This failure was not lost upon its opponents. Senator Ervin complained:

"The word 'discrimination,' as used in this reference, has no contextual explanation whatever, other than the provision that the discrimination 'is to be against' individuals participating in or benefiting from federally assisted programs and activities on the ground specified. With this context, the discrimination condemned by this reference occurs only when an individual is treated unequally or unfairly because of his race, color, religion, or national origin. What constitutes unequal or unfair treatment? Section 601 and section 602 of title VI do not say. They leave the determination of that question to the executive department or agencies administering each program, without any guideline whatever to point out what is the congressional intent." 110 Cong.Rec. 5612 (1964).

See also remarks of Representative Abernethy (*id.*, at 1619); Representative Dowdy (*id.*, at 1632); Senator Talmadge (*id.*, at 5251); Senator Sparkman (*id.*, at 6052). Despite these criticisms, the legislation's supporters refused to include in the statute or even provide in debate a more explicit definition of what Title VI prohibited.

The explanation for this failure is clear. Specific definitions were undesirable, in the views of the legislation's principal backers, because Title VI's standard was that of the Constitution and one that could and should be administratively and judicially applied. ****2773** See remarks of Senator Humphrey (*id.*, at 5253, 6553); Senator Ribicoff (*id.*, at 7057, 13333); Senator Pastore (*id.*, at 7057); Senator Javits (*id.*, at 5606–5607, 6050).[FN14] Indeed, there was a strong emphasis throughout ***339** Congress' consideration of Title VI on providing the Executive Branch with considerable flexibility in interpreting and applying the prohibition against racial discrimination. Attorney General Robert Kennedy testified that regulations had not been written into the legislation itself because the rules and regulations defining discrimination might differ from one program to another so that the term would assume different meanings in different contexts.[FN15] This determination to preserve flexibility in the administration of Title VI was shared by the legislation's supporters. When Senator Johnston offered an amendment that would have expressly authorized federal grantees to take race into account in placing children in adoptive and foster homes, Senator Pastore opposed the amendment, which was ultimately defeated by a 56–29 vote, on the ground that federal administrators could be trusted to act reasonably and that there was no danger that they would prohibit the use of racial criteria under such circumstances. *Id.*, at 13695.

FN14. These remarks also reflect the expectations of Title VI's proponents that the application of the Constitution to the conduct at the core of their concern—the segregation of Negroes in federally funded programs and their exclusion from the full benefits of such programs—was clear. See *supra*, at 2770–2772; *infra*, at 2774–2775, n. 17.

FN15. Testimony of Attorney General Kennedy in Hearings before the Senate Committee on the Judiciary on S. 1731 and S. 1750, 88th Cong., 1st Sess., 398–399 (1963).

Congress' resolve not to incorporate a static definition of discrimination into Title VI is not surprising. In 1963 and 1964, when Title VI was drafted and debated, the courts had only recently applied the Equal Protection Clause to strike down public racial discrimination in America, and the scope of that Clause's nondiscrimination principle was in a state of flux and rapid evolution. Many questions, such as whether the Fourteenth Amendment barred only *de jure* discrimination or in at least some circumstances reached *de facto* discrimination, had not yet received an authoritative judicial resolution. The congressional debate reflects an awareness of the evolutionary***340** change that constitutional law in the area of racial discrimination was undergoing in 1964.[FN16]

FN16. See, *e. g.*, 110 Cong.Rec. 6544, 13820 (1964) (Sen. Humphrey); *id.*, at 6050 (Sen. Javits); *id.*, at 12677 (Sen. Allott).

In sum, Congress' equating of Title VI's prohibition with the commands of the Fifth and Fourteenth Amendments, its refusal precisely to define that racial discrimination which it intended to prohibit, and its expectation

that the statute would be administered in a flexible manner, compel the conclusion that Congress intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution. Thus, any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history. The cryptic nature of the language employed in Title VI merely reflects Congress' concern with the then-prevalent use of racial standards as a means of excluding or disadvantaging Negroes and its determination to prohibit absolutely such discrimination. We have recently held that " '[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." ' " *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434 (1976), quoting *United States v. American Trucking Assns.*, 310 U.S. 534, 543–544, 60 S.Ct. 1059, 1063–1064, 84 L.Ed. 1345 (1940). This is especially so when, as is the case here, the literal application of what is believed to be the ****2774** plain language of the statute, assuming that it is so plain, would lead to results in direct conflict with Congress' unequivocally expressed legislative purpose.[FN17]

FN17. Our Brother STEVENS finds support for a colorblind theory of Title VI in its legislative history, but his interpretation gives undue weight to a few isolated passages from among the thousands of pages of the legislative history of Title VI. See *id.*, at 6547 (Sen. Humphrey); *id.*, at 6047, 7055 (Sen. Pastore); *id.*, at 12675 (Sen. Allott); *id.*, at 6561 (Sen. Kuchel). These fragmentary comments fall far short of supporting a congressional intent to prohibit a racially conscious admissions program designed to assist those who are likely to have suffered injuries from the effects of past discrimination. In the first place, these statements must be read in the context in which they were made. The concern of the speakers was far removed from the incidental injuries which may be inflicted upon nonminorities by the use of racial preferences. It was rather with the evil of the segregation of Negroes in federally financed programs and, in some cases, their arbitrary exclusion on account of race from the benefits of such programs. Indeed, in this context there can be no doubt that the Fourteenth Amendment does command color blindness and forbids the use of racial criteria. No consideration was given by these legislators, however, to the permissibility of racial preference designed to redress the effects of injuries suffered as a result of one's color. Significantly one of the legislators, Senator Pastore, and perhaps also Senator Kuchel, who described Title VI as proscribing decisionmaking based upon skin color, also made it clear that Title VI does not outlaw the use of racial criteria in all circumstances. See *supra*, at 2773–2774; 110 Cong.Rec. 6562 (1964). See also *id.*, at 2494 (Rep. Celler). Moreover, there are many statements in the legislative history explicitly indicating that Congress intended neither to require nor to prohibit the remedial use of racial preferences where not otherwise required or prohibited by the Constitution. Representative MacGregor addressed directly the problem of preferential treatment:

"Your mail and mine, your contacts and mine with our constituents, indicates a great degree of misunderstanding about this bill. People complain about racial 'balancing' in the public schools, about open occupancy in housing, about preferential treatment or quotas in employment. There is a mistaken belief that Congress is legislating in these areas in this bill. When we drafted this bill we excluded these issues largely because the problems raised by these controversial questions are more properly handled at a governmental level close to the American people and by communities and individuals themselves. The Senate has spelled out our intentions more specifically." *Id.*, at 15893.

Other legislators explained that the achievement of racial balance in elementary and secondary schools where there had been no segregation by law was not compelled by Title VI but was rather left to the judgment of state and local communities. See, *e. g.*, *id.*, at 10920 (Sen. Javits); *id.*, at 5807, 5266 (Sen. Keating); *id.*, at 13821 (Sens. Humphrey and Saltonstall). See also, *id.*, at 6562 (Sen. Kuchel); *id.*, at 13695 (Sen. Pastore).

Much the same can be said of the scattered remarks to be found in the legislative history of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1970 ed. and Supp. V), which prohibits employment discrimination on the basis of race in terms somewhat similar to those contained in Title VI, see 42 U.S.C. §

2000e–2(a)(1) (unlawful "to fail or refuse to hire" any applicant "because of such individual's race, color, religion, sex, or national origin . . . ."), to the effect that any deliberate attempt by an employer to maintain a racial balance is not required by the statute and might in fact violate it. See, *e. g.*, 110 Cong.Rec. 7214 (1964) (Sens. Clark and Case); *id.*, at 6549 (Sen. Humphrey); *id.*, at 2560 (Rep. Goodell). Once again, there is no indication that Congress intended to bar the voluntary use of racial preferences to assist minorities to surmount the obstacles imposed by the remnants of past discrimination. Even assuming that Title VII prohibits employers from deliberately maintaining a particular racial composition in their work force as an end in itself, this does not imply, in the absence of any consideration of the question, that Congress intended to bar the use of racial preferences as a tool for achieving the objective of remedying past discrimination or other compelling ends. The former may well be contrary to the requirements of the Fourteenth Amendment (where state action is involved), while the latter presents very different constitutional considerations. Indeed, as discussed *infra*, at 2780–2781, this Court has construed Title VII as requiring the use of racial preferences for the purpose of hiring and advancing those who have been adversely affected by past discriminatory employment practices, even at the expense of other employees innocent of discrimination. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 767–768, 96 S.Ct. 1251, 1265–1266, 47 L.Ed.2d 444 (1976). Although Title VII clearly does not require employers to take action to remedy the disadvantages imposed upon racial minorities by hands other than their own, such an objective is perfectly consistent with the remedial goals of the statute. See *id.*, at 762–770, 96 S.Ct., at 1263–1267; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975). There is no more indication in the legislative history of Title VII than in that of Title VI that Congress desired to prohibit such affirmative action to the extent that it is permitted by the Constitution, yet judicial decisions as well as subsequent executive and congressional action clearly establish that Title VII does not forbid race-conscious remedial action. See *infra*, at 2780–2782, and n. 28.

***341 **2775** B

Section 602 of Title VI, 42 U.S.C. § 2000d–1, instructs federal agencies to promulgate regulations interpreting Title ***342** VI. These regulations, which, under the terms of the statute, require Presidential approval, are entitled to considerable deference in construing Title VI. See, *e. g.*, ***343***Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 371 (1969). Consequently, it is most significant that the Department of Health, Education, and Welfare (HEW), which provides much of the federal assistance to institutions of higher education, has adopted regulations *requiring* affirmative measures designed to enable racial minorities which have been previously discriminated against by a federally funded institution or program to overcome the effects of such actions and *authorizing* the voluntary undertaking of affirmative-action programs by federally funded institutions that have not been guilty of prior discrimination in order to overcome the effects of conditions which have adversely affected the degree of participation by persons of a particular race.

Title 45 CFR § 80.3(b)(6)(i) (1977) provides:

"In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination."

Title 45 CFR § 80.5(i) (1977) elaborates upon this requirement:

"In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under § 80.6(d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary under the requirement stated in (i) of § 80.3(b)(6) for such applicant or recipient to take additional steps to make the benefits ***344** fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served."

These regulations clearly establish that where there is a need to overcome the effects of past racially discriminatory or exclusionary practices engaged in by a federally funded institution, race-conscious action is not only permitted but required to accomplish the remedial objectives of Title VI. [FN18] Of course, there is no evidence that the Medical School has been guilty of past discrimination and consequently these regulations would not compel it to employ a program of preferential admissions in behalf of racial minorities. It would be difficult to explain from the language of Title VI, however, much less from its legislative history, why the statute *compels* race-conscious remedies where a recipient institution has engaged in past discrimination but *prohibits* such remedial action where racial minorities, as a result of the effects of past discrimination imposed by entities other than the recipient, are excluded from the benefits of federally funded programs. HEW was fully aware of the incongruous nature of such an interpretation of Title VI.

FN18. HEW has stated that the purpose of these regulations is "to specify that affirmative steps to make services more equitably available are not prohibited and that such steps are required when necessary to overcome the consequences of prior discrimination." 36 Fed.Reg. 23494 (1971). Other federal agencies which provide financial assistance pursuant to Title VI have adopted similar regulations. See Supplemental Brief for United States as *Amicus Curiae* 16 n. 14.

****2776** Title 45 CFR § 80.3(b)(6)(ii) (1977) provides:

"Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted ***345** in limiting participation by persons of a particular race, color, or national origin."

An explanatory regulation explicitly states that the affirmative action which § 80.3(b)(6)(ii) contemplates includes the use of racial preferences:

"Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service." 45 CFR § 80.5(j) (1977).

This interpretation of Title VI is fully consistent with the statute's emphasis upon voluntary remedial action and reflects the views of an agency [FN19] responsible for achieving its objectives.[FN20]

FN19. Moreover, the President has delegated to the Attorney General reponsibility for coordinating the enforcement of Title VI by federal departments and agencies and has directed him to 'assist the departments and agencies in accomplishing effective implementation.' Exec. Order No. 11764, 3 CFR 849 (1971-1975 Comp.). Accordingly, the views of the Solicitor General, as well as those of HEW, that the use of racial preferences for remedial purposes is consistent with Title VI are entitled to considerable respect.

FN20. HEW administers at least two explicitly race-conscious programs. Details concerning them may be found in the Office of Management and Budget, 1977 Catalogue of Federal Domestic Assistance 205-206, 401-402. The first program, No. 13.375, 'Minority Biomedical Support.' has as its objectives:

"To increase the number of ethnic minority faculty, students, and investigators engaged in biomedical research. To broaden the opportunities for participation in biomedical research of ethnic minority faculty, students, and investigators by providing support for biomedical research programs at eligible institutions."

Eligibility for grants under this program is limited to (1) four-year colleges, universities, and health professional schools with over 50% minority enrollments; (2) four-year institutions with significant but not necessarily over 50% minority enrollment provided they have a history of encouragement and assistance to minorities; (3) two-year colleges with 50% minority enrollment; and (4) American Indian Tribal Councils. Grants made pursuant to this program are estimated to total $9,711,000 for 1977.

> The second program, No. 13.880, entitled "Minority Access To Research Careers," has as its objective to "assist minority institutions to train greater numbers of scientists and teachers in health related fields." Grants under this program are made directly to individuals and to institutions for the purpose of enabling them to make grants to individuals.

***346** The Court has recognized that the construction of a statute by those charged with its execution is particularly deserving of respect where Congress has directed its attention to the administrative construction and left it unaltered. Cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S., at 381, 89 S.Ct., at 1801; *Zemel v. Rusk*, 381 U.S. 1, 11–12, 85 S.Ct. 1271, 1278–1279, 14 L.Ed.2d 179 (1965). Congress recently took just this kind of action when it considered an amendment to the Departments of Labor and Health, Education, and Welfare appropriation bill for 1978, which would have restricted significantly the remedial use of race in programs funded by the appropriation. The amendment, as originally submitted by Representative Ashbrook, provided that "[n]one of the funds appropriated in this Act may be used to initiate, carry out or enforce any program of affirmative action or any other system of quotas or goals in regard to admission policies or employment practices which encourage or require any discrimination on the basis of race, creed, religion, sex or age." 123 ***347** Rec. 19715 (1977). In support of the measure, Representative Ashbrook argued that the 1964 Civil Rights Act never authorized the imposition of affirmative action and that this was a creation of the bureaucracy. *Id.*, at 19722. He explicitly stated, however, that ****2777** he favored permitting universities to adopt affirmative action programs giving consideration to racial identity but opposed the imposition of such programs by the Government. *Id.*, at 19715. His amendment was itself amended to reflect this position by only barring the *imposition* of race-conscious remedies by HEW:

"None of the funds appropriated in this Act may be obligated or expended in connection with the issuance, implementation, or enforcement of any rule, regulation, standard, guideline, recommendation, or order issued by the Secretary of Health, Education, and Welfare which for purposes of compliance with any ratio, quota, or other numerical requirement related to race, creed, color, national origin, or sex requires any individual or entity to take any action with respect to (1) the hiring or promotion policies or practices of such individual or entity, or (2) the admissions policies or practices of such individual or entity." *Id.*, at 19722.

This amendment was adopted by the House. *Ibid.* The Senate bill, however, contained no such restriction upon HEW's authority to impose race-conscious remedies and the Conference Committee, upon the urging of the Secretary of HEW, deleted the House provision from the bill.[FN21] More significant for present purposes, however, is the fact that even the proponents of imposing limitations upon HEW's implementation of Title VI did not challenge the right of federally funded educational institutions voluntarily to extend preferences to racial minorities.

> FN21. H.R.Conf.Rep. No. 95–538, p. 22 (1977); 123 Cong.Rec. 26188 (1977). See H.J.Res. 662, 95th Cong., 1st Sess. (1977); Pub.L. 95–205, 91 Stat. 1460.

***348** Finally, congressional action subsequent to the passage of Title VI eliminates any possible doubt about Congress' views concerning the permissibility of racial preferences for the purpose of assisting disadvantaged racial minorities. It confirms that Congress did not intend to prohibit and does not now believe that Title VI prohibits the consideration of race as part of a remedy for societal discrimination even where there is no showing that the institution extending the preference has been guilty of past discrimination nor any judicial finding that the particular beneficiaries of the racial preference have been adversely affected by societal discrimination.

Just last year Congress enacted legislation [FN22] explicitly requiring that no grants shall be made "for any local public works project unless the applicant gives satisfactory assurance to the Secretary [of Commerce] that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." The statute defines the term "minority business enterprise" as "a business, at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." The term "minority group members" is defined in explicitly racial terms: "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Although the statute contains an exemption from this requirement "to the extent that the Secretary determines otherwise," this escape clause was provided only to deal with the possibility that certain areas of the country might not contain sufficient qualified "minority business enterprises" to permit com-

pliance with the quota provisions of the legislation. [FN23]

FN22. 91 Stat. 117, 42 U.S.C. § 6705 (f)(2) (1976 ed.).

FN23. 123 Cong.Rec. 7156 (1977); *id.*, at 5327–5330 (1977).

The legislative history of this race-conscious legislation reveals that it represents a deliberate attempt to deal with ***349** the excessive rate of unemployment among minority citizens and to encourage the development of viable minority controlled enterprises.[FN24] ****2778** It was believed that such a "set-aside" was required in order to enable minorities, still "new on the scene" and "relatively small," to compete with larger and more established companies which would always be successful in underbidding minority enterprises. 123 Cong.Rec. 5327 (1977) (Rep. Mitchell). What is most significant about the congressional consideration of the measure is that although the use of a racial quota or "set-aside" by a recipient of federal funds would constitute a direct violation of Title VI if that statute were read to prohibit race-conscious action, no mention was made during the debates in either the House or the Senate of even the possibility that the quota provisions for minority contractors might in any way conflict with or modify Title VI. It is inconceivable that such a purported conflict would have escaped congressional attention through an inadvertent failure to recognize the relevance of Title VI. Indeed, the Act of which this affirmative-action provision is a part also contains a provision barring discrimination on the basis of sex which states that this prohibition "will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination under Title VI of the Civil Rights Act of 1964." 42 U.S.C. § 6709 (1976 ed.). Thus Congress was fully aware of the applicability of Title VI to the funding of public works projects. Under these circumstances, the enactment of the 10% "set-aside" for minority enterprises reflects a congressional judgment that the remedial use of race is permissible under Title VI. We have repeatedly recognized that subsequent legislation reflecting an interpretation of an earlier Act is entitled to great weight in determining the meaning of the earlier statute. *Red Lion Broadcasting Co. v. FCC*, 395 U.S., at 380–381, 89 S.Ct., at 1801–1802; ***350***Erlenbaugh v. United States*, 409 U.S. 239, 243–244, 93 S.Ct. 477, 480–481, 34 L.Ed.2d 446 (1972). See also *United States v. Stewart*, 311 U.S. 60, 64–65, 61 S.Ct. 102, 105–106 85 L.Ed. 40 (1940).[FN25]

FN24. See *id.*, at 7156 (1977) (Sen. Brooke).

FN25. In addition to the enactment of the 10% quota provision discussed *supra*, Congress has also passed other Acts mandating race-conscious measures to overcome disadvantages experienced by racial minorities. Although these statutes have less direct bearing upon the meaning of Title VI, they do demonstrate that Congress believes race-conscious remedial measures to be both permissible and desirable under at least some circumstances. This in turn undercuts the likelihood that Congress intended to limit voluntary efforts to implement similar measures. For example, § 7(a) of the National Science Foundation Authorization Act, 1977, provides:

"The Director of the National Science Foundation shall initiate an intensive search for qualified women, members of minority groups, and handicapped individuals to fill executive level positions in the National Science Foundation. In carrying out the requirement of this subsection, the Director shall work closely with organizations which have been active in seeking greater recognition and utilization of the scientific and technical capabilities of minorities, women, and handicapped individuals. The Director shall improve the representation of minorities, women, and handicapped individuals on advisory committees, review panels, and all other mechanisms by which the scientific community provides assistance to the Foundation." 90 Stat. 2056, note following 42 U.S.C. § 1873 (1976 ed.).

Perhaps more importantly, the Act also authorizes the funding of Minority Centers for Graduate Education. Section 7(c)(2) of the Act, 90 Stat. 2056, requires that these Centers:

"(A) have substantial minority student enrollment;

"(B) are geographically located near minority population centers;

"(C) demonstrate a commitment to encouraging and assisting minority students, researchers, and faculty;

> "(F) will serve as a regional resource in science and engineering for the minority community which the Center is designed to serve; and
>
> "(G) will develop joint educational programs with nearby undergraduate institutions of higher education which have a substantial minority student enrollment."
>
> Once again, there is no indication in the legislative history of this Act or elsewhere that Congress saw any inconsistency between the race-conscious nature of such legislation and the meaning of Title VI. And, once again, it is unlikely in the extreme that a Congress which believed that it had commanded recipients of federal funds to be absolutely color-blind would itself expend federal funds in such a race-conscious manner. See also the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. § 801 *et seq.* (1976 ed.), 49 U.S.C. § 1657a *et seq.* (1976 ed.); the Emergency School Aid Act, 20 U.S.C. § 1601 *et seq.* (1976 ed.).

****2779** C

Prior decisions of this Court also strongly suggest that Title VI does not prohibit the remedial use of race where such action is constitutionally permissible. In *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), the Court held that the failure of the San ***351** Francisco school system to provide English-language instruction to students of Chinese ancestry who do not speak English, or to provide them with instruction in Chinese, constituted a violation of Title VI. The Court relied upon an HEW regulation which stipulates that a recipient of federal funds "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 45 CFR § 80.3(b)(2) (1977). It interpreted this regulation as requiring San Francisco to extend the same educational benefits to Chinese-speaking students as to English-speaking students, even though there was no finding or allegation that the city's failure to do so was a result of a purposeful design to discriminate on the basis of race.

Lau is significant in two related respects. First, it indicates that in at least some circumstances agencies responsible for the administration of Title VI may require recipients who have not been guilty of any constitutional violations to depart from a policy of color blindness and to be cognizant of the impact of their actions upon racial minorities. Secondly, *Lau* clearly requires that institutions receiving federal funds be accorded considerable latitude in voluntarily undertaking race-conscious action designed to remedy the exclusion of significant numbers***352** of minorities from the benefits of federally funded programs. Although this Court has not yet considered the question, presumably, by analogy to our decisions construing Title VII, a medical school would not be in violation of Title VI under *Lau* because of the serious underrepresentation of racial minorities in its student body as long as it could demonstrate that its entrance requirements correlated sufficiently with the performance of minority students in medical school and the medical profession.[FN26] It would be inconsistent with *Lau* and the emphasis of Title VI and the HEW regulations on voluntary action, however, to require that an institution wait to be adjudicated to be in violation of the law before being permitted to voluntarily undertake corrective action based upon a good-faith and reasonable belief that the failure of certain racial minorities to satisfy entrance requirements is not a measure of their ultimate performance as doctors but a result of the lingering effects of past societal discrimination.

> FN26. Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

We recognize that *Lau*, especially when read in light of our subsequent decision in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision. However, even accepting *Lau*'s implication that impact alone is in some contexts sufficient to establish a prima facie violation of Title VI, contrary to our review that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's, this would not assist the respondent ***353** in the least. First, for the reasons discussed *supra*, at 2772–2779, regardless of whether Title VI's prohibitions extend beyond the ****2780** Constitution's, the evidence fails to establish, and, indeed, compels the rejection of, the proposition that Congress

intended to prohibit recipients of federal funds from voluntarily employing race-conscious measures to eliminate the effects of past societal discrimination against racial minorities such as Negroes. Secondly, *Lau* itself, for the reasons set forth in the immediately preceding paragraph, strongly supports the view that voluntary race-conscious remedial action is permissible under Title VI. If discriminatory racial impact alone is enough to demonstrate at least a prima facie Title VI violation, it is difficult to believe that the Title would forbid the Medical School from attempting to correct the racially exclusionary effects of its initial admissions policy during the first two years of the School's operation.

The Court has also declined to adopt a "color-blind" interpretation of other statutes containing nondiscrimination provisions similar to that contained in Title VI. We have held under Title VII that where employment requirements have a disproportionate impact upon racial minorities they constitute a statutory violation, even in the absence of discriminatory intent, unless the employer is able to demonstrate that the requirements are sufficiently related to the needs of the job.[FN27] More significantly, the Court has required that preferences be given by employers to members of racial minorities as a remedy for past violations of Title VII, even where there has been no finding that the employer has acted with a discriminatory intent.[FN28] Finally, we have construed the Voting ***354** Rights Act of 1965, ****2781** 42 U.S.C. § 1973 *et seq.* (1970 ed. and Supp. V), which contains a provision barring any voting procedure or qualification that denies or abridges "the right of ***355** any citizen of the United States to vote on account of race or color," as permitting States to voluntarily take race into account in a way that fairly represents the voting strengths of different racial groups in order to comply with the commands of the statute, even where the result is a gain for one racial group at the expense of others.[FN29]

FN27. *Ibid.*; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

FN28. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Executive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race. Prior to the 1972 amendments to Title VII (Equal Employment Opportunity Act of 1972, 86 Stat. 103) a number of Courts of Appeals approved race-conscious action to remedy the effects of employment discrimination. See, *e. g., Heat & Frost Insulators & Asbestos Workers v. Vogler*, 407 F.2d 1047 (C.A.5 1969); *United States v. Electrical Workers*, 428 F.2d 144, 149–150 (C.A.6), cert. denied, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); *United States v. Sheet Metal Workers*, 416 F.2d 123 (C.A.8 1969). In 1965, the President issued Exec. Order No. 11246, 3 CFR 339 (1964–1965 Comp.), which as amended by Exec. Order No. 11375, 3 CFR 684 (1966–1970 Comp.), required federal contractors to take affirmative action to remedy the disproportionately low employment of racial minorities in the construction industry. The Attorney General issued an opinion concluding that the race consciousness required by Exec. Order No. 11246 did not conflict with Title VII:

"It is not correct to say that Title VII prohibits employers from making race or national origin a factor for consideration at any stage in the process of obtaining employees. The legal definition of discrimination is an evolving one, but it is now well recognized in judicial opinions that the obligation of nondiscrimination, whether imposed by statute or by the Constitution, does not require and, in some circumstances, may not permit obliviousness or indifference to the racial consequences of alternative courses of action which involve the application of outwardly neutral criteria." 42 Op. Atty. Gen. 405, 411 (1969).

The federal courts agreed. See, *e. g., Contractors Assn. of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (C.A.3), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971) (which also held, 442 F.2d, at 173, that race-conscious affirmative action was permissible under Title VI); *Southern Illinois Builders Assn. v. Ogilvie*, 471 F.2d 680 (C.A.7 1972). Moreover, Congress, in enacting the 1972 amendments to Title VII, explicitly considered and rejected proposals to alter Exec. Order No. 11246 and the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race-conscious action. See Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chi.L.Rev. 723, 747–757 (1972). The section-by-section analysis of the 1972 amendments

> to Title VII undertaken by the Conference Committee Report on H.R. 1746 reveals a resolve to accept the then (as now) prevailing judicial interpretations of the scope of Title VII:
>
> "In any area where the new law does not address itself, or in any areas where a specific contrary intent is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." Legislative History of the Equal Employment Opportunity Act of 1972, p. 1844 (Comm.Print. 1972).
>
> FN29. *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977). See also *id.*, at 167–168, 97 S.Ct., at 1010–1011 (opinion of WHITE, J.).

These prior decisions are indicative of the Court's unwillingness to construe remedial statutes designed to eliminate discrimination against racial minorities in a manner which would impede efforts to attain this objective. There is no justification for departing from this course in the case of Title VI and frustrating the clear judgment of Congress that race-conscious remedial action is permissible.

We turn, therefore, to our analysis of the Equal Protection Clause of the Fourteenth Amendment.

III

A

The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors must be "constitutionally an irrelevance," *Edwards v. California*, 314 U.S. 160, 185, 62 S.Ct. 164, 172, 86 L.Ed. 119 (1941) (Jackson, J., concurring), summed up by the shorthand phrase "[o]ur Constitution is color-blind," *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 1146, 41 L.Ed. 256 (1896) (Harlan, J., dissenting), has never been adopted by this Court as the proper meaning of the Equal Protection Clause. In ***356** deed, we have expressly rejected this proposition on a number of occasions.

Our cases have always implied that an "overriding statutory purpose," *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S.Ct. 283, 288, 13 L.Ed.2d 222 (1964), could be found that would justify racial classifications. See, *e. g.*, *ibid.*; *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100–101, 63 S.Ct. 1375, 1385–1386, 87 L.Ed. 1774 (1943). More recently, in *McDaniel v. Barresi*, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971), this Court unanimously reversed the Georgia Supreme Court which had held that a desegregation plan voluntarily adopted by a local school board, which assigned students on the basis of race, was *per se* invalid because it was not color-blind. And in *North Carolina Board of Education v. Swann* we held, again unanimously, that a statute mandating color-blind school-assignment plans could not stand "against the background of segregation," since such a limit on remedies would "render illusory the promise of *Brown [I]*." 402 U.S., at 45–46, 91 S.Ct., at 1286.

We conclude, therefore, that racial classifications are not *per se* invalid under the Fourteenth Amendment. Accordingly, we turn to the problem of articulating what our role should be in reviewing state action that expressly classifies by race.

B

Respondent argues that racial classifications are always suspect and, consequently, that this Court should weigh the importance of the objectives served by Davis' special admissions program to see if they are compelling. In addition, he asserts that this Court must inquire whether, in its judgment, there are alternatives to racial classifications which would suit Davis' purposes. Petitioner, on the other hand, states that our proper role is simply to accept petitioner's determination that the racial ****2782** classifications used by its program are reasonably related to what it tells us are its benign ***357** purposes. We reject petitioner's view, but, because our prior cases are in many respects inapposite to that before us now, we find it necessary to define with precision the meaning of that inexact term, "strict scrutiny."

[10] Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny" and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.[FN30] See, *e. g.*, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16–17, 93 S.Ct. 1278, 1287–1288, 36 L.Ed.2d 16 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31

L.Ed.2d 274 (1972). But no fundamental right is involved here. See *San Antonio, supra*, 411 U.S., at 29–36, 93 S.Ct., at 1294–1298. Nor do whites as a class have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.*, at 28, 93 S.Ct., at 1294; see *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783, 82 L.Ed. 1234 (1938).[FN31]

FN30. We do not pause to debate whether our cases establish a "two-tier" analysis, a "sliding scale" analysis, or something else altogether. It is enough for present purposes that strict scrutiny is applied at least in some cases.

FN31. Of course, the fact that whites constitute a political majority in our Nation does not necessarily mean that active judicial scrutiny of racial classifications that disadvantage whites is inappropriate. Cf. *Castaneda v. Partida*, 430 U.S. 482, 499–500, 97 S.Ct. 1272, 1282–1283, 51 L.Ed.2d 498 (1977); *id.*, at 501, 97 S.Ct., at 1283 (MARSHALL, J., concurring).

Moreover, if the University's representations are credited, this is not a case where racial classifications are "irrelevant and therefore prohibited." *Hirabayashi, supra*, 320 U.S., at 100, 63 S.Ct., at 1385. Nor has anyone suggested that the University's purposes contravene the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government***358** behind racial hatred and separatism—are invalid without more. See *Yick Wo v. Hopkins*, 118 U.S. 356, 374, 6 S.Ct. 1064, 1073, 30 L.Ed. 220 (1886);[FN32] accord, *Strauder v. West Virginia*, 100 U.S. 303, 308, 25 L.Ed. 664 (1880); *Korematsu v. United States*, *supra*, 323 U.S., at 223, 65 S.Ct., at 197; *Oyama v. California*, 332 U.S. 633, 663, 68 S.Ct. 269, 283, 92 L.Ed. 249 (1948) (Murphy, J., concurring); *Brown I*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *McLaughlin v. Florida*, *supra*, 379 U.S., at 191–192, 85 S.Ct., at 287–289; *Loving v. Virginia*, *supra*, 388 U.S., at 11–12, 87 S.Ct., at 1823–1824; *Reitman v. Mulkey*, 387 U.S. 369, 375–376, 87 S.Ct. 1627, 1631–1632, 18 L.Ed.2d 830 (1967); *United Jewish Organizations v. Carey*, 430 U.S. 144, 165, 97 S.Ct. 996, 1009, 51 L.Ed.2d 229 (1977) (*UJO*) (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.); *id.*, at 169, 97 S.Ct., at 1011 (opinion concurring in part).[FN33]

FN32. "[T]he conclusion cannot be resisted, that no reason for [the refusal to issue permits to Chinese] exists except hostility to the race and nationality to which the petitioners belong . . .. The discrimination is, therefore, illegal . . .."

FN33. Indeed, even in *Plessy v. Ferguson* the Court recognized that a classification by race that presumed one race to be inferior to another would have to be condemned. See 163 U.S., at 544–551, 16 S.Ct., at 1140–1143.

On the other hand, the fact that this case does not fit neatly into our prior analytic framework for race cases does not mean that it should be analyzed by applying the very loose rational-basis standard of review that is the very least that is always applied in equal protection cases.[FN34] " '[T]he mere ****2783** recitation of a benign, compensatory purpose is not an automatic shield ***359** hich protects against any inquiry into the actual purposes underlying a statutory scheme.' " *Califano v. Webster*, 430 U.S. 313, 317, 97 S.Ct. 1192, 1194, 51 L.Ed.2d 360 (1977), quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648, 95 S.Ct. 1225, 1233, 43 L.Ed.2d 514 (1975). Instead, a number of considerations—developed in gender-discrimination cases but which carry even more force when applied to racial classifications—lead us to conclude that racial classifications designed to further remedial purposes " 'must serve important governmental objectives and must be substantially related to achievement of those objectives.' " *Califano v. Webster*, *supra*, 430 U.S., at 317, 97 S.Ct., at 1194, quoting *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976).[FN35]

FN34. Paradoxically, petitioner's argument is supported by the cases generally thought to establish the "strict scrutiny" standard in race cases, *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), and *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). In *Hirabayashi*, for example, the Court, responding to a claim that a racial classification was rational, sustained a racial classification solely on the basis of a conclusion in the double negative that it could not say that facts which might have been available "could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United

States." *Hirabayashi*, 320 U.S., at 101, 63 S.Ct., at 1386. A similar mode of analysis was followed in *Korematsu*, see 323 U.S., at 224, 65 S.Ct., at 197, even though the Court stated there that racial classifications were "immediately suspect" and should be subject to "the most rigid scrutiny." *Id.*, at 216, 65 S.Ct., at 194.

FN35. We disagree with our Brother POWELL's suggestion, *ante*, at 2755, that the presence of "rival groups which can claim that they, too, are entitled to preferential treatment" distinguishes the gender cases or is relevant to the question of scope of judicial review of race classifications. We are not asked to determine whether groups other than those favored by the Davis program should similarly be favored. All we are asked to do is to pronounce the constitutionality of what Davis has done.

But, were we asked to decide whether any given rival group—German-Americans for example—must constitutionally be accorded preferential treatment, we do have a "principled basis," *ante*, at 2751, for deciding this question, one that is well established in our cases: The Davis program expressly sets out four classes which receive preferred status. *Ante*, at 2740. The program clearly distinguishes whites, but one cannot reason from this a conclusion that German-Americans, as a national group, are singled out for invidious treatment. And even if the Davis program had a differential impact on German-Americans, they would have no constitutional claim unless they could prove that Davis intended invidiously to discriminate against German-Americans. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264–265, 97 S.Ct. 555, 562–563, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 238–241, 96 S.Ct. 2040, 2046, 2048, 48 L.Ed.2d 597 (1976). If this could not be shown, then "the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights . . . is inapplicable," *Katzenbach v. Morgan*, 384 U.S. 641, 657, 86 S.Ct. 1717, 1727, 16 L.Ed.2d 828 (1966), and the only question is whether it was rational for Davis to conclude that the groups it preferred had a greater claim to compensation than the groups it excluded. See *ibid.*; *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 38–39, 93 S.Ct. 1278, 1299–1300, 36 L.Ed.2d 16 (1973) (applying *Katzenbach* test to state action intended to remove discrimination in educational opportunity). Thus, claims of rival groups, although they may create thorny political problems, create relatively simple problems for the courts.

360** First, race, like, "gender-based classifications too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society." *Kahn v. Shevin*, 416 U.S. 351, 357, 94 S.Ct. 1734, 1738, 40 L.Ed.2d 189 (1974) (dissenting opinion). While a carefully tailored statute designed to remedy past discrimination could avoid these vices, see *Califano v. Webster*, *supra*; *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Kahn v. Shevin*, *supra*, we nonetheless have recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear and that a statute based on the latter is patently capable of stigmatizing all women with a badge of inferiority. Cf. *Schlesinger v. Ballard*, *supra*, 419 U.S., at 508, 95 S.Ct., at 577; *UJO*, *supra*, 430 U.S., at 174, and n. 3, 97 S.Ct., at 1014 (opinion concurring in part); ****2784Califano v. Goldfarb*, 430 U.S. 199, 223, 97 S.Ct. 1021, 1035, 51 L.Ed.2d 270 (1977) (STEVENS, J., concurring in judgment). See also *Stanton v. Stanton*, 421 U.S. 7, 14–15, 95 S.Ct. 1373, 1377–1378, 43 L.Ed.2d 688 (1975). State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own. See *UJO*, *supra*, 430 U.S., at 172, 97 S.Ct., at 1013 (opinion concurring in part); *ante*, at 2753 (opinion of POWELL, J.).

Second, race, like gender and illegitimacy, see *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972), is an immutable characteristic which its possessors are powerless to escape or set aside. While a classification is not *per se* invalid because it divides classes on the basis of an immutable characteristic, see *supra*, at 2781–2782, it is nevertheless true that such divisions are contrary to our deep belief that "legal burdens should bear some relationship to individual responsibility or ***361** wrongdoing," *Weber*, *supra*, 406 U.S., at 175, 92 S.Ct., at 1407; *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.), and that

advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual. See *UJO*, 430 U.S., at 173, 97 S.Ct., at 1013 (opinion concurring in part); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 566, 67 S.Ct. 910, 917, 91 L.Ed. 1093 (1947) (Rutledge, J., dissenting).

Because this principle is so deeply rooted it might be supposed that it would be considered in the legislative process and weighed against the benefits of programs preferring individuals because of their race. But this is not necessarily so: The "natural consequence of our governing process [may well be] that the most 'discrete and insular' of whites . . . will be called upon to bear the immediate, direct costs of benign discrimination." *UJO, supra*, 430 U.S., at 174, 97 S.Ct., at 1014 (opinion concurring in part). Moreover, it is clear from our cases that there are limits beyond which majorities may not go when they classify on the basis of immutable characteristics. See, *e. g., Weber, supra.* Thus, even if the concern for individualism is weighed by the political process, that weighing cannot waive the personal rights of individuals under the Fourteenth Amendment. See *Lucas v. Colorado General Assembly*, 377 U.S. 713, 736, 84 S.Ct. 1459, 1473, 12 L.Ed.2d 632 (1964).

In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. Thus, our review under the Fourteenth Amendment should be ***362** strict—not " 'strict' in theory and fatal in fact," [FN36] because it is stigma that causes fatality—but strict and searching nonetheless.

FN36. Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L.Rev. 1, 8 (1972).

IV

Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.

****2785** A

At least since *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), it has been clear that a public body which has itself been adjudged to have engaged in racial discrimination cannot bring itself into compliance with the Equal Protection Clause simply by ending its unlawful acts and adopting a neutral stance. Three years later, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), and its companion cases, *Davis v. School Comm'rs of Mobile County*, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971); *McDaniel v. Barresi*, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971), and *North Carolina Board of Education v. Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971), reiterated that racially neutral remedies for past discrimination were inadequate where consequences of past discriminatory acts influence or control present decisions. See, *e. g., Charlotte-Mecklenburg, supra*, 402 U.S., at 28, 91 S.Ct., at 1282. And the Court further held both that courts could enter desegregation orders which assigned students and faculty by reference to race, *Charlotte-Mecklenburg, supra; Davis, supra; United States v. Montgomery County Board of Ed.*, 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969), and that local school boards could *voluntarily* adopt desegregation ***363** plans which made express reference to race if this was necessary to remedy the effects of past discrimination. *McDaniel v. Barresi, supra.* Moreover, we stated that school boards, even in the absence of a judicial finding of past discrimination, could voluntarily adopt plans which assigned students with the end of creating racial pluralism by establishing fixed ratios of black and white students in each school. *Charlotte-Mecklenburg, supra*, 402 U.S., at 16, 91 S.Ct., at 1276. In each instance, the creation of unitary school systems, in which the effects of past discrimination had been "eliminated root and branch," *Green, supra*, 391 U.S., at 438, 88 S.Ct., at 1694, was recognized as a compelling social goal justifying the overt use of race.

Finally, the conclusion that state educational institutions may constitutionally adopt admissions programs designed to avoid exclusion of historically disadvantaged minorities, even when such programs explicitly take race into account, finds direct support in our cases construing congressional legislation designed to overcome the present effects of past discrimination. Congress can and has out-

lawed actions which have a disproportionately adverse and unjustified impact upon members of racial minorities and has required or authorized race-conscious action to put individuals disadvantaged by such impact in the position they otherwise might have enjoyed. See *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination. See *id.*, at 357–362, 97 S.Ct., at 1865–1868. Nor is it an objection to such relief that preference for minorities will upset the settled expectations of nonminorities. See *Franks, supra.* In addition, we have held that Congress, to remove barriers to equal opportunity, can and has required employers to use test criteria that fairly reflect the qualifications of minority applicants ***364** vis-à-vis nonminority applicants, even if this means interpreting the qualifications of an applicant in light of his race. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 435, 95 S.Ct. 2362, 2380, 45 L.Ed.2d 280 (1975).[FN37]

FN37. In *Albemarle*, we approved "differential validation" of employment tests. See 422 U.S., at 435, 95 S.Ct., at 2380. That procedure requires that an employer must ensure that a test score of, for example, 50 for a minority job applicant means the same thing as a score of 50 for a nonminority applicant. By implication, were it determined that a test score of 50 for a minority corresponded in "potential for employment" to a 60 for whites, the test could not be used consistently with Title VII unless the employer hired minorities with scores of 50 even though he might not hire nonminority applicants with scores above 50 but below 60. Thus, it is clear that employers, to ensure equal opportunity, may have to adopt race-conscious hiring practices.

These cases cannot be distinguished simply by the presence of judicial findings of ****2786** discrimination, for race-conscious remedies have been approved where such findings have not been made. *McDaniel v. Barresi*, *supra*; *UJO*; see *Califano V. Webster*, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974). See also *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966). Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law. And our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action.[FN38]

FN38. Indeed, Titles VI and VII of the Civil Rights Act of 1964 put great emphasis on voluntarism in remedial action. See *supra*, at 2772–2773. And, significantly, the Equal Employment Opportunity Commission has recently proposed guidelines authorizing employers to adopt racial preferences as a remedial measure where they have a reasonable basis for believing that they might otherwise be held in violation of Title VII. See 42 Fed.Reg. 64826 (1977).

***365** Nor can our cases be distinguished on the ground that the entity using explicit racial classifications itself had violated § 1 of the Fourteenth Amendment or an antidiscrimination regulation, for again race-conscious remedies have been approved where this is not the case. See *UJO*, 430 U.S., at 157, 97 S.Ct., at 1005 (opinion of WHITE, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ.);[FN39] *id.*, at 167, 97 S.Ct., at 1010 (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.);[FN40] cf. *Califano v. Webster*, *supra*, 430 U.S., at 317, 97 S.Ct., at 1194; *Kahn v. Shevin*, *supra.* Moreover, the presence or absence of past discrimination by universities or employers is largely irrelevant to resolving respondent's constitutional claims. The claims of those burdened by the race-conscious actions of a university or employer who has never been adjudged in violation of an antidiscrimination law are not any more or less entitled to deference than the claims of the burdened nonminority workers in *Franks v. Bowman Transportation Co.*, *supra*, in which the employer had violated Title VII, for in each case the employees are innocent of past discrimination. And, although it might be argued that, where an employer has violated an antidiscrimination law, the expectations of nonminority workers are themselves products of discrimination and hence "tainted," see *Franks*, *supra*, at 776, 96 S.Ct., at 1270, and therefore more easily upset, the same argument can be made with respect to respondent. If it was reasonable to conclude—as we hold that it was—that the failure of minorities to qualify for admission at Davis under regular

procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination,***366** respondent would have failed to qualify for admission even in the absence of Davis' special admissions program.[FN41]

FN39. "[T]he [Voting Rights] Act's prohibition . . . is not dependent upon proving past unconstitutional apportionments . . . ."

FN40. "[T]he State is [not] powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls."

FN41. Our cases cannot be distinguished by suggesting, as our Brother POWELL does, that in none of them was anyone deprived of "the relevant benefit." *Ante*, at 2756. Our school cases have deprived whites of the neighborhood school of their choice; our Title VII cases have deprived nondiscriminating employees of their settled seniority expectations; and *UJO* deprived the Hassidim of bloc voting strength. Each of these injuries was constitutionally cognizable as is respondent's here.

Thus, our cases under Title VII of the Civil Rights Act have held that, in order to ****2787** achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefited suffered from racial discrimination. These decisions compel the conclusion that States also may adopt race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination.[FN42]

FN42. We do not understand Mr. Justice POWELL to disagree that providing a remedy for past racial prejudice can constitute a compelling purpose sufficient to meet strict scrutiny. See *ante*, at 2756. Yet, because petitioner is a corporation administering a university, he would not allow it to exercise such power in the absence of "judicial, legislative, or administrative findings of constitutional or statutory violations." *Ante*, at 2758. While we agree that reversal in this case would follow *a fortiori* had Davis been guilty of invidious racial discrimination or if a federal statute mandated that universities refrain from applying any admissions policy that had a disparate and unjustified racial impact, see, *e. g., McDaniel v. Barresi*, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), we do not think it of constitutional significance that Davis has not been so adjudged.

Generally, the manner in which a State chooses to delegate governmental functions is for it to decide. Cf. *Sweezy v. New Hampshire*, 354 U.S. 234, 256, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) (Frankfurter, J., concurring in result). California, by constitutional provision, has chosen to place authority over the operation of the University of California in the Board of Regents. See Cal.Const., Art. 9, § 9(a). Control over the University is to be found not in the legislature, but rather in the Regents who had been vested with full legislative (including policymaking), administrative, and adjudicative powers by the citizens of California. See *ibid.; Ishimatsu v. Regents*, 266 Cal.App.2d 854, 863–864, 72 Cal.Rptr. 756, 762–763 (1968); *Goldberg v. Regents*, 248 Cal.App.2d 867, 874, 57 Cal.Rptr. 463, 468 (1967); 30 Op.Cal.Atty.Gen. 162, 166 (1957) ("The Regents, not the legislature, have the general rule-making or policy-making power in regard to the University"). This is certainly a permissible choice, see *Sweezy*, *supra*, and we, unlike our Brother POWELL, find nothing in the Equal Protection Clause that requires us to depart from established principle by limiting the scope of power the Regents may exercise more narrowly than the powers that may constitutionally be wielded by the Assembly.

Because the Regents can exercise plenary legislative and administrative power, it elevates form over substance to insist that Davis could not use race-conscious remedial programs until it had been adjudged in violation of the Constitution or an antidiscrimination statute. For, if the Equal Protection Clause required such a violation as a predicate, the Regents could simply have promulgated a regulation prohibiting disparate treatment not justified by the need to admit only

qualified students, and could have declared Davis to have been in violation of such a regulation on the basis of the exclusionary effect of the admissions policy applied during the first two years of its operation. See *infra*, at 2789–2790.

367** Title VII was enacted pursuant to Congress' power under the Commerce Clause and § 5 of the Fourteenth Amendment. To the extent that Congress acted under the Commerce Clause power, it was restricted in the use of race in governmental decisionmaking by the equal protection component of the Due Process Clause of the Fifth Amendment precisely to the same extent as are the States by § 1 of the Fourteenth Amendment.[FN43] Therefore, to the extent that Title VII rests on the Commerce Clause power, our decisions such as *Franks* and ***368** *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), implicitly recognize that the affirmative use of race is consistent with the equal protection component of the Fifth Amendment ****2788** and therefore with the Fourteenth Amendment. To the extent that Congress acted pursuant to § 5 of the Fourteenth Amendment, those cases impliedly recognize that Congress was empowered under that provision to accord preferential treatment to victims of past discrimination in order to overcome the effects of segregation, and we see no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do. A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional pre-emption of the subject matter. Nothing whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed. Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment. "To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment." *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 98, 65 S.Ct. 1483, 1489, 89 L.Ed. 2072 (1945) (Frankfurter, J., concurring).[FN44] We therefore369** conclude that Davis' goal of admitting minority students disadvantaged by the effects of past discrimination is sufficiently important to justify use of race-conscious admissions criteria.

FN43. "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 (1976) (*per curiam*), citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2, 95 S.Ct. 1225, 1228, 43 L.Ed.2d 514 (1975).

FN44. *Railway Mail Assn.* held that a state statute forbidding racial discrimination by certain labor organizations did not abridge the Association's due process rights secured by the Fourteenth Amendment because that result "would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color." 326 U.S., at 94, 65 S.Ct., at 1487. That case thus established the principle that a State voluntarily could go beyond what the Fourteenth Amendment required in eliminating private racial discrimination.

B

Properly construed, therefore, our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large. There is no question that Davis' program is valid under this test.

Certainly, on the basis of the undisputed factual submissions before this Court, Davis had a sound basis for believing that the problem of underrepresentation of minorities was substantial and chronic and that the problem was attributable to handicaps imposed on minority applicants by past and present racial discrimination. Until at least 1973, the practice of medicine in this country was, in fact, if not in law, largely the prerogative of whites.[FN45] In 1950, for example, while Negroes ***370** constituted 10% of the ****2789** total population, Negro physicians constituted only 2.2% of the total number of physicians.[FN46] The overwhelming majority of these, moreover, were educated in two predominantly Negro medical schools, Howard and Meharry.[FN47] By 1970, the gap between the proportion of Negroes in medicine and their proportion in the population had widened: The number of Negroes employed in medicine remained frozen at 2.2% [FN48] while the Negro population had increased to 11.1%.[FN49] The number of Negro admittees to predominantly white medical schools, moreover, had declined in absolute numbers during the years

1955 to 1964. Odegaard 19.

FN45. According to 89 schools responding to a questionnaire sent to 112 medical schools (all of the then-accredited medical schools in the United States except Howard and Meharry), substantial efforts to admit minority students did not begin until 1968. That year was the earliest year of involvement for 34% of the schools; an additional 66% became involved during the years 1969 to 1973. See C. Odegaard, Minorities in Medicine: From Receptive Passivity to Positive Action, 1966–1976, p. 19 (1977) (hereinafter Odegaard). These efforts were reflected in a significant increase in the percentage of minority M.D. graduates. The number of American Negro graduates increased from 2.2% in 1970 to 3.3% in 1973 and 5.0% in 1975. Significant percentage increases in the number of Mexican American, American-Indian, and mainland Puerto Rican graduates were also recorded during those years. *Id.*, at 40.

The statistical information cited in this and the following notes was compiled by Government officials or medical educators, and has been brought to our attention in many of the briefs. Neither the parties nor the *amici* challenge the validity of the statistics alluded to in our discussion.

FN46. D. Reitzes, Negroes and Medicine, pp. xxvii, 3 (1958).

FN47. Between 1955 and 1964, for example, the percentage of Negro physicians graduated in the United States who were trained at these schools ranged from 69.0% to 75.8%. See Odegaard 19.

FN48. U.S. Dept. of Health, Education, and Welfare, Minorities and Women in the Health Fields 7 (Pub. No. (HRA) 75–22, May 1974).

FN49. U.S. Dept. of Commerce, Bureau of the Census, 1970 Census, vol. 1, pt. 1, Table 60 (1973).

Moreover, Davis had very good reason to believe that the national pattern of underrepresentation of minorities in medicine would be perpetuated if it retained a single admissions standard. For example, the entering classes in 1968 and 1969, the years in which such a standard was used, included only 1 Chicano and 2 Negroes out of the 50 admittees for each year. Nor is there any relief from this pattern of underrepresentation in the statistics for the regular admissions program in later years.[FN50]

FN50. See *ante*, at 2741 n. 6 (opinion of POWELL, J.).

Davis clearly could conclude that the serious and persistent underrepresentation of minorities in medicine depicted by these statistics is the result of handicaps under which minority applicants labor as a consequence of a background of deliberate, purposeful discrimination against minorities in education ***371** and in society generally, as well as in the medical profession. From the inception of our national life, Negroes have been subjected to unique legal disabilities impairing access to equal educational opportunity. Under slavery, penal sanctions were imposed upon anyone attempting to educate Negroes.[FN51] After enactment of the Fourteenth Amendment the States continued to deny Negroes equal educational opportunity, enforcing a strict policy of segregation that itself stamped Negroes as inferior, *Brown I*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), that relegated minorities to inferior educational institutions,[FN52] and that denied them intercourse in the mainstream of professional life necessary to advancement. See *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950). Segregation was not limited to public facilities, moreover, but was enforced by criminal penalties against private action as well. Thus, as late as 1908, this Court enforced a state criminal conviction against a private college for teaching Negroes together with whites. *Berea College v. Kentucky*, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81. See also *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

FN51. See, *e. g.*, R. Wade, Slavery in the Cities: The South 1820–1860, pp. 90–91 (1964).

FN52. For an example of unequal facilities in California schools, see *Soria v. Oxnard School Dist. Board*, 386 F.Supp. 539, 542 (CD Cal.1974). See also R. Kluger, Simple Justice (1976).

Green v. County School Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), gave explicit recognition to the fact that the habit of discrimination and the cultural tradition of race prejudice cultivated by centuries of legal slavery and segregation were not immediately

dissipated when *Brown I, supra,* announced the constitutional principle that equal educational opportunity and participation in all aspects of American life could not be denied on the basis of race. Rather, massive official and private resistance prevented, and to a lesser extent still prevents, attainment of equal opportunity in education at all levels and in ****2790** the professions. The generation of minority students applying to Davis Medical School since it opened in 1968—most of whom ***372** were born before or about the time *Brown I* was decided—clearly have been victims of this discrimination. Judicial decrees recognizing discrimination in public education in California testify to the fact of widespread discrimination suffered by California-born minority applicants; [FN53] many minority group members living in California, moreover, were born and reared in school districts in Southern States segregated by law. [FN54] Since separation of school-children by race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," *Brown I, supra,* 347 U.S., at 494, 74 S.Ct., at 691, the conclusion is inescapable that applicants to medical school must be few indeed who endured the effects of *de jure* segregation, the resistance to *Brown I,* or the equally debilitating pervasive private discrimination fostered by our long history of official discrimination, cf. *Reitman v. Mulkey,* 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967), and yet come to the starting line with an education equal to whites.[FN55]

FN53. See, *e. g., Crawford v. Board of Education,* 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28 (1976); *Soria v. Oxnard School Dist. Board, supra*; *Spangler v. Pasadena City Board of Education,* 311 F.Supp. 501 (C.D.Cal.1970); C. Wollenberg, All Deliberate Speed: Segregation and Exclusion in California Schools, 1855–1975, pp. 136–177 (1976).

FN54. For example, over 40% of American-born Negro males aged 20 to 24 residing in California in 1970 were born in the South, and the statistic for females was over 48%. These statistics were computed from data contained in Census, *supra* n. 49, pt. 6, California, Tables 139, 140.

FN55. See, *e. g.,* O'Neil, Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education, 80 Yale L.J. 699, 729–731 (1971).

Moreover, we need not rest solely on our own conclusion that Davis had sound reason to believe that the effects of past discrimination were handicapping minority applicants to the Medical School, because the Department of Health, Education, and Welfare, the expert agency charged by Congress with promulgating regulations enforcing Title VI of the Civil Rights Act of 1964, see *supra,* at 2775–2776, has also reached the conclusion that race may be taken into account in situations ***373** where a failure to do so would limit participation by minorities in federally funded programs, and regulations promulgated by the Department expressly contemplate that appropriate race-conscious programs may be adopted by universities to remedy unequal access to university programs caused by their own or by past societal discrimination. See *supra,* at 2776, discussing 45 CFR §§ 80.3(b)(6)(ii) and 80.5(j) (1971). It cannot be questioned that, in the absence of the special admissions program, access of minority students to the Medical School would be severely limited and, accordingly, race-conscious admissions would be deemed an appropriate response under these federal regulations. Moreover, the Department's regulatory policy is not one that has gone unnoticed by Congress. See *supra,* at 2777–2778. Indeed, although an amendment to an appropriations bill was introduced just last year that would have prevented the Secretary of Health, Education, and Welfare from mandating race-conscious programs in university admissions, proponents of this measure, significantly, did not question the validity of voluntary implementation of race-conscious admissions criteria. See *ibid.* In these circumstances, the conclusion implicit in the regulations—that the lingering effects of past discrimination continue to make race-conscious remedial programs appropriate means for ensuring equal educational opportunity in universities—deserves considerable judicial deference. See, *e. g., Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966); *UJO,* 430 U.S., at 175–178, 97 S.Ct., at 1014–1016 (opinion concurring in part).[FN56]

FN56. Congress and the Executive have also adopted a series of race-conscious programs, each predicated on an understanding that equal opportunity cannot be achieved by neutrality because of the effects of past and present discrimination. See *supra,* at 2778–2779.

****2791** C

The second prong of our test—whether the Davis program stigmatizes any discrete group or individual and whether race ***374** is reasonably used in light of the program's objectives—is clearly satisfied by the Davis pro-

gram.

It is not even claimed that Davis' program in any way operates to stigmatize or single out any discrete and insular, or even any identifiable, nonminority group. Nor will harm comparable to that imposed upon racial minorities by exclusion or separation on grounds of race be the likely result of the program. It does not, for example, establish an exclusive preserve for minority students apart from and exclusive of whites. Rather, its purpose is to overcome the effects of segregation by bringing the races together. True, whites are excluded from participation in the special admissions program, but this fact only operates to reduce the number of whites to be admitted in the regular admissions program in order to permit admission of a reasonable percentage—less than their proportion of the California population [FN57]—of otherwise underrepresented qualified minority applicants. [FN58]

FN57. Negroes and Chicanos alone constitute approximately 22% of California's population. This percentage was computed from data contained in Census, *supra*, n. 49, pt. 6, California, sec. 1, 6–4, and Table 139.

FN58. The constitutionality of the special admissions program is buttressed by its restriction to only 16% of the positions in the Medical School, a percentage less than that of the minority population in California, see *ibid.*, and to those minority applicants deemed qualified for admission and deemed likely to contribute to the Medical School and the medical profession. Record 67. This is consistent with the goal of putting minority applicants in the position they would have been in if not for the evil of racial discrimination. Accordingly, this case does not raise the question whether even a remedial use of race would be unconstitutional if it admitted unqualified minority applicants in preference to qualified applicants or admitted, as a result of preferential consideration, racial minorities in numbers significantly in excess of their proportional representation in the relevant population. Such programs might well be inadequately justified by the legitimate remedial objectives. Our allusion to the proportional percentage of minorities in the population of the State administering the program is not intended to establish either that figure or that population universe as a constitutional benchmark. In this case, even respondent, as we understand him, does not argue that, if the special admissions program is otherwise constitutional, the allotment of 16 places in each entering class for special admittees is unconstitutionally high.

***375** Nor was Bakke in any sense stamped as inferior by the Medical School's rejection of him. Indeed, it is conceded by all that he satisfied those criteria regarded by the school as generally relevant to academic performance better than most of the minority members who were admitted. Moreover, there is absolutely no basis for concluding that Bakke's rejection as a result of Davis' use of racial preference will affect him throughout his life in the same way as the segregation of the Negro schoolchildren in *Brown I* would have affected them. Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color. This distinction does not mean that the exclusion of a white resulting from the preferential use of race is not sufficiently serious to require justification; but it does mean that the injury inflicted by such a policy is not distinguishable from disadvantages caused by a wide range of government actions, none of which has ever been thought impermissible for that reason alone.

In addition, there is simply no evidence that the Davis program discriminates intentionally or unintentionally against any minority group which it purports to benefit. The program does not establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted. ****2792** Nor can the program reasonably be regarded as stigmatizing the program's beneficiaries or their race as inferior. The Davis program does not simply advance less qualified applicants; rather, it compensates applicants, who it is uncontested are fully qualified to study medicine, for educational disadvantages which it was reasonable to conclude were a product of ***376** state-fostered discrimination. Once admitted, these students must satisfy the same degree requirements as regularly admitted students; they are taught by the same faculty in the same classes; and their performance is evaluated by the same standards by which regularly admitted students are judged. Under these circumstances, their performance and degrees must be regarded equally with the regularly admitted students with whom they compete for standing. Since minority graduates cannot justifiably be regarded as less well qualified than nonminority graduates by virtue of the special admissions program, there is no reasonable

basis to conclude that minority graduates at schools using such programs would be stigmatized as inferior by the existence of such programs.

D

We disagree with the lower courts' conclusion that the Davis program's use of race was unreasonable in light of its objectives. First, as petitioner argues, there are no practical means by which it could achieve its ends in the foreseeable future without the use of race-conscious measures. With respect to any factor (such as poverty or family educational background) that may be used as a substitute for race as an indicator of past discrimination, whites greatly outnumber racial minorities simply because whites make up a far larger percentage of the total population and therefore far outnumber minorities in absolute terms at every socioeconomic level.[FN59] For example, of a class of recent medical school applicants from families with less than $10,000 income, at least 71% were white.[FN60] Of all 1970 families headed by a ***377** person *not* a high school graduate which included related children under 18, 80% were white and 20% were racial minorities.[FN61] Moreover, while race is positively correlated with differences in GPA and MCAT scores, economic disadvantage is not. Thus, it appears that economically disadvantaged whites do not score less well than economically advantaged whites, while economically advantaged blacks score less well than do disadvantaged whites.[FN62] These statistics graphically illustrate that the University's purpose to integrate its classes by compensating for past discrimination could not be achieved by a general preference for the economically disadvantaged or the children of parents of limited education unless such groups were to make up the entire class.

FN59. See Census, *supra*, n. 49, Sources and Structure of Family Income, pp. 1–12.

FN60. This percentage was computed from data presented in B. Waldman, Economic and Racial Disadvantage as Reflected in Traditional Medical School Selection Factors: A Study of 1976 Applicants to U. S. Medical Schools 34 (Table A–15), 42 (Table A–23) (Association of American Medical Colleges 1977.)

FN61. This figure was computed from data contained in Census, *supra* n. 49, pt. 1, United States Summary, Table 209.

FN62. See Waldman, *supra* n. 60, at 10–14 (Figures 1–5).

Second, the Davis admissions program does not simply equate minority status with disadvantage. Rather, Davis considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination. The record makes clear that only minority applicants likely to have been isolated from the mainstream of American life are considered in the special program; other minority applicants are eligible only through the regular admissions program. True, the procedure by which disadvantage is detected is informal, but we have never insisted that educators conduct their affairs through adjudicatory proceedings, and such ****2793** insistence here is misplaced. A case-by-case inquiry into the extent to which each individual applicant has been affected, either directly or indirectly, by racial discrimination, would seem to be, as a practical matter, virtually impossible, despite the fact that there are excellent reasons for concluding that such effects generally exist. When individual measurement is impossible or extremely impractical, there is nothing to prevent a State ***378** from using categorical means to achieve its ends, at least where the category is closely related to the goal. Cf. *Gaston County v. United States*, 395 U.S. 285, 295–296, 89 S.Ct. 1720, 1725–1726, 23 L.Ed.2d 309 (1969); *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1731, 16 L.Ed.2d 828(1986). And it is clear from our cases that specific proof that a person has been victimized by discrimination is not a necessary predicate to offering him relief where the probability of victimization is great. See *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

E

Finally, Davis' special admissions program cannot be said to violate the Constitution simply because it has set aside a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants. For purposes of constitutional adjudication, there is no difference between the two approaches. In any admissions program which accords special consideration to disadvantaged racial minorities, a determination of the degree of preference to be given is unavoidable, and any given preference that results in the exclusion of a white candidate is no more or less constitutionally acceptable than a program such as that at Davis. Furthermore, the extent of the preference inevitably depends on how many minority applicants the particular school is seeking to admit in any particular year so long as the number of qualified minority applicants

exceeds that number. There is no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done here.[FN63]

FN63. The excluded white applicant, despite Mr. Justice POWELL's contention to the contrary, *ante*, at 2763 n. 52, receives no more or less "individualized consideration" under our approach than under his.

***379** The "Harvard" program, see *ante*, at 2762–2763, as those employing it readily concede, openly and successfully employs a racial criterion for the purpose of ensuring that some of the scarce places in institutions of higher education are allocated to disadvantaged minority students. That the Harvard approach does not also make public the extent of the preference and the precise workings of the system while the Davis program employs a specific, openly stated number, does not condemn the latter plan for purposes of Fourteenth Amendment adjudication. It may be that the Harvard plan is more acceptable to the public than is the Davis "quota." If it is, any State, including California, is free to adopt it in preference to a less acceptable alternative, just as it is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program. But there is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public.

V

Accordingly, we would reverse the judgment of the Supreme Court of California holding the Medical School's special admissions program unconstitutional and directing respondent's admission, as well as that ****2794** portion of the judgment enjoining the Medical School from according any consideration to race in the admissions process.

Mr. Justice WHITE.

I write separately concerning the question of whether Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, provides for a private cause of action. Four Justices are apparently of the view that such a private cause of action ***380** exists, and four Justices assume it for purposes of this case. I am unwilling merely to assume an affirmative answer. If in fact no private cause of action exists, this Court and the lower courts as well are without jurisdiction to consider respondent's Title VI claim. As I see it, if we are not obliged to do so, it is at least advisable to address this threshold jurisdictional issue. See *United States v. Griffin*, 303 U.S. 226, 229, 58 S.Ct. 601, 602, 82 L.Ed. 764 (1938).[FN1] Furthermore, just as it is inappropriate to address constitutional issues without determining whether statutory grounds urged before us are dispositive, it is at least questionable practice to adjudicate a novel and difficult statutory issue without first considering whether we have jurisdiction to decide it. Consequently, I address the question of whether respondent may bring suit under Title VI.

FN1. It is also clear from *Griffin* that "lack of jurisdiction . . . touching the subject matter of the litigation cannot be waived by the parties . . . ." 303 U.S., at 229, 58 S.Ct., at 602. See also *Mount Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 278, 97 S.Ct. 568, 571, 50 L.Ed.2d 471 (1977); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908); *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884).

In *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), we did adjudicate a Title VI claim brought by a class of individuals. But the existence of a private cause of action was not at issue. In addition, the understanding of Mr. Justice STEWART's concurring opinion, which observed that standing was not being contested, was that the standing alleged by petitioners was as third-party beneficiaries of the funding contract between the Department of Health, Education, and Welfare and the San Francisco United School District, a theory not alleged by the present respondent. *Id.*, at 571 n. 2, 94 S.Ct., at 790. Furthermore, the plaintiffs in *Lau* alleged jurisdiction under 42 U.S.C. § 1983 rather than directly under the provisions of Title VI, as does the plaintiff in this case. Although the Court undoubtedly had an obligation to consider the jurisdictional question, this is surely not the first instance in which the Court has bypassed a jurisdictional problem not presented by the parties. Certainly the Court's silence on the jurisdictional question, when considered in the context of the indifference of the litigants to it and the fact that jurisdiction was alleged under § 1983, does not foreclose a reasoned conclusion that Title VI affords no private cause

of action.

A private cause of action under Title VI, in terms both of ***381** the Civil Rights Act as a whole and that Title, would not be "consistent with the underlying purposes of the legislative scheme" and would be contrary to the legislative intent. *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975). Title II, 42 U.S.C. § 2000a *et seq.*, dealing with public accommodations, and Title VII, 42 U.S.C. § 2000e *et seq.* (1970 ed. and Supp. V), dealing with employment, proscribe private discriminatory conduct that as of 1964 neither the Constitution nor other federal statutes had been construed to forbid. Both Titles carefully provided for private actions as well as for official participation in enforcement. Title III, 42 U.S.C. § 2000b *et seq.*, and Title IV, 42 U.S.C. § 2000c *et seq.* (1970 ed. and Supp. V), dealing with public facilities and public education, respectively, authorize suits by the Attorney General to eliminate racial discrimination in these areas. Because suits to end discrimination in public facilities and public education were already available under 42 U.S.C. § 1983, it was, of course, unnecessary to provide for private actions under Titles III and IV. But each Title carefully provided that its provisions for public actions would not adversely affect pre-existing private remedies. §§ 2000b–2 and 2000c–8.

The role of Title VI was to terminate federal financial support for public and private institutions or programs that discriminated on the basis of race. Section 601, ****2795**42 U.S.C. § 2000d, imposed the proscription that no person, on the grounds of race, color, or national origin, was to be excluded from or discriminated against under any program or activity receiving federal financial assistance. But there is no express provision for private actions to enforce Title VI, and it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other Titles of the Act, intended silently to create a private cause of action to enforce Title VI.

It is also evident from the face of § 602, 42 U.S.C. § 2000d–1, that Congress intended the departments and agencies***382** to define and to refine, by rule or regulation, the general proscription of § 601, subject only to judicial review of agency action in accordance with established procedures. Section 602 provides for enforcement: Every federal department or agency furnishing financial support is to implement the proscription by appropriate rule or regulation, each of which requires approval by the President. Termination of funding as a sanction for noncompliance is authorized, but *only* after a hearing and after the failure of voluntary means to secure compliance. Moreover, termination may not take place until the department or agency involved files with the appropriate committees of the House and Senate a full written report of the circumstances and the grounds for such action and 30 days have elapsed thereafter. Judicial review was provided, at least for actions terminating financial assistance.

Termination of funding was regarded by Congress as a serious enforcement step, and the legislative history is replete with assurances that it would not occur until every possibility for conciliation had been exhausted.[FN2] To allow a private ***383** individual to sue to cut off funds under Title VI would compromise these assurances and short circuit the procedural preconditions provided in Title VI. If the Federal Government may not cut off funds except pursuant to an agency rule, approved by the President, and presented to the appropriate committee of Congress for a layover period, and after voluntary means to achieve compliance have failed, it is inconceivable that Congress intended to permit individuals to circumvent these administrative prerequisites themselves.

> FN2. "Yet, before that principle [that 'Federal funds are not to be used to support racial discrimination'] is implemented to the detriment of any person, agency, or State, regulations giving notice of what conduct is required must be drawn up by the agency administering the program. . . . Before such regulations become effective, they must be submitted to and approved by the President.
>
> "Once having become effective, there is still a long road to travel before any sanction whatsoever is imposed. Formal action to compel compliance can only take place after the following has occurred: first, there must be an unsuccessful attempt to obtain voluntary compliance; second, there must be an administrative hearing; third, a written report of the circumstances and the grounds for such action must be filed with the appropriate committees of the House and Senate; and fourth, 30 days must have elapsed between such filing and the action denying benefits under a Federal program. Finally, even that action is by no means final because it is subject to judicial review and can be further postponed by judicial action granting temporary relief pending review in order to avoid irreparable injury. It would be difficult indeed to concoct any additional safe-

> guards to incorporate in such a procedure." 110 Cong.Rec. 6749 (1964) (Sen. Moss).
>
> "[T]he authority to cut off funds is hedged about with a number of procedural restrictions. . . . [There follow details of the preliminary steps.]
>
> "In short, title VI is a reasonable, moderate, cautious, carefully worked out solution to a situation that clearly calls for legislative action." *Id.*, at 6544 (Sen. Humphrey). "Actually, *no action whatsoever* can be taken against anyone until the Federal agency involved has advised the appropriate person of his failure to comply with nondiscrimination requirements and until voluntary efforts to secure compliance have failed." *Id.*, at 1519 (Rep. Celler) (emphasis added). See also remarks of Sen. Ribicoff (*id.*, at 7066–7067); Sen. Proxmire (*id.*, at 8345); Sen. Kuchel (*id.*, at 6562). These safeguards were incorporated into 42 U.S.C. § 2000d–1.

Furthermore, although Congress intended Title VI to end federal financial support for racially discriminatory policies of not only public but also private institutions and programs, it is extremely unlikely that Congress,****2796** without a word indicating that it intended to do so, contemplated creating an independent, private statutory cause of action against all private as well as public agencies that might be in violation of the section. There is no doubt that Congress regarded private litigation as an important tool to attack discriminatory practices. It does not at all follow, however, that Congress anticipated new private actions under Title VI itself. Wherever a discriminatory program was a public undertaking, such as a public school, private remedies were already available under other statutes, and a private remedy under Title VI was ***384** unnecessary. Congress was well aware of this fact. Significantly, there was frequent reference to *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (C.A.4 1963), cert. denied, 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659 (1964), throughout the congressional deliberations. See, *e. g.*, 110 Cong.Rec. 6544 (1964) (Sen. Humphrey). *Simkins* held that under appropriate circumstances, the operation of a private hospital with "massive use of public funds and extensive state-federal sharing in the common plan" constituted "state action" for the purposes of the Fourteenth Amendment. 323 F.2d, at 967. It was unnecessary, of course, to create a Title VI private action against private discriminators where they were already within the reach of existing private remedies. But when they were not—and *Simkins* carefully disclaimed holding that "every subvention by the federal or state government automatically involves the beneficiary in 'state action,' " *ibid.* [FN3]—it is difficult ***385** to believe that Congress *silently* created a *private* remedy to terminate conduct that previously had been entirely beyond the reach of federal law.

> FN3. This Court has never held that the mere receipt of federal or state funds is sufficient to make the recipient a federal or state actor. In *Norwood v. Harrison*, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973), private schools that received state aid were held subject to the Fourteenth Amendment's ban on discrimination, but the Court's test required "tangible financial aid" with a "significant tendency to facilitate, reinforce, and support private discrimination." *Id.*, at 466, 93 S.Ct., at 2811. The mandate of *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961), to sift facts and weigh circumstances of governmental support in each case to determine whether private or state action was involved, has not been abandoned for an automatic rule based on receipt of funds.
>
> Contemporaneous with the congressional debates on the Civil Rights Act was this Court's decision in *Griffin v. School Board*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 265 (1964). Tuition grants and tax concessions were provided for parents of students in private schools, which discriminated racially. The Court found sufficient state action, but carefully limited its holding to the circumstances presented: "[C]losing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws." *Id.*, at 232, 84 S.Ct., at 1234.
>
> Hence, neither at the time of the enactment of Title VI, nor at the present time to the extent this Court has spoken, has mere receipt of state funds created state action. Moreover, *Simkins* has not met with universal approval among the United States Courts of Appeals. See cases cited in *Greco v. Orange Memorial Hospital Corp.*, 423 U.S. 1000, 1004, 96 S.Ct. 433, 435, 46 L.Ed.2d 376 (1975) (WHITE, J., dissenting from denial of certiorari).

For those who believe, contrary to my views, that Title VI was intended to create a stricter standard of color blindness than the Constitution itself requires, the result of no private cause of action follows even more readily. In that case Congress must be seen to have banned degrees of discrimination, as well as types of discriminators, not previously reached by law. A Congress careful enough to provide that existing private causes of action would be preserved (in Titles III and IV) would not leave for inference a vast new extension of private enforcement power. And a Congress so exceptionally concerned with the satisfaction of procedural preliminaries before confronting fund recipients with the choice of a cutoff or of stopping discriminating would not permit private parties to pose precisely that same dilemma in a greatly widened category of cases with no procedural requirements whatsoever.

Significantly, in at least three instances legislators who played a major role in the ****2797** passage of Title VI explicitly stated that a private right of action under Title VI does not exist.[FN4] ***386** As an "indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one," *Cort v. Ash*, 422 U.S., at 78, 95 S.Ct., at 2088, clearer statements cannot be imagined, and under *Cort*, "an explicit purpose to *deny* such cause of action [is] controlling." *Id.*, at 82, 95 S.Ct., at 2090. Senator Keating, for example, proposed a private "right to sue" for the "person suffering from discrimination"; but the Department of Justice refused to include it, and the Senator acquiesced.[FN5] These are not neutral, ambiguous statements. They indicate the absence of a legislative intent to create a private remedy. Nor do any of these statements make nice distinctions between a private cause of action to enjoin discrimination and one to cut off funds, as Mr. Justice STEVENS and the three Justices who join his opinion apparently would. See *post*, at 2814–2815, n. 26. Indeed, it would be odd if they did, since the practical effect of either type of private cause of action would be identical. If private suits to enjoin conduct allegedly violative of § 601 were permitted, recipients of federal funds would be presented with the choice of either ending what the court, rather than the agency, determined to be a discriminatory practice within the meaning of Title VI or refusing federal funds and thereby escaping from the statute's jurisdictional predicate.[FN6] This is precisely the same choice as would confront recipients if suit were brought to cut off funds. Both types of actions would equally jeopardize the administrative processes so carefully structured into the law.

FN4. "Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim." 110 Cong.Rec. 2467 (1964) (Rep. Gill).

"[A] good case could be made that a remedy is provided for the State or local official who is practicing discrimination, but none is provided for the victim of the discrimination." *Id.*, at 6562 (Sen. Kuchel).

"Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or the facility which was deprived of Federal funds, we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill. However, both the Senator from Connecticut and I are grateful that our other suggestions were adopted by the Justice Department." *Id.*, at 7065 (Sen. Keating).

FN5. *Ibid.*

FN6. As Senator Ribicoff stated: "Sometimes those eligible for Federal assistance may elect to reject such aid, unwilling to agree to a nondiscrimination requirement. If they choose that course, the responsibility is theirs." *Id.*, at 7067.

***387** This Court has always required "that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act." *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646 (1974). See also *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 418–420, 95 S.Ct. 1733, 1737–1738, 44 L.Ed.2d 263 (1975). A private cause of action under Title VI is unable to satisfy either prong of this test.

Because each of my colleagues either has a different view or assumes a private cause of action, however, the merits of the Title VI issue must be addressed. My views in that regard, as well as my views with respect to the equal protection issue, are included in the joint opinion that my Brothers BRENNAN, MARSHALL, and BLACKMUN

and I have filed.[FN7]

FN7. I also join Parts I, III–A, and V–C of Mr. Justice POWELL's opinion.

Mr. Justice MARSHALL.

I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the ****2798** Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

I

A

Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, ***388** the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.[FN1]

FN1. The history recounted here is perhaps too well known to require documentation. But I must acknowledge the authorities on which I rely in retelling it. J. Franklin, From Slavery to Freedom (4th ed. 1974) (hereinafter Franklin); R. Kluger, Simple Justice (1975) (hereinafter Kluger); C. Woodward, The Strange Career of Jim Crow (3d ed. 1974) (hereinafter Woodward).

The denial of human rights was etched into the American Colonies' first attempts at establishing self-government. When the colonists determined to seek their independence from England, they drafted a unique document cataloguing their grievances against the King and proclaiming as "self-evident" that "all men are created equal" and are endowed "with certain unalienable Rights," including those to "Life, Liberty and the pursuit of Happiness." The self-evident truths and the unalienable rights were intended, however, to apply only to white men. An earlier draft of the Declaration of Independence, submitted by Thomas Jefferson to the Continental Congress, had included among the charges against the King that

"[h]e has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither." Franklin 88.

The Southern delegation insisted that the charge be deleted; the colonists themselves were implicated in the slave trade, and inclusion of this claim might have made it more difficult to justify the continuation of slavery once the ties to England were severed. Thus, even as the colonists embarked on a ***389** course to secure their own freedom and equality, they ensured perpetuation of the system that deprived a whole race of those rights.

The implicit protection of slavery embodied in the Declaration of Independence was made explicit in the Constitution, which treated a slave as being equivalent to three-fifths of a person for purposes of apportioning representatives and taxes among the States. Art. I, § 2. The Constitution also contained a clause ensuring that the "Migration or Importation" of slaves into the existing States would be legal until at least 1808, Art. I, § 9, and a fugitive slave clause requiring that when a slave escaped to another State, he must be returned on the claim of the master, Art. IV, § 2. In their declaration of the principles that were to provide the cornerstone of the new Nation, therefore, the Framers made it plain that "we the people," for whose protection the Constitution was designed, did not include those whose skins were the wrong color. As Professor John Hope Franklin has observed Americans "proudly accepted the challenge and responsibility of their new political freedom by establishing the machinery and safeguards that insured the continued enslavement of blacks." Franklin 100.

The individual States likewise established the machinery to protect the system of slavery through the promulgation of the Slave ****2799** Codes, which were designed primarily to defend the property interest of the owner in his slave. The position of the Negro slave as mere property was confirmed by this Court in *Dred Scott v. Sandford*, 19 How. 393, 15 L.Ed. 691 (1857), Holding that the Missouri Compromise—which prohibited slavery in the portion of the Louisiana Purchase Territory north of Missouri—was unconstitutional because it deprived slave owners of their property without due process. The Court declared that under the Constitution a slave was property,

and "[t]he right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United ***390** States . . . ." *Id.*, at 451. The Court further concluded that Negroes were not intended to be included as citizens under the Constitution but were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . ." *Id.*, at 407.

B

The status of the Negro as property was officially erased by his emancipation at the end of the Civil War. But the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." *Slaughter-House Cases*, 16 Wall. 36, 70, 21 L.Ed. 394 (1873). Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those Amendments were supposed to secure. The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War.

The Southern States took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary.

Congress responded to the legal disabilities being imposed ***391** in the Southern States by passing the Reconstruction Acts and the Civil Rights Acts. Congress also responded to the needs of the Negroes at the end of the Civil War by establishing the Bureau of Refugees, Freedmen, and Abandoned Lands, better known as the Freedmen's Bureau, to supply food, hospitals, land, and education to the newly freed slaves. Thus, for a time it seemed as if the Negro might be protected from the continued denial of his civil rights and might be relieved of the disabilities that prevented him from taking his place as a free and equal citizen.

That time, however, was short-lived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights. In the words of C. Vann Woodward: "By narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights." Woodward 139.

The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections. See, *e. g.*, *Slaughter-House Cases*, *supra*; *United States v. Reese*, 92 U.S. 214, 23 L.Ed. 563 (1876); *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1876). Then in the notorious *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), ****2800** the Court strangled Congress' efforts to use its power to promote racial equality. In those cases the Court invalidated sections of the Civil Rights Act of 1875 that made it a crime to deny equal access to "inns, public conveyances, theatres and other places of public amusement." *Id.*, at 10, 3 S.Ct., at 20. According to the Court, the Fourteenth Amendment gave Congress the power to proscribe only discriminatory action by the State. The Court ruled that the Negroes who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy that. *Id.*, at 24–25, 3 S.Ct., at 31. "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that ***392** state," the Court concluded, "there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . ." *Id.*, at 25, 3 S.Ct., at 31. As Mr. Justice Harlan noted in dissent, however, the Civil War Amendments and Civil Rights Acts did not make the Negroes the "special favorite" of the laws but instead "sought to accomplish in reference to that race . . .—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more." *Id.*, at 61, 3 S.Ct., at 57.

The Court's ultimate blow to the Civil War Amendments and to the equality of Negroes came in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). In upholding a Louisiana law that required railway companies to provide "equal but separate" accommodations for whites and Negroes, the Court held that the

Fourteenth Amendment was not intended "to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." *Id.*, at 544, 16 S.Ct., at 1140. Ignoring totally the realities of the positions of the two races, the Court remarked:

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.*, at 551, 16 S.Ct., at 1143.

Mr. Justice Harlan's dissenting opinion recognized the bankruptcy of the Court's reasoning. He noted that the "real meaning" of the legislation was "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." *Id.*, at 560, 16 S.Ct., at 1147. He expressed his fear that if like laws were enacted in other ***393** States, "the effect would be in the highest degree mischievous." *Id.*, at 563, 16 S.Ct., at 1148. Although slavery would have disappeared, the States would retain the power "to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens . . . ." *Ibid.*

The fears of Mr. Justice Harlan were soon to be realized. In the wake of *Plessy*, many States expanded their Jim Crow laws, which had up until that time been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts. In 1898, after *Plessy*, the Charlestown News and Courier printed a parody of Jim Crow laws:

" 'If there must be Jim Crow cars on the railroads, there should be Jim Crow cars on the street railways. Also on all passenger boats. . . . If there are to be ****2801** Jim Crow cars, moreover, there should be Jim Crow waiting saloons at all stations, and Jim Crow eating houses. . . . There should be Jim Crow sections of the jury box, and a separate Jim Crow dock and witness stand in every court—and a Jim Crow Bible for colored witnesses to kiss.' " Woodward 68.

The irony is that before many years had passed, with the exception of the Jim Crow witness stand, "all the improbable applications of the principle suggested by the editor in derision had been put into practice—down to and including the Jim Crow Bible." *Id.*, at 69.

Nor were the laws restricting the rights of Negroes limited ***394** solely to the Southern States. In many of the Northern States, the Negro was denied the right to vote, prevented from serving on juries, and excluded from theaters, restaurants, hotels, and inns. Under President Wilson, the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated. When his segregationist policies were attacked, President Wilson responded that segregation was " 'not humiliating but a benefit' " and that he was " 'rendering [the Negroes] more safe in their possession of office and less likely to be discriminated against.' " Kluger 91.

The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were for the most part confined to separate military units; it was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools—and thereby denied the opportunity to become doctors, lawyers, engineers, and the like—is also well established. It is of course true that some of the Jim Crow laws (which the decisions of this Court had helped to foster) were struck down by this Court in a series of decisions leading up to *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). See, *e. g., Morgan v. Virginia*, 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317 (1946); *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950). Those decisions, however, did not automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality. The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.

***395** II

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

A Negro child today has a life expectancy which is shorter by more than five years than that of a white child.[FN2] The Negro child's mother is over three times more likely to die of complications in childbirth,[FN3] and the infant mortality rate for Negroes is nearly twice that for whites.[FN4] The median income of the Negro family is only 60% that of the median of a white family,[FN5] and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.[FN6]

FN2. U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 65 (1977) (Table 94).

FN3. *Id.*, at 70 (Table 102).

FN4. *Ibid.*

FN5. U. S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series P–60, No. 107, p. 7 (1977) (Table 1).

FN6. *Id.*, at 20 (Table 14).

****2802** When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites,[FN7] and the unemployment rate for Negro teenagers is nearly three times that of white teenagers.[FN8] A Negro male who completes four years of college can expect a median annual income of merely $110 more than a white male who has only a high school diploma.[FN9] Although Negroes ***396** represent 11.5% of the population,[FN10] they are only 1.2% of the lawyers, and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.[FN11]

FN7. U. S. Dept. of Labor, Bureau of Labor Statistics, Employment and Earnings, January 1978, p. 170 (Table 44).

FN8. *Ibid.*

FN9. U. S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series P–60, No. 105, p. 198 (1977) (Table 47).

FN10. U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract, *supra*, at 25 (Table 24).

FN11. *Id.*, at 407–408 (Table 662) (based on 1970 census).

The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

III

I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.

A

This Court long ago remarked that

"in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy . . .." *Slaughter-House Cases*, 16 Wall., at 72.

It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the ***397** Nation's past treatment of Negroes. The Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act, an Act that provided many of its benefits only to Negroes. Act of July 16, 1866, ch. 200, 14 Stat. 173; see *supra*, at 2800. Although the Freedmen's Bureau legisla-

tion provided aid for refugees, thereby including white persons within some of the relief measures, 14 Stat. 174; see also Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, the bill was regarded, to the dismay of many Congressmen, as "solely and entirely for the freedmen, and to the exclusion of all other persons . . .." Cong.Globe, 39th Cong., 1st Sess., 544 (1866) (remarks of Rep. Taylor). See also *id.*, at 634–635 (remarks of Rep. Ritter); *id.*, at App. 78, 80–81 (remarks of Rep. Chanler). Indeed, the bill was bitterly opposed on the ground that it "undertakes to make the negro in some respects . . . superior . . . and gives them favors that the poor white boy in the North cannot get." *Id.*, at 401 (remarks of Sen. McDougall). See also *id.*, at 319 (remarks of Sen. Hendricks); *id.*, at 362 (remarks of Sen. Saulsbury); *id.*, at 397 (remarks of Sen. Willey); *id.*, at 544 (remarks of Rep. Taylor). The bill's supporters defended it—not by rebutting the claim of special treatment—but by pointing to the need for such treatment:

****2803** "The very discrimination it makes between 'destitute and suffering' negroes, and destitute and suffering white paupers, proceeds upon the distinction that, in the omitted case, civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection." *Id.*, at App. 75 (remarks of Rep. Phelps).

Despite the objection to the special treatment the bill would provide for Negroes, it was passed by Congress. *Id.*, at 421, 688. President Johnson vetoed this bill and also a subsequent bill that contained some modifications; one of his principal***398** objections to both bills was that they gave special benefits to Negroes. 8 Messages and Papers of the Presidents 3596, 3599, 3620, 3623 (1897). Rejecting the concerns of the President and the bill's opponents, Congress overrode the President's second veto. Cong.Globe, 39th Cong., 1st Sess., 3842, 3850 (1866).

Since the Congress that considered and rejected the objections to the 1866 Freedmen's Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures. It "would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color." *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 94, 65 S.Ct. 1483, 1487, 89 L.Ed. 2072 (1945), to hold that it barred state action to remedy the effects of that discrimination. Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve.

B

As has been demonstrated in our joint opinion, this Court's past cases establish the constitutionality of race-conscious remedial measures. Beginning with the school desegregation cases, we recognized that even absent a judicial or legislative finding of constitutional violation, a school board constitutionally could consider the race of students in making school-assignment decisions. See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971); *McDaniel v. Barresi*, 402 U.S. 39, 41, 91 S.Ct. 1287, 1288, 28 L.Ed.2d 582 (1971). We noted, moreover, that a

"flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann*, the Constitution does not compel any particular degree of racial***399** balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful as starting points in shaping a remedy. An absolute prohibition against use of such a device—even as a starting point—contravenes the implicit command of *Green v. County School Board*, 391 U.S. 430 [88 S.Ct. 1689, 20 L.Ed.2d 716] (1968), that all reasonable methods be available to formulate an effective remedy." *Board of Education v. Swann*, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586 (1971).

As we have observed, "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes." *McDaniel v. Barresi*, *supra*, 402 U.S. at 41, 91 S.Ct. at 1289.

Only last Term, in *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed. 229 (1977), we upheld a New York reapportionment plan that was deliberately drawn on the basis of race to enhance the electoral power of Negroes and Puerto Ricans; the plan had the effect of diluting the electoral strength of the Hasidic Jewish community. We were willing in *UJO* to sanction the remedial use of a racial classification even though it disadvantaged otherwise "innocent" individuals. In another case last Term, ****2804***Califano v. Webster*, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977), the Court upheld a provision in the Social Security laws that discriminated against men because its purpose was " 'the per-

missible one of redressing our society's longstanding disparate treatment of women.' " *Id.*, at 317, 97 S.Ct. at 1195, quoting *Califano v. Goldfarb*, 430 U.S. 199, 209 n. 8, 97 S.Ct. 1021, 1028, 51 L.Ed.2d 270 (1977) (plurality opinion). We thus recognized the permissibility of remedying past societal discrimination through the use of otherwise disfavored classifications.

Nothing in those cases suggests that a university cannot similarly act to remedy past discrimination.[FN12] It is true that ***400** in both *UJO* and *Webster* the use of the disfavored classification was predicated on legislative or administrative action, but in neither case had those bodies made findings that there had been constitutional violations or that the specific individuals to be benefited had actually been the victims of discrimination. Rather, the classification in each of those cases was based on a determination that the group was in need of the remedy because of some type of past discrimination. There is thus ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefited were actually victims of that discrimination.

> FN12. Indeed, the action of the University finds support in the regulations promulgated under Title VI by the Department of Health, Education, and Welfare and approved by the President, which authorize a federally funded institution to take affirmative steps to overcome past discrimination against groups even where the institution was not guilty of prior discrimination. 45 CFR § 80.3(b)(6)(ii) (1977).

IV

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has ***401** not been realized for the Negro; because of his skin color he never even made it into the pot.

These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination. In the *Civil Rights Cases*, *supra*, the Court wrote that the Negro emerging from slavery must cease "to be the special favorite of the laws." 109 U.S., at 25, 3 S.Ct., at 31, see *supra*, at 2800. We cannot in light of the history of the last century yield to that view. Had the Court in that decision and others been willing to "do for human liberty and the fundamental rights of American citizenship, what it did . . . for the protection of slavery and the rights of the masters of fugitive slaves," 109 U.S., at 53, 3 S.Ct., at 51 (Harlan, J., dissenting), we would not need now to permit the recognition of any "special wards."

Most importantly, had the Court been willing in 1896, in *Plessy v. Ferguson*, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that ****2805** the principle that the "Constitution is color-blind" appeared only in the opinion of the lone dissenter. 163 U.S., at 559, 16 S.Ct., at 1146. The majority of the Court rejected the principle of color-blindness, and for the next 58 years, from *Plessy* to *Brown v. Board of Education*, ours was a Nation where, *by law*, an individual could be given "special" treatment based on the color of his skin.

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing ***402** to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.

It has been said that this case involves only the individual, Bakke, and this University. I doubt, however, that there is a computer capable of determining the number of

persons and institutions that may be affected by the decision in this case. For example, we are told by the Attorney General of the United States that at least 27 federal agencies have adopted regulations requiring recipients of federal funds to take " '*affirmative action* to overcome the effects of conditions which resulted in limiting participation . . . by persons of a particular race, color, or national origin.' " Supplemental Brief for United States as *Amicus Curiae* 16 (emphasis added). I cannot even guess the number of state and local governments that have set up affirmative-action programs, which may be affected by today's decision.

I fear that we have come full circle. After the Civil War our Government started several "affirmative action" programs. This Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. *Now*, we have this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California.

Mr. Justice BLACKMUN.

I participate fully, of course, in the opinion, *ante*, p. 2766, that bears the names of my Brothers BRENNAN, WHITE, MARSHALL, and myself. I add only some general observations that hold particular significance for me, and then a few comments on equal protection.

***403** I

At least until the early 1970's, apparently only a very small number, less than 2%, of the physicians, attorneys, and medical and law students in the United States were members of what we now refer to as minority groups. In addition, approximately three-fourths of our Negro physicians were trained at only two medical schools. If ways are not found to remedy that situation, the country can never achieve its professed goal of a society that is not race conscious.

I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination****2806** of the type we address today will be an ugly feature of history that is instructive but that is behind us.

The number of qualified, indeed highly qualified, applicants for admission to existing medical schools in the United States far exceeds the number of places available. Wholly apart from racial and ethnic considerations, therefore, the selection process inevitably results in the denial of admission to many *qualified* persons, indeed, to far more than the number of those who are granted admission. Obviously, it is a denial to the deserving. This inescapable fact is brought into sharp focus here because Allan Bakke is not himself charged with discrimination and yet is the one who is disadvantaged, and because the Medical School of the University of California at Davis itself is not charged with historical discrimination.

One theoretical solution to the need for more minority ***404** members in higher education would be to enlarge our graduate schools. Then all who desired and were qualified could enter, and talk of discrimination would vanish. Unfortunately, this is neither feasible nor realistic. The vast resources that apparently would be required simply are not available. And the need for more professional graduates, in the strict numerical sense, perhaps has not been demonstrated at all.

There is no particular or real significance in the 84–16 division at Davis. The same theoretical, philosophical, social, legal, and constitutional considerations would necessarily apply to the case if Davis' special admissions program had focused on any lesser number, that is, on 12 or 8 or 4 places or, indeed, on only 1.

It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.

Programs of admission to institutions of higher learning are basically a responsibility for academicians and for administrators and the specialists they employ. The judiciary, in contrast, is ill-equipped and poorly trained for

this. The administration and management of educational institutions are beyond the competence of judges and are within the special competence of educators, provided always that the educators perform within legal and constitutional bounds. For me, therefore, interference by the judiciary must be the rare exception and not the rule.

II

I, of course, accept the propositions that (a) Fourteenth Amendment rights are personal; (b) racial and ethnic distinctions***405** where they are stereotypes are inherently suspect and call for exacting judicial scrutiny; (c) academic freedom is a special concern of the First Amendment; and (d) the Fourteenth Amendment has expanded beyond its original 1868 concept and now is recognized to have reached a point where, as Mr. Justice POWELL states, *ante*, at 2750, quoting from the Court's opinion in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296, 96 S.Ct. 2574, 2586, 49 L.Ed.2d 493 (1976), it embraces a "broader principle."

This enlargement does not mean for me, however, that the Fourteenth Amendment has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what "affirmative action," in the face of proper facts, is all about. If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area. In this sense, constitutional equal protection is a shield.

I emphasize in particular that the decided cases are not easily to be brushed aside. ****2807** Many, of course, are not precisely on point, but neither are they off point. Racial factors have been given consideration in the school desegregation cases, in the employment cases, in *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), and in *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977). To be sure, some of these may be "distinguished" on the ground that victimization was directly present. But who is to say that victimization is not present for some members of today's minority groups, although it is of a lesser and perhaps different degree. The petitioners in *United Jewish Organizations* certainly complained bitterly of their reapportionment treatment, and I rather doubt that they regard the "remedy" there imposed as one that was "to improve" the group's ability to participate, as Mr. Justice POWELL describes it, *ante*, at 2756. And surely in *Lau v. Nichols* we looked to ethnicity.

***406** I am not convinced, as Mr. Justice POWELL seems to be, that the difference between the Davis program and the one employed by Harvard is very profound or constitutionally significant. The line between the two is a thin and indistinct one. In each, subjective application is at work. Because of my conviction that admission programs are primarily for the educators, I am willing to accept the representation that the Harvard program is one where good faith in its administration is practiced as well as professed. I agree that such a program, where race or ethnic background is only one of many factors, is a program better formulated than Davis' two-track system. The cynical, of course, may say that under a program such as Harvard's one may accomplish covertly what Davis concedes it does openly. I need not go that far, for despite its two-track aspect, the Davis program, for me, is within constitutional bounds, though perhaps barely so. It is surely free of stigma, and, as in *United Jewish Organizations*, I am not willing to infer a constitutional violation.

It is worth noting, perhaps, that governmental preference has not been a stranger to our legal life. We see it in veterans' preferences. We see it in the aid-to-the-handicapped programs. We see it in the progressive income tax. We see it in the Indian programs. We may excuse some of these on the ground that they have specific constitutional protection or, as with Indians, that those benefited are wards of the Government. Nevertheless, these preferences exist and may not be ignored. And in the admissions field, as I have indicated, educational institutions have always used geography, athletic ability, anticipated financial largess, alumni pressure, and other factors of that kind.

I add these only as additional components on the edges of the central question as to which I join my Brothers BRENNAN, WHITE, and MARSHALL in our more general approach. It is gratifying to know that the Court at least finds it constitutional for an academic institution to take race and ethnic background into consideration as one factor, among many, in ***407** the administration of its admissions program. I presume that that factor always has been there, though perhaps not conceded or even admitted. It is a fact of life, however, and a part of the real world of which we are all a part. The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene.

I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.

So the ultimate question, as it was at the beginning of this litigation, is: Among the qualified, how does one choose?

****2808** A long time ago, as time is measured for this Nation, a Chief Justice, both wise and farsighted, said:

"In considering this question, then, we must never forget, that it is *a constitution* we are expounding." *McCulloch v. Maryland*, 4 Wheat. 316, 407, 4 L.Ed. 579 (1819) (emphasis in original).

In the same opinion, the Great Chief Justice further observed:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.*, at 421.

More recently, one destined to become a Justice of this Court observed:

"The great generalities of the constitution have a content and a significance that vary from age to age." B. Cardozo, The Nature of the Judicial Process 17 (1921).

***408** And an educator who became a President of the United States said:

"But the Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age." W. Wilson, Constitutional Government in the United States 69 (1911).

These precepts of breadth and flexibility and ever-present modernity are basic to our constitutional law. Today, again, we are expounding a *Constitution.* The same principles that governed *McCulloch's* case in 1819 govern *Bakke's* case in 1978. There can be no other answer.

Mr. Justice STEVENS, with whom THE CHIEF JUSTICE, Mr. Justice STEWART, and Mr. Justice REHNQUIST join, concurring in the judgment in part and dissenting in part.

It is always important at the outset to focus precisely on the controversy before the Court.[FN1] It is particularly important to do so in this case because correct identification of the issues will determine whether it is necessary or appropriate to express any opinion about the legal status of any admissions program other than petitioner's.

FN1. Four Members of the Court have undertaken to announce the legal and constitutional effect of this Court's judgment. See opinion of Justices BRENNAN, WHITE, MARSHALL, and BLACKMUN, *ante*, at 2766. It is hardly necessary to state that only a majority can speak for the Court or determine what is the "central meaning" of any judgment of the Court.

I

This is not a class action. The controversy is between two specific litigants. Allan Bakke challenged petitioner's special admissions program, claiming that it denied him a place in medical school because of his race in violation of the Federal and California Constitutions and of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* The California Supreme Court upheld his challenge and ordered him admitted. If the ***409** state court was correct in its view that the University's special program was illegal, and that Bakke was therefore unlawfully excluded from the Medical School because of his race, we should affirm its judgment, regardless of our views about the legality of admissions programs that are not now before the Court.

The judgment as originally entered by the trial court contained four separate paragraphs, two of which are of critical importance.[FN2] Paragraph 3 declared that the University's****2809** special admissions program violated the Fourteenth Amendment, the State Constitution, and Title VI. The trial court did not order the University to admit Bakke because it concluded that Bakke had not shown that he would have been admitted if there had been no special program. Instead, in paragraph 2 of its judgment it ordered the University to consider Bakke's application for admission without regard to his race or the race of any other applicant. The order did not include any broad ***410** prohibition against any use of race in the admissions process; its terms were clearly limited to the University's consideration of *Bakke's* application.[FN3] Because the University has since been ordered to admit Bakke paragraph 2 of the trial court's order no longer has any significance.

FN2. The judgment first entered by the trial court

read, in its entirety, as follows:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

"1. Defendant, the Regents of the University of California, have judgment against plaintiff, Allan Bakke, denying the mandatory injunction requested by plaintiff ordering his admission to the University of California at Davis Medical School;

"2. That plaintiff is entitled to have his application for admission to the medical school considered without regard to his race or the race of any other applicant, and defendants are hereby restrained and enjoined from considering plaintiff's race or the race of any other applicant in passing upon his application for admission;

"3. Cross-defendant Allan Bakke have judgment against cross-complainant, the Regents of the University of California, declaring that the special admissions program at the University of California at Davis Medical School violates the Fourteenth Amendment to the United States Constitution, Article 1, Section 21 of the California Constitution, and the Federal Civil Rights Act [42 U.S.C. § 2000d];

"4. That plaintiff have and recover his court costs incurred herein in the sum of $217.35." App. to Pet. for Cert. 120a.

FN3. In paragraph 2 the trial court ordered that "plaintiff [Bakke] is entitled to have *his* application for admission to the medical school considered without regard to *his* race or the race of any other applicant, and defendants are hereby restrained and enjoined from considering *plaintiff's* race or the race of any other applicant in passing upon *his* application for admission." See n. 2, *supra* (emphasis added). The only way in which this order can be broadly read as prohibiting any use of race in the admissions process, apart from Bakke's application, is if the final "his" refers to "any other applicant." But the consistent use of the pronoun throughout the paragraph to refer to Bakke makes such a reading entirely unpersuasive, as does the failure of the trial court to suggest that it was issuing relief to applicants who were not parties to the suit.

The California Supreme Court, in a holding that is not challenged, ruled that the trial court incorrectly placed the burden on Bakke of showing that he would have been admitted in the absence of discrimination. The University then conceded "that it [could] not meet the burden of proving that the special admissions program did not result in Mr. Bakke's failure to be admitted." FN4 Accordingly, the California Supreme Court directed the trial court to enter judgment ordering Bakke's admission.FN5 Since that order superseded paragraph***411** 2 of the trial court's judgment, there is no outstanding injunction forbidding any consideration of racial criteria in processing applications.

FN4. Appendix B to Application for Stay A19–A20.

FN5. 18 Cal.3d 34, 64, 132 Cal.Rptr. 680, 700, 553 P.2d 1152, 1172 (1976). The judgment of the Supreme Court of the State of California affirms only paragraph 3 of the trial court's judgment. The Supreme Court's judgment reads as follows:

"IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the judgment of the Superior Court[,] County of Yolo[,] in the above-entitled cause, is hereby affirmed insofar as it determines that the special admission program is invalid; the judgment is reversed insofar as it denies Bakke an injunction ordering that he be admitted to the University, and the trial court is directed to enter judgment ordering Bakke to be admitted.

"Bakke shall recover his costs on these appeals."

It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate.FN6

FN6. "This Court . . . reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297, 76 S.Ct. 824, 827, 100 L.Ed. 1188.

II

Both petitioner and respondent have asked us to determine the legality of the University's special admissions program by reference to the Constitution. Our settled

practice, however, is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication,****2810** it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101. [FN7] The more important the issue, the more force ***412** there is to this doctrine.[FN8] In this case, we are presented with a constitutional question of undoubted and unusual importance. Since, however, a dispositive statutory claim was raised at the very inception of this case, and squarely decided in the portion of the trial court judgment affirmed by the California Supreme Court, it is our plain duty to confront it. Only if petitioner should prevail on the statutory issue would it be necessary to decide whether the University's admissions program violated the Equal Protection Clause of the Fourteenth Amendment.

FN7. "From *Hayburn's Case*, 2 Dall. 409, to *Alma Motor Co. v. Timken-Detroit Axle Co.*[, 329 U.S. 129, 67 S.Ct. 231, 91 L.Ed. 128,] and the *Hatch Act* case [*United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754] decided this term, this Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications, too well known for repeating the history here, arose in the Court's refusal to render advisory opinions and in applications of the related jurisdictional policy drawn from the case and controversy limitation. U.S.Const., Art. III. . . .

"The policy, however, has not been limited to jurisdictional determinations. For, in addition, 'the Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' Thus, as those rules were listed in support of the statement quoted, constitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided." *Rescue Army v. Municipal Court*, 331 U.S. 549, 568–569, 67 S.Ct. 1409, 1419, 91 L.Ed. 1666 (footnotes omitted). See also *Ashwander v. TVA*, 297 U.S. 288, 346–348, 56 S.Ct. 466, 482–483, 80 L.Ed. 688 (Brandeis, J., concurring).

FN8. The doctrine reflects both our respect for the Constitution as an enduring set of principles and the deference we owe to the Legislative and Executive Branches of Government in developing solutions to complex social problems. See A. Bickel, The Least Dangerous Branch 131 (1962).

III

Section 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d, provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The University, through its special admissions policy, excluded Bakke from participation in its program of medical education because of his race. The University also acknowledges that it was, and still is, receiving federal financial assistance.[FN9] The plain language of the statute therefore requires affirmance of the judgment below. A different result ***413** cannot be justified unless that language misstates the actual intent of the Congress that enacted the statute or the statute is not enforceable in a private action. Neither conclusion is warranted.

FN9. Record 29.

Title VI is an integral part of the far-reaching Civil Rights Act of 1964. No doubt, when this legislation was being debated, Congress was not directly concerned with the legality of "reverse discrimination" or "affirmative action" programs. Its attention was focused on the problem at hand, the "glaring . . . discrimination against Negroes which exists throughout our Nation," [FN10] and, with respect to Title ****2811** VI, the federal funding of segregated facilities.[FN11] The genesis of the legislation, however, did not limit the breadth of the solution adopted. Just as Congress responded to the problem of employment discrimination by enacting a provision that protects all races, see *McDo-*

nald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279, 96 S.Ct. 2574, 2578, 49 L.Ed. 493,[FN12] so, too, its answer to the problem of federal funding of segregated facilities stands as a broad prohibition against the exclusion of *any* individual from a federally funded program "on the ground of race." In the words of the House Report, Title VI stands for "the general principle that *no person* . . . be excluded from participation . . . on the ground of race, color, or national origin under any program or activity receiving Federal financial assistance." H.R.Rep.No.914, 88th ***414** Cong., 1st Sess., pt. 1, p. 25 (1963), U.S.Code Cong. & Admin.News 1964, p. 2401 (emphasis added). This same broad view of Title VI and § 601 was echoed throughout the congressional debate and was stressed by every one of the major spokesmen for the Act.[FN13]

FN10. H.R.Rep.No.914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963), U.S.Code Cong. & Admin.News 1964, p. 2393.

FN11. It is apparent from the legislative history that the immediate object of Title VI was to prevent federal funding of segregated facilities. See, *e. g.*, 110 Cong.Rec. 1521 (1964) (remarks of Rep. Celler); *id.*, at 6544 (remarks of Sen. Humphrey).

FN12. In *McDonald v. Santa Fe Trail Transp. Co.*, the Court held that "Title VII prohibits racial discrimination against . . . white petitioners . . . upon the same standards as would be applicable were they Negroes . . . ." 427 U.S., at 280, 96 S.Ct., at 2579. Quoting from our earlier decision in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158, the Court reaffirmed the principle that the statute "prohibit[s] '[d]iscriminatory preference for *any* [racial] group, *minority* or *majority*.' " 427 U.S., at 279, 96 S.Ct., at 2578 (emphasis in original).

FN13. See, *e. g.*, 110 Cong.Rec. 1520 (1964) (remarks of Rep. Celler); *id.*, at 5864 (remarks of Sen. Humphrey); *id.*, at 6561 (remarks of Sen. Kuchel); *id.*, at 7055 (remarks of Sen. Pastore). (Representative Celler and Senators Humphrey and Kuchel were the House and Senate floor managers for the entire Civil Rights Act, and Senator Pastore was the majority Senate floor manager for Title VI.)

Petitioner contends, however, that exclusion of applicants on the basis of race does not violate Title VI if the exclusion carries with it no racial stigma. No such qualification or limitation of § 601's categorical prohibition of "exclusion" is justified by the statute or its history. The language of the entire section is perfectly clear; the words that follow "excluded from" do not modify or qualify the explicit outlawing of any exclusion on the stated grounds.

The legislative history reinforces this reading. The only suggestion that § 601 would allow exclusion of nonminority applicants came from opponents of the legislation and then only by way of a discussion of the meaning of the word "discrimination." [FN14] The opponents feared that the term "discrimination***415** " would be read as mandating racial quotas and "racially balanced" colleges and universities, and they pressed for a specific definition of the term in order to avoid this possibility.[FN15] In response, the proponents of the legislation gave repeated assurances that the Act ****2812** would be "colorblind" in its application.[FN16] Senator Humphrey, the Senate floor manager for the Act, expressed this position as follows:

FN14. Representative Abernathy's comments were typical:

"Title VI has been aptly described as the most harsh and unprecedented proposal contained in the bill . . . .

"It is aimed toward eliminating discrimination in federally assisted programs. It contains no guideposts and no yardsticks as to what might constitute discrimination in carrying out federally aided programs and projects. . . .

"Presumably the college would have to have a 'racially balanced' staff from the dean's office to the cafeteria . . . .

"The effect of this title, if enacted into law, will interject race as a factor in every decision involving the selection of an individual . . . . The concept of 'racial imbalance' would hover like a black cloud over every transaction . . . ." *Id.*, at 1619. See also, *e. g.*, *id.*, at 5611–5613 (remarks of Sen. Ervin); *id.*, at 9083 (remarks of Sen. Gore).

FN15. *E. g.*, *id.*, at 5863, 5874 (remarks of Sen. Eastland).

FN16. See, *e. g., id.*, at 8346 (remarks of Sen. Proxmire) ("Taxes are collected from whites and Negroes, and they should be expended without discrimination"); *id.*, at 7055 (remarks of Sen. Pastore) ("[Title VI] will guarantee that the money collected by colorblind tax collectors will be distributed by Federal and State administrators who are equally colorblind"); and *id.*, at 6543 (remarks of Sen. Humphrey) (" 'Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination' ") (quoting from President Kennedy's Message to Congress, June 19, 1963).

"[T]he word 'discrimination' has been used in many a court case. What it really means in the bill is a distinction in treatment . . . given to different individuals because of their different race, religion or national origin. . . .

"The answer to this question [what was meant by 'discrimination'] is that if race is not a factor, we do not have to worry about discrimination because of race. . . . The Internal Revenue Code does not provide that colored people do not have to pay taxes, or that they can pay their taxes 6 months later than everyone else." 110 Cong.Rec. 5864 (1964).

"[I]f we started to treat Americans as Americans, not as fat ones, thin ones, short ones, tall ones, brown ones, green ones, yellow ones, or white ones, but as Americans. If we did that we would not need to worry about discrimination." *Id.*, at 5866.

***416** In giving answers such as these, it seems clear that the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government,[FN17] but that does not mean that the legislation only codifies an existing constitutional prohibition. The statutory prohibition against discrimination in federally funded projects contained in § 601 is more than a simple paraphrasing of what the Fifth or Fourteenth Amendment would require. The Act's proponents plainly considered Title VI consistent with their view of the Constitution and they sought to provide an effective weapon to implement that view.[FN18] As a distillation of what the supporters of the Act believed the Constitution demanded of State and Federal Governments, § 601 has independent force, with language and emphasis in addition to that found in the Constitution.[FN19]

FN17. See, *e. g.*, 110 Cong.Rec. 5253 (1964) (remarks of Sen. Humphrey); and *id.*, at 7102 (remarks of Sen. Javits). The parallel between the prohibitions of Title VI and those of the Constitution was clearest with respect to the immediate goal of the Act—an end to federal funding of "separate but equal" facilities.

FN18. "As in *Monroe [v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492], we have no occasion here to 'reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals.' 365 U.S. [167], at 191 [81 S.Ct. 473, 5 L.Ed.2d 492]. For in interpreting the statute it is not our task to consider whether Congress was mistaken in 1871 in its view of the limits of its power over municipalities; rather, we must construe the statute in light of the impressions under which Congress did in fact act, see *Ries v. Lynskey*, 452 F.2d, 172, at 175." *Moor v. County of Alameda*, 411 U.S. 693, 709, 93 S.Ct. 1785, 1795, 36 L.Ed.2d 596.

FN19. Both Title VI and Title VII express Congress' belief that, in the long struggle to eliminate social prejudice and the effects of prejudice, the principle of *individual* equality, without regard to race or religion, was one on which there could be a "meeting of the minds" among all races and a common national purpose. See *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 709, 98 S.Ct. 1370, 1376, 55 L.Ed.2d 657 ("[T]he basic policy of the statute [Title VII] requires that we focus on fairness to individuals rather than fairness to classes"). This same principle of *individual* fairness is embodied in Title VI.

"The basic fairness of title VI is so clear that I find it difficult to understand why it should create any opposition. . . .

"Private prejudices, to be sure, cannot be eliminated overnight. However, there is one area where no room at all exists for private prejudices. That is the area of governmental conduct. As the first Mr. Justice Harlan said in his prophetic dissenting opinion in *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 1146, 41 L.Ed. 256.

> " 'Our Constitution is colorblind.'
>
> "So—I say to Senators—must be our Government. . . .
>
> "Title VI closes the gap between our purposes as a democracy and our prejudices as individuals. The cuts of prejudice need healing. The costs of prejudice need understanding. We cannot have hostility between two great parts of our people without tragic loss in our human values . . . .
>
> "Title VI offers a place for the meeting of our minds as to Federal money." 110 Cong.Rec. 7063–7064 (1964) (remarks of Sen. Pastore).
>
> Of course, one of the reasons marshaled in support of the conclusion that Title VI was "noncontroversial" was that its prohibition was already reflected in the law. See *ibid.* (remarks of Sen. Pell and Sen. Pastore).

***417 **2813** As with other provisions of the Civil Rights Act, Congress' expression of its policy to end racial discrimination may independently proscribe conduct that the Constitution does not.[FN20] However, we need not decide the congruence—or lack of congruence—of the controlling statute and the Constitution ***418** since the meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program.

> FN20. For example, private employers now under duties imposed by Title VII were wholly free from the restraints imposed by the Fifth and Fourteenth Amendments which are directed only to governmental action.
>
> In *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1, the Government's brief stressed that "the applicability of Title VI . . . does not depend upon the outcome of the equal protection analysis. . . . [T]he statute independently proscribes the conduct challenged by petitioners and provides a discrete basis for injunctive relief." Brief for United States as *Amicus Curiae*, O.T. 1973, No. 72–6520, p. 15. The Court, in turn, rested its decision on Title VI. Mr. Justice POWELL takes pains to distinguish *Lau* from the case at hand because the *Lau* decision "rested solely on the statute." *Ante*, at 2756. See also *Washington v. Davis*, 426 U.S. 229, 238–239, 96 S.Ct. 2040, 2046–2047, 48 L.Ed.2d 597; *Allen v. State Board of Elections*, 393 U.S. 544, 588, 89 S.Ct. 817, 843, 22 L.Ed.2d 1 (Harlan, J., concurring and dissenting).

In short, nothing in the legislative history justifies the conclusion that the broad language of § 601 should not be given its natural meaning. We are dealing with a distinct statutory prohibition, enacted at a particular time with particular concerns in mind; neither its language nor any prior interpretation suggests that its place in the Civil Rights Act, won after long debate, is simply that of a constitutional appendage.[FN21] In unmistakable terms the Act prohibits the exclusion of individuals from federally funded programs because of their race.[FN22] As succinctly phrased during the Senate debate, under Title VI it is not "permissible to say 'yes' to one person; but to say 'no' to another person, only because of the color of his skin." [FN23]

> FN21. As explained by Senator Humphrey, § 601 expresses a principle imbedded in the constitutional *and* moral understanding of the times.
>
> "The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination. *In many instances* the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. . . . *In all cases*, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." 110 Cong.Rec. 6544 (1964) (emphasis added).
>
> FN22. Petitioner's attempt to rely on regulations issued by HEW for a contrary reading of the statute is unpersuasive. Where no discriminatory policy was in effect, HEW's example of permissible "affirmative action" refers to "special recruitment policies." 45 CFR § 80.5(j) (1977). This regulation, which was adopted in 1973, sheds no light on the legality of the admissions program that excluded Bakke in this case.
>
> FN23. 110 Cong.Rec. 6047 (1964) (remarks of Sen Pastore).

Belatedly, however, petitioner argues that Title VI cannot be enforced by a private litigant. The claim is unpersuasive in the context of this case. Bakke requested injunctive and declaratory relief under Title VI; petitioner itself then joined ***419** issue on the question of the legality of its program under Title VI by asking for a declaratory judgment that it was in compliance with the statute.[FN24] Its view during state-court litigation was that a private cause of action does exist under Title VI. Because petitioner****2814** questions the availability of a private cause of action for the first time in this Court, the question is not properly before us. See *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434, 60 S.Ct. 670, 672, 84 L.Ed. 849. Even if it were, petitioner's original assumption is in accord with the federal courts' consistent interpretation of the Act. To date, the courts, including this Court, have unanimously concluded or assumed that a private action may be maintained under Title VI. [FN25] The United States has taken the same position; in its *amicus curiae* brief directed to this specific issue, it concluded that such a remedy is clearly available,[FN26] ***420** and Congress has repeatedly enacted legislation predicated on the assumption that Title VI may be enforced in a private action.[FN27] The conclusion that an individual may maintain a private cause of action is amply supported in the legislative history of Title VI itself.[FN28] In ****2815** short, a fair consideration of ***421** petitioner's tardy attack on the propriety of Bakke's suit under Title VI requires that it be rejected.

FN24. Record 30–31.

FN25. See, *e. g., Lau v. Nichols*, *supra*; *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (C.A.5 1967), cert. denied, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350; *Uzzell v. Friday*, 547 F.2d 801 (C.A.4 1977), opinion on rehearing en banc, 558 F.2d 727, cert. pending, No. 77–635; *Serna v. Portales*, 499 F.2d 1147 (C.A.10 1974); cf. *Chambers v. Omaha Public School District*, 536 F.2d 222, 225 n. 2 (C.A.8 1976) (indicating doubt over whether a *money judgment* can be obtained under Title VI). Indeed, the Government's brief in *Lau v. Nichols*, *supra*, succinctly expressed this common assumption: "It is settled that petitioners . . . have standing to enforce Section 601 . . . ." Brief for United States as *Amicus Curiae* in *Lau v. Nichols*, O.T.1973, No. 72–6520, p. 13 n. 5.

FN26. Supplemental Brief for United States as *Amicus Curiae* 24–34. The Government's supplemental brief also suggests that there may be a difference between a private cause of action brought to end a particular discriminatory practice and such an action brought to cut off federal funds. *Id.*, at 28–30. Section 601 is specifically addressed to personal rights, while § 602—the fund cutoff provision—establishes "an elaborate mechanism for *governmental* enforcement by federal agencies." Supplemental Brief, *supra*, at 28 (emphasis added). Arguably, private enforcement of this "elaborate mechanism" would not fit within the congressional scheme, see separate opinion of Mr. Justice WHITE, *ante*, at 2794. But Bakke did not seek to cut off the University's federal funding; he sought admission to medical school. The difference between these two courses of action is clear and significant. As the Government itself states:

"[T]he grant of an injunction or a declaratory judgment in a private action would not be inconsistent with the administrative program established by Section 602 . . . . A declaratory judgment or injunction against future discrimination would not raise the possibility that funds would be terminated, and it would not involve bringing the forces of the Executive Branch to bear on state programs; it therefore would not implicate the concern that led to the limitations contained in Section 602." Supplemental Brief, *supra*, at 30 n. 25.

The notion that a private action seeking injunctive or declaratory judgment relief is inconsistent with a federal statute that authorizes termination of funds has clearly been rejected by this Court in prior cases. See *Rosado v. Wyman*, 397 U.S. 397, 420, 90 S.Ct. 1207, 1221, 25 L.Ed.2d 442.

FN27. See 29 U.S.C. § 794 (1976 ed.) (the Rehabilitation Act of 1973) (in particular, the legislative history discussed in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1285–1286 (C.A.7 1977)); 20 U.S.C. § 1617 (1976 ed.) (attorney fees under the Emergency School Aid Act); and 31 U.S.C. § 1244 (1976 ed.) (private action under the Financial Assistance Act). Of course, none of these subsequent legislative enactments is necessarily reliable evidence of Congress' intent in 1964 in enacting Title VI, and the legislation was not intended to change the

existing status of Title VI.

FN28. Framing the analysis in terms of the four-part *Cort v. Ash* test, see 422 U.S. 66, 78, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26, it is clear that all four parts of the test are satisfied. (1) Bakke's status as a potential beneficiary of a federally funded program definitely brings him within the " 'class for whose *especial* benefit the statute was enacted,' " *Ibid.* (emphasis in original). (2) A cause of action based on race discrimination has not been "traditionally relegated to state law." *Ibid.* (3) While a few excerpts from the voluminous legislative history suggest that Congress did not intend to create a private cause of action, see opinion of Mr. Justice *POWELL, ante,* at 2745 n. 18, an examination of the entire legislative history makes it clear that Congress had no intention to foreclose a private right of action. (4) There is ample evidence that Congress considered private causes of action to be consistent with, if not essential to, the legislative scheme. See, *e. g.,* remarks of Senator Ribicoff:

"We come then to the crux of the dispute—how this right [to participate in federally funded programs without discrimination] should be protected. And even this issue becomes clear upon the most elementary analysis. If Federal funds are to be dispensed on a nondiscriminatory basis, the only possible remedies must fall into one of two categories: First, action to end discrimination; or second, action to end the payment of funds. Obviously action to end discrimination is preferable since that reaches the objective of extending the funds on a nondiscriminatory basis. But if the discrimination persists and cannot be effectively terminated, how else can the principle of nondiscrimination be vindicated except by nonpayment of funds?" 110 Cong.Rec. 7065 (1964). See also *id.,* at 5090, 6543, 6544 (remarks of Sen. Humphrey); *id.,* at 7103, 12719 (remarks of Sen. Javits); id., at 7062, 7063 (remarks of Sen. Pastore).

The congressional debates thus show a clear understanding that the principle embodied in § 601 involves *personal* federal rights that administrative procedures would not, for the most part, be able to protect. The analogy to the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* (1970 ed. and Supp. V), is clear. Both that Act and Title VI are broadly phrased in terms of personal rights ("no person shall be denied . . ."); both Acts were drafted with broad remedial purposes in mind; and the effectiveness of both Acts would be "severely hampered" without the existence of a private remedy to supplement administrative procedures. See *Allen v. State Bd. of Elections,* 393 U.S. 544, 556, 89 S.Ct. 817, 826, 22 L.Ed.2d 1. In *Allen,* of course, this Court found a private right of action under the Voting Rights Act.

The University's special admissions program violated Title VI of the Civil Rights Act of 1964 by excluding Bakke from the Medical School because of his race. It is therefore our duty to affirm the judgment ordering Bakke admitted to the University.

Accordingly, I concur in the Court's judgment insofar as it affirms the judgment of the Supreme Court of California. To the extent that it purports to do anything else, I respectfully dissent.

U.S.Cal.,1978.
Regents of University of California v. Bakke
438 U.S. 265, 98 S.Ct. 2733, 17 Fair Empl.Prac.Cas. (BNA) 1000, 17 Empl. Prac. Dec. P 8402, 57 L.Ed.2d 750

END OF DOCUMENT

THELMA L. RUTHERFORD et al., Plaintiffs and Respondents,
v.
OWENS-ILLINOIS, INC., Defendant and Appellant.

[Modification [FN*] of opinion (16 Cal.4th 953; 67 Cal.Rptr.2d 16, 941 P.2d 1203).]

FN* This modification requires movement of text affecting pages 982-983 of the bound volume report.

No. S046944.

Supreme Court of California
Oct. 22, 1997.

THE COURT.

The opinion in this case, appearing at 16 Cal.4th 953, is modified as follows:

1. The last sentence of the second full paragraph on page 977 of 16 Cal.4th, commencing with the words, "We therefore hold," and ending with the words, "of developing cancer," is modified to delete the words, "contributed to the plaintiff or decedent's *risk*," and substitute the words, "was a substantial factor contributing to the plaintiff's or decedent's *risk*."

2. The fourth sentence of the only full paragraph on page 979 of 16 Cal.4th, commencing with the words, "As explained earlier," and ending with the words, "of developing cancer," is modified to delete the words, "substantial factor," and substitute the word, "legal," and to delete the words, "contributed to the plaintiff or decedent's risk," and substitute the words, "was a substantial factor contributing to the plaintiff's or decedent's risk."

3. The fourth sentence of the paragraph on pages 982-983 of 16 Cal.4th, commencing with the words, "Instead, the plaintiff," and ending with the words, "of developing cancer," is modified to delete the words, "contributed to the plaintiff or decedent's *risk*," and substitute the words, "was a substantial factor contributing to the plaintiff's or decedent's *risk*."

The modification does not affect the judgment

THELMA L. RUTHERFORD et al., Plaintiffs and Respondent,
v.
OWENS-ILLINOIS, INC., Defendant and Appellant.

No. S046944.
Aug. 28, 1997.

SUMMARY

An individual filed a personal injury action against an asbestos manufacturer and others, alleging that he had contracted lung cancer as a result of his exposure to asbestos products while on the job, and alleging causes of action for products liability, negligent and intentional infliction of emotional distress, and loss of consortium. After the individual died of lung cancer, the complaint was amended to allege a wrongful death action brought by his wife and their daughter. During the liability phase of trial, the trial court refused to permit defendant manufacturer to present a "tobacco company defense." It also instructed the jury pursuant to a local superior court order that shifted the burden to defendant manufacturer to prove its products were not a legal cause of plaintiff's injuries and death. The jury apportioned a percentage of fault to defendant, and plaintiffs recovered economic and noneconomic damages against defendant. (Superior Court of Solano County, No. V19609, Dennis W. Bunting, Judge, and William E. Jensen, Judge. [FN*]) The Court of Appeal, First Dist., Div. Four, No. A058047, reversed the judgment, concluding that the trial court's rejection of defendant's proffered tobacco company defense was prejudicial. The Court of Appeal also ruled, for purposes of guidance in the event of a retrial, that the burden-shifting instruction was erroneous.

FN* Retired judge of the Solano Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that the trial court

erred by shifting the burden to defendant to prove its products were not a legal cause of the decedent's injuries and death. Although plaintiffs in complex asbestos litigation cannot be expected to prove the scientifically unknown details of carcinogenesis, or trace the unknowable path of a given asbestos fiber, the impossibility of such proof does not dictate use of a burden shifting instruction. Instead, the plaintiff may prove causation by showing that exposure to defendant's defective asbestos-containing product, in reasonable medical probability, was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer. However, the court further held that the instructional error was not prejudicial. Instructional error requires reversal only where it seems probable that the error prejudicially affected the verdict. The reviewing court should consider not only the nature of the error, including its natural and probable effect on a party's ability to place his or her full case before the jury, but the likelihood of actual prejudice as reflected in the individual trial record. Under this analysis, defendant failed to demonstrate a miscarriage of justice arose from the erroneous instruction. The court further held, however, that the portion of the Court of Appeal's judgment reversing the trial court's judgment for failing to permit defendant to present a tobacco company defense was reversible error under a recent California Supreme Court decision. (Opinion by Baxter, J., with George, C. J., Kennard, Werdegar, Chin, and Brown, JJ., concurring. Dissenting opinion by Mosk, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Products Liability § 9--Negligence--Evidence and Proof-- Causation--Shifting Burden of Proof to Defendant--Alternative Liability-- Applicability to Asbestos Cases.

In a personal injury action against an asbestos manufacturer, the trial court, in instructing the jury pursuant to a local superior court order, erred by shifting the burden to defendant to prove its products were not a legal cause of plaintiff's injuries and death. Although plaintiffs in complex asbestos litigation cannot be expected to prove the scientifically unknown details of carcinogenesis, or trace the unknowable path of a given asbestos fiber, the impossibility of such proof does not dictate use of a burden-shifting instruction. Instead, the plaintiff may prove causation by showing that exposure to defendant's defective asbestos-containing product, in reasonable medical probability, was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer. The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. The standard instructions on substantial factor and concurrent causation (BAJI Nos. 3.76 and 3.77) remain correct in this context and should also be given. The burden-shifting instruction should not have been given since, inter alia, the theoretical predicate for a burden shift on causation--i.e., the need of an asbestos plaintiff to rely on a theory of alternative liability to establish causation and thereby perfect his or her action-was lacking.

[See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 50.]

(2) Courts § 5--Powers and Organization--Inherent Powers.

Courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them. In addition to their inherent equitable power derived from the historic power of equity courts, all courts have inherent supervisory or administrative powers that enable them to carry out their duties, and that exist apart from any statutory authority. It is beyond dispute that courts have inherent power to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council. That inherent power entitles trial courts to exercise reasonable control over all proceedings connected with pending litigation in order to insure the orderly administration of justice. Courts are not powerless to formulate rules of procedure where justice demands it. The Legislature has also recognized the authority of courts to manage their proceedings and to adopt suitable methods of practice (Code Civ. Proc., §§ 128, 187). However, regardless of their source of authority, trial judges have no authority to issue local courtroom rules that conflict with any statute or are inconsistent with law.

(3) Negligence § 22--Elements of Actionable Negligence--Proximate Cause-- Concurrent Causes--Plurality of Proximate Causes--Substantial Factor Test.

California has adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact

determinations. Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury. The substantial factor standard generally produces the same results as does the "but for" rule of causation that states that a defendant's conduct is a cause of the injury if the injury would not have occurred "but for" that conduct. The substantial factor standard, however, has been embraced as a clearer rule of causation-one that subsumes the "but for" test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact. Undue emphasis should not be placed on the term "substantial." For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the "but for" test, has been invoked by defendants whose conduct is clearly a "but for" cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.

(4) Appellate Review § 183--Determination and Disposition of Cause-- Harmless and Reversible Error--Instructions--Erroneous Shifting of Burden of Proof of Causation--Prejudice.

Although the trial court, in a personal injury action against an asbestos manufacturer, erred by shifting the burden to defendant to prove its products were not a legal cause of plaintiff's injuries and death, the instructional error was not prejudicial. Instructional error requires reversal only where it seems probable that the error prejudicially affected the verdict. The reviewing court should consider not only the nature of the error, including its natural and probable effect on a party's ability to place his or her full case before the jury, but the likelihood of actual prejudice as reflected in the individual trial record, taking into account (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled. Under this analysis, defendant failed to demonstrate a miscarriage of justice arose from the erroneous instruction. The instruction in no way impaired defendant's ability to put its full case on substantial-factor causation before the jury. Also, other instructions minimized the importance of the burden of proof as to the substantial-factor issue. Moreover, the arguments of counsel suggested the burden-shifting instruction played little or no role at trial, and neither attorney drew the jury's attention to the instruction shifting the burden on this issue. Finally, the record did not contain any indications the jury was actually misled.

COUNSEL

Morgenstein & Jubelirer, Eliot S. Jubelirer, Lee Ann Huntington and Bruce A. Wagman for Defendant and Appellant.

Brobeck, Phleger & Harrison, Thomas M. Peterson and Marilyn Fisher as Amici Curiae on behalf of Defendant and Appellant.

John C. Robinson and Bryce C. Anderson for Plaintiffs and Respondents. ***957**

BAXTER, J.

I. *Introduction.*

In this consolidated action for asbestos-related personal injuries and wrongful death brought and tried in Solano County, defendant Owens-Illinois, Inc. (Owens-Illinois) contends the trial court erred in instructing the liability phase jury pursuant to Solano County Complex Asbestos Litigation General Order No. 21.00. This instruction shifts the burden of proof to defendants in asbestos cases tried on a products liability theory to prove that their products were *not* a legal cause of the plaintiff's injuries, provided the plaintiff first establishes certain predicate facts, chief among them that the defendant manufactured or sold defective asbestos-containing products to which plaintiff was exposed, and that plaintiff's exposure to asbestos fibers generally was a legal cause of plaintiff's injury. The Court of Appeal concluded the trial court erred in giving the burden-shifting instruction.

The Court of Appeal further held that the judgment in this case must be reversed because the trial court erred in refusing to permit Owens-Illinois to present a "tobacco company defense." The Court of Appeal's judgment in this regard was error requiring reversal under our recent holding in *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985, 988-989 [60 Cal.Rptr.2d 103, 928 P.2d 1181], a case consolidated and tried with the instant action and three others. However, because the Court of Appeal alternatively determined the trial court erred in giving the burden-shifting instruction, and because plaintiffs here additionally sought review of that aspect of the Court of Appeal's judgment, we must also in this case review the Court of Appeal's holding that it was error to give

the burden-shifting instruction.

We conclude the Court of Appeal correctly determined that the burdenshifting instruction should not have been given in this case. For reasons to be explained, we hold that in cases of asbestos-related cancer, a jury instruction shifting the burden of proof to asbestos defendants on the element of causation is generally unnecessary and incorrect under settled statewide principles of tort law. Proof of causation in such cases will always present inherent practical difficulties, given the long latency period of asbestos-related disease, and the occupational settings that commonly exposed the worker to multiple forms and brands of asbestos products with varying degrees of toxicity. In general, however, no insuperable barriers prevent an asbestos-related cancer plaintiff from demonstrating that exposure to the defendant's asbestos products was, in reasonable medical probability, a ***958** substantial factor in causing or contributing to his risk of developing cancer. We conclude that plaintiffs are required to prove no more than this. In particular, they need *not* prove with medical exactitude that fibers from a particular defendant's asbestos-containing products were those, or among those, that actually began the cellular process of malignancy. Instruction on the limits of the plaintiff's burden of proof of causation, together with the standardized instructions defining cause-in-fact causation under the substantial factor test (BAJI No. 3.76) and the doctrine of concurrent proximate legal causation (BAJI No. 3.77) will adequately apprise the jury of the elements required to establish causation. No burden-shifting instruction is necessary on the matter of proof of causation, and in the absence of such necessity, there is no justification or basis for shifting part of the plaintiff's burden of proof to the defendant to prove that it was not a legal cause of plaintiff's absestos-related disease or injuries. (See *Summers v. Tice* (1948) 33 Cal.2d 80, 86 [199 P.2d 1, 5 A.L.R.2d 91] (*Summers*) [burden shift justified because without it all tortfeasors might escape liability and the injured plaintiff be left "remediless."].) However, as will be explained, the giving of the burden-shifting instruction in this case was harmless.

Ultimately, the sufficiency of the evidence of causation will depend on the factual circumstances of each case. Although the plaintiff must, in accordance with traditional tort principles, demonstrate to a reasonable medical probability that a product or products supplied by the defendant, to which he became exposed, were a substantial factor in causing his disease or risk of injuries, he is free to further establish that his particular asbestos disease is cumulative in nature, with many separate exposures each having constituted a "substantial factor" (BAJI No. 3.76) that contributed to his risk of injury. And although a defendant cannot escape *liability* simply because it cannot be determined with medical exactitude the precise contribution that exposure to fibers from defendant's products made to plaintiff's ultimate contraction of asbestos-related disease, all joint tortfeasors found liable as named defendants will remain entitled to limit *damages* ultimately assessed against them in accordance with established comparative fault and apportionment principles.

II. *Factual and Procedural Background.*

Charles Rutherford (Rutherford) was in the Air Force from 1935 to 1940, after which he became an apprentice sheet metal worker at the Mare Island Naval Shipyard (Mare Island). He worked in the sheet metal shop for several years, and then became an engineering technician working with ventilation before retiring from Mare Island after 40 years. At the time of his death in April 1988, he had been married to Thelma L. Rutherford for 45 years, and they had 2 children. ***959**

In January 1988, three months before his death, Rutherford filed an asbestos-related personal injury action in Solano County Superior Court naming as defendants nineteen manufacturers and/or distributors of asbestos products, including the sole defendant in this appeal, Owens-Illinois. The original complaint alleged Rutherford had contracted lung cancer as a result of his exposure to defendants' asbestos products while on the job at Mare Island, and alleged causes of action for products liability, negligent and intentional infliction of emotional distress, and loss of consortium. After Rutherford died of lung cancer in April 1988, the complaint was amended to allege a wrongful death action brought by his wife, Thelma Rutherford, and their daughter, Cheryl Rutherford Thomas (hereafter plaintiffs).

Plaintiffs' case was consolidated for trial with four other actions presenting the similar claims of various other plaintiffs, including those of Harvey Richards (Solano County Super. Ct. No. V21705). In the appeal taken by defendant Owens-Illinois from the

judgment of damages recovered by Richards, we recently held that the immunity accorded by Civil Code section 1714.45 to suppliers of certain unhealthy consumer products such as tobacco represents a legislative judgment that, to the extent of the immunity afforded, such companies have no "fault" or responsibility, in the legal sense, for harm caused by their products, and that such companies are therefore not "tortfeasors" to which comparative fault can be assigned for purposes of Proposition 51. [FN1] Consequently, we reversed the judgment of the Court of Appeal insofar as it concluded the trial court prejudicially erred in not allowing Owens-Illinois to present a "tobacco company defense." (*Richards v. Owens-Illinois, Inc., supra*, 14 Cal.4th 985, 988-989 (*Richards*).)

FN1 Proposition 51 (Civ. Code, § 1431 et seq.), adopted by the voters in 1986, provides that in a tort action governed by principles of comparative fault, a defendant shall not be jointly liable for the plaintiff's *noneconomic* damages, but shall only be severally liable for such damages "in direct proportion to that defendant's percentage of fault." (Civ. Code, § 1431.2, subd. (a).)

Under procedures adopted by the Solano County Superior Court for general use in complex asbestos litigation within that county, trial of these consolidated cases was bifurcated into "damages" and "liability" phases (heard by separate juries). [FN2] In the first damages phase of trial, the jury was to determine, as to each plaintiff, whether exposure to asbestos was a proximate cause of injury (i.e., whether plaintiff was suffering from asbestos-related disease or, as here, plaintiffs' decedent had died from asbestos-related disease) and, if so, the total amount of resulting damages. ***960**

FN2 Occasionally, an asbestos plaintiff will proceed to a third phase at which he will attempt to establish punitive damages against one or more defendants. For reasons that will become clear, there was no punitive damages phase in the *Rutherford* action. One of the four remaining consolidated actions did proceed to a third punitive damages phase against defendant Owens-Illinois, leading to a hung jury and no award of punitive damages against defendant. (*Anderson v. Owens-Illinois, Inc.*, review granted Oct. 19, 1995 (S047602), briefing deferred pursuant to rule 29.3, Cal. Rules of Court.)

Plaintiffs presented medical evidence that Rutherford had died of asbestos-related lung cancer. He had worked aboard ships around asbestos insulators at Mare Island starting in 1940. Although Rutherford's answers to interrogatories reflected he had never himself worked as an installer of asbestos insulation, he nevertheless had been exposed to respirable asbestos dust on a daily basis during periods of his employment at Mare Island. Three weeks before his death, Rutherford had furnished a medical history recounting his heavy exposure to asbestos products similar to that of other sheet metal workers in the shipyard. In 1985 he first noticed he would tire quickly and get out of breath easily. In 1986 Rutherford was diagnosed with lung cancer and underwent surgery. A year later a cancerous tumor was discovered in his head. He received radiation treatments but died three weeks later. Evidence was also presented that Rutherford had smoked approximately a pack of cigarettes a day over a period of 30 or more years until he quit smoking in 1977. As will be explained, this evidence took on heightened relevance at the second "liability" phase of trial.

At the end of the first phase of trial, the jury answered the question, "Did the decedent, Charles Rutherford, have lung cancer legally caused by his inhalation of asbestos fibers?" in the affirmative. The jury returned a verdict finding that a total of $278,510 in economic damages had been incurred by plaintiffs, and $280,000 in noneconomic damages suffered by plaintiffs as a result of decedent's death. Owens-Illinois has not challenged the damages phase jury's verdict finding Rutherford's injuries and death were proximately caused by his exposure to asbestos, nor has it challenged the plaintiffs' total award of economic and noneconomic damages.

Between the first and second phases of trial, nearly all the defendants except Owens-Illinois settled with plaintiffs. [FN3] The second liability phase thus involved only issues of Owens-Illinois's percentage of fault and apportionment of damages. At this phase of trial, the Rutherford plaintiffs elected to proceed under the burden-shifting instruction authorized, once again, under the procedures adopted by the Solano County Superior Court for general use in complex asbestos

litigation within that county. The instruction (Solano County Complex Asbestos Litigation General Order No. 21.00-hereafter Solano County General Order No. 21.00, or the burden-shifting instruction) will be discussed in greater detail below. Briefly, the instruction, available in ***961** asbestos personal injury actions tried on a products liability theory, provides that if the plaintiff has proved that a particular asbestos supplier's product was "defective," that the plaintiff's injuries or death were legally caused by asbestos exposure *generally*, and that he was exposed to asbestos fibers from the defendant's product, the burden then shifts to the defendant to prove, if it can, that its product was not a legal cause of the plaintiff's injuries or death.

> FN3 The record reflects that before his death, Rutherford identified three additional asbestos manufacturers to whose products he believed he had been exposed: Johns-Manville, Unarco and Amatex. The parties suggest those manufacturers were not named as defendants because they were bankrupt. Owens-Illinois further states in its brief that of the 19 named defendants in the Rutherford action, "[o]nly one of these entities-Owens-Illinois-remained through trial, because the rest of them settled with, or were dismissed by plaintiffs. Thus ... it was a case in which almost every defendant implicitly acknowledged its potential for liability."

Each plaintiff in these consolidated actions sought to show that he (or in this case, plaintiffs' decedent) had been exposed to asbestos fibers from the asbestos-containing insulation product known as Kaylo that was manufactured by Owens-Illinois from 1948 to 1958. This product, which was produced in block and pipe-covering forms, contained both amosite and chrysotile asbestos fibers. John McKinley, who worked as an electrician at Mare Island, recalled working with Rutherford in the early 1950's. He testified that Rutherford and he were often required to go down into fire rooms and engine rooms as part of their jobs, and that when they were working in those areas, the asbestos dust looked like a "Texas dust storm." McKinley specifically remembered working with Rutherford below decks on board ships while the laggers were ripping out insulation. The deposition testimony of Milton Reed was also introduced at the second phase of trial. Reed, an insulator and pipe coverer at Mare Island, testified that during the 1940's and 1950's Owens-Illinois's insulation product Kaylo was used extensively at the shipyard, and that the product gave off visible dust when used.

Medical testimony was also presented to establish that the plaintiffs' asbestos-related disease was "dose-related"-i.e., that the risk of developing asbestsos-related cancer increased as the total occupational dose of inhaled asbestos fibers increased. Dr. Allan Smith, a professor of epidemiology, testified that asbestos-related lung cancers are dose-related diseases, and that all occupational exposures through the latency period can contribute to the risk of contracting the diseases. Owens-Illinois's own medical expert, Dr. Elliot Hinckes, testified that asbestos-related cancers are dose responsive, and that if a worker had occupational exposure to many different asbestos-containing products, each such exposure would contribute to the degree of risk of contracting asbestos-related lung cancer, although he testified further that a very light or brief exposure could be considered "insignificant or at least nearly so" in the "context" of other, very heavy exposures. There was no evidence in this case that Rutherford had been exposed predominantly to any one kind or brand of asbestos product. All of the evidence regarding Rutherford's asbestos exposure was specifically related to industrial-occupational exposure, i.e., exposure to asbestos products while they were being installed or removed at Mare Island. ***962**

Owens-Illinois was allowed to establish that other asbestos manufacturers, and the plaintiffs' various employers, shared comparative fault for the plaintiffs' long-term exposure to asbestos. Owens-Illinois was also permitted to present evidence that smoking was a "negligent" contributing factor to each plaintiff's condition. Undisputed evidence indicated that smoking sharply increases the risk of lung disease, including lung cancer, and works "synergistically" with asbestos exposure to enhance the severity of resulting damage to the lungs. The trial court's instructions made clear that each plaintiff's entire recovery must be reduced to the extent of his own comparative "negligence" contributing to his condition, because each had continued to smoke tobacco long after he had notice that smoking was hazardous to health, and that the long-term consumption of tobacco products could be a contributing cause of lung disease.

As previously noted, Owens-Illinois further

sought permission to establish that, in addition to Rutherford's own comparative fault for smoking, and the fault assigned to other asbestos manufacturers and to employers, cigarette manufacturers also shared fault for plaintiffs' injuries because they supplied the harmful tobacco products plaintiffs had consumed. Owens-Illinois urged that under Proposition 51, the proportionate fault of tobacco companies for plaintiffs' injuries should further reduce, to that extent, Owens-Illinois's liability for the plaintiffs' noneconomic damages. The trial court ruled that no "tobacco company defense" could be presented because the tobacco companies "aren't on trial here," and excluded all proffered evidence concerning the fault of cigarette manufacturers, refusing to allow a verdict form in which fault could be apportioned to those entities. (See *Richards, supra*, 14 Cal.4th at p. 991.)

The liability phase jury was instructed to assign percentages of fault for each injury, adding up to a total of 100 percent, among (1) the plaintiff himself (here, plaintiffs' decedent); (2) Owens-Illinois; (3) other manufacturers of asbestos to which the plaintiff or decedent was exposed; and (4) each employer that contributed to the exposure. In Rutherford's case, the jury apportioned fault as follows: 1.2 percent to Owens-Illinois, 2.5 percent to Rutherford himself, and 96.3 percent to the remaining entities to which the jury was allowed to assign fault. After further adjustment for pretrial settlements, the Rutherford plaintiffs recovered a net judgment of $177,047 in economic damages and $2,160 in noneconomic damages against defendant Owens-Illinois. [FN4]

> FN4 In *Richards, supra*, 14 Cal.4th at page 992, footnote. 4, we explained that the parties to that appeal were not challenging the general applicability of Proposition 51 to the case. Here too, plaintiffs have explained in their brief on the merits that "Because Charles Rutherford died before trial, and the case was converted into a wrongful death case, and because there were substantial pretrial settlements, the Rutherford plaintiffs have not contested the issue of the application of Civil Code section 1431.2 [Proposition 51] to this appeal." Although the issue of when a cause of action for asbestos-related latent injuries "accrues" for the specific purpose of determining whether Proposition 51 can be applied prospectively in a latent injury case has been decided by this court in *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520 [___ Cal.Rptr.2d ___, ___ P.2d ___], we will accept plaintiffs' election not to challenge the applicability of Proposition 51 to this case for the reasons given by them.

Owens-Illinois appealed. In its Court of Appeal briefs, Owens-Illinois asserted as trial errors the denial of its tobacco company defense, the giving ***963** of the burden-shifting instruction, and several other unrelated evidentiary issues of no direct concern to us on review. The Court of Appeal reversed on the same ground that led it to reverse the judgment in *Richards*; it concluded, erroneously, that the trial court's rejection of the proffered tobacco company defense in these consolidated actions was prejudicial error under this court's earlier decision in *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593 [7 Cal.Rptr.2d 238, 828 P.2d 140]. (See *Richards, supra*, 14 Cal.4th at p. 992.)

The Court of Appeal, in very perfunctory fashion, also resolved the other issues raised by Owens-Illinois. All but one of Owens-Illinois's remaining arguments were rejected; the Court of Appeal ruling, for purposes of guidance "in the event of a retrial," that the aforementioned burden-shifting instruction was "erroneous" under the recent decision by Division One of the First District Court of Appeal in *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409 [37 Cal.Rptr.2d 902], and should not again be given on retrial. (See *Richards, supra*, 14 Cal.4th at p. 1003.)

Plaintiffs' petition for review herein raised both the tobacco company defense and burden-shifting issues. In its answer to the petition, Owens-Illinois confined itself to the same two issues, and did not exercise its right to present other aspects of the Court of Appeal's decision for our consideration. (See Cal. Rules of Court, rule 28(e)(5).) Though we issued no order specifically limiting the issues on review, the parties' briefs on the merits are likewise concerned only with those two issues.

Our holding in *Richards, supra*, 14 Cal.4th 985, is dispositive of the tobacco company defense issue presented in this appeal. The actions were consolidated and jointly tried at the liability phase, the trial court made one order disallowing the defense to

Owens-Illinois vis-a-vis all the plaintiffs, and the Court of Appeal treated the issue in a single substantive discussion in its opinion in that case, reversing the judgment in this case with a citation to its opinion and holding in *Richards* filed six weeks earlier. [FN5] As was our conclusion in *Richards*, because the Court of Appeal incorrectly awarded Owens-Illinois a new trial to pursue its tobacco company defense, we must ***964** likewise reverse that aspect of the judgment of the Court of Appeal in the instant case. (*Id.* at p. 1003.)

FN5 The parties to this appeal and their counsel, who were also counsel of record in *Richards*, have likewise indicated in their briefs their understanding that *Richards* was the lead case in which the tobacco company defense issue would be resolved.

Our decision in *Richards, supra*, 14 Cal.4th 985, however, provides no guidance on the burden-shifting issue. Plaintiff Richards did not challenge the Court of Appeal's ruling on that issue on review of his judgment in this court. In its answer, Owens-Illinois likewise directed its arguments to the issue of the tobacco company defense, and did not exercise its right to present other aspects of the Court of Appeal's decision for our consideration. Accordingly, we confined our decision in *Richards* to the tobacco company defense issue. (*Richards, supra*, 14 Cal.4th at p. 1003.) Here, in contrast, plaintiffs' petition for review did contest the correctness of the Court of Appeal's determination that the trial court erred in giving the burden-shifting instruction, and Owens-Illinois in turn has sought to defend the Court of Appeal's ruling in that regard. When we granted review in this case, briefing on the burden-shifting issue was ordered deferred pending our disposition in *Coughlin v. Owens-Illinois, Inc.* (1993) 49 Cal.App.4th 1879 [27 Cal.Rptr.2d 214], review granted April 21, 1994 (S037837), further action deferred October 17, 1996, in which case the same issue, involving a closely related instruction (Alameda County Superior Court Complex Asbestos Litigation General Order No. 7.07) on which the Solano County burden-shifting instruction here in issue was assertedly patterned, was also pending and briefed. Subsequently, we issued an order designating the instant action as the lead case on the burden-shifting issue and requesting the parties to address in their briefs the questions set out in the margin. [FN6]

FN6 "1. Does the burden-shifting instruction authorized in Solano County comport or conflict with existing California authorities on concurrent causation (see BAJI No. 3.77)? [¶] 2. What is the source or sources of local rule making authority for such an instruction? [¶] 3. What is the source of authority and rationale behind the requirement that the plaintiff waive any claim for punitive damages in order to obtain the benefit of the burden-shifting instruction? [¶] 4. How does the decision in *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409 [on which the Court of Appeal *exclusively* relied to find the burden-shifting instruction given in this case invalid] bear upon our resolution of the burden-shifting issue in this case?"

Consequently, although that aspect of the judgment of the Court of Appeal granting Owens-Illinois a new trial on the tobacco company defense issue must be reversed pursuant to our holding in *Richards, supra*, 14 Cal.4th 985, we are additionally confronted in this appeal with the further holding by the Court of Appeal that the burden-shifting instruction given below was erroneous, a holding which, unlike the procedural posture of *Richards*, has been challenged on review by the plaintiffs, with the issue now fully briefed by both parties and various amici curiae. We conclude the Court of Appeal correctly determined plaintiffs should not have been permitted to elect to proceed under the Solano County burden-shifting instruction. We also find, ***965** however, that defendant has not demonstrated prejudice from the instructional error. Accordingly, we shall reverse the judgment of the Court of Appeal pursuant to our holding in *Richards, supra*, 14 Cal.4th 985.

III. *Discussion.*

1. *Preliminary Considerations; Solano County Superior Court's Local Rulemaking Authority in Complex Asbestos Litigation.*

(1a) Owens-Illinois urged the Court of Appeal to reverse the liability (second phase of trial) verdicts on the ground that the trial court improperly shifted the burden to defendant to prove that its products were not a legal cause of Rutherford's injuries and death. The argument is supported by several amici curiae. [FN7]

FN7 Fibreboard Corporation has filed an amicus curiae brief in support of Owens-Illinois on the burden-shifting issue.

> Additionally, this court's order designating the instant matter as the lead case on this issue indicated that "[a]ll amicus curiae briefs filed in *Coughlin v. Owens-Illinois, supra*, 49 Cal.App.4th 1879, review granted April 21, 1994 (S037837), which address the burden-shifting instructional issue, and all briefs filed in that case in reply thereto, shall be considered by this court in deciding the issue in the instant case." The following organizations and entities filed briefs amicus curiae on the burden shifting issue in *Coughlin v. Owens-Illinois* in support of the defendants in that appeal: Plant Insulation Company; General Motors Corporation; Fibreboard Corporation; Kaiser Gypsum Company, Inc.; and the Center For Claims Resolution.

Upon plaintiffs' election, the trial court instructed the jury at the second liability phase of trial pursuant to Solano County General Order No. 21.00. Under this order, at the commencement of the liability phase of an asbestos products liability action (tried under either the consumer expectation or risk/benefit theories of product liability), the plaintiff "shall elect whether to request that all defendants carry the burden of proof regarding the legal cause of the plaintiff's or plaintiff's decedent's injury as to each said defendant. [¶] The plaintiff so requesting [the burden-shifting instruction] must, as to each defendant, prove by a preponderance of the evidence each of the following: [¶] a) That the asbestos product manufactured or distributed by said defendant was defective; [¶] b) That plaintiff's or plaintiff's decedent's injury was legally caused by his exposure to or contact with asbestos fibers, or products containing asbestos, and [¶] c) That plaintiff's exposure to or contact with asbestos fibers, or products containing asbestos, included exposure to or contact with such fibers or products manufactured or distributed by said defendant. [¶] The burden shall then shift to each defendant to prove by a preponderance of the evidence that this product was not a legal cause of the plaintiff's or plaintiff's decedent's injury. [¶] If plaintiff relies on this shifting of the burden of proof, there is deemed to be ***966** a waiver by plaintiff of any claim for punitive damages." [FN8] The record reflects that Owens-Illinois generally objected to the giving of Solano County General Order No. 21.00 in this case.

FN8 The precise wording of the burden-shifting instruction as given in this case was as follows:

"Plaintiffs in the Rutherford case have the burden of proving by a preponderance of the evidence all of the facts necessary to establish the following claim of liability against defendant Owens-Illinois:

"(A) Under plaintiffs' claim that Owens-Illinois-let me start that again.

"Under plaintiffs' claim that Owens-Illinois' Kaylo pipe and block insulation were defective in design, plaintiff must establish by a preponderance of the evidence:

"(1) That Owens-Illinois was a manufacturer of asbestos-containing thermal-I am having problems-let me start over again.

"That Owens-Illinois was a manufacturer of asbestos-containing thermal insulation materials called Kaylo.

"(2) That Owens-Illinois' Kaylo insulation products contained asbestos when they left the possession of the defendant.

"(3) That the decedent Charles Rutherford inhaled asbestos fibers as a result of exposure to or contact with asbestos-containing Kaylo made by Owens-Illinois.

"(4) That Owens-Illinois' Kaylo insulation products were being used at the time of such exposure or contact in a manner intended or reasonably foreseeable by the defendant.

"(5) That Kaylo insulation products of Owens-Illinois failed to perform as safely as an ordinary consumer would expect.

"(B) Defendant Owens-Illinois has a preponderance of the evidence to establish [*sic*]:

"(1) that the exposure to Owens-Illinois' Kaylo was not a legal cause of Charles Rutherford's injury and death."

Code of Civil Procedure section 575.1, subdivision (a), is one source of legislative authority for local judicial rulemaking. That section provides that "[t]he presiding judge of each superior ... court may prepare ... proposed local rules designed to expedite and facilitate the business of the court. The rules ... may provide for the supervision and judicial management of actions from the date they are filed."

The Judicial Council has also adopted standards applicable to local judicial rulemaking. "The Judicial Council has adopted suggested procedures for processing complex civil cases which require specialized management to avoid placing unnecessary burdens on the trial courts or litigants. (Cal. Standards Jud. Admin., § 19 (Deering's Cal. Ann. Codes, Rules (Appen.) (1988 ed.) pp. 620-621 (hereafter Standards).) The complex litigation procedure is intended to facilitate pretrial resolution of evidentiary and other issues, and to minimize the time and expense of lengthy or multiple trials. (*Vermeulen v. Superior Court* (1988) 204 Cal.App.3d 1192, 1195-1196 [251 Cal.Rptr. 805].)" (*Asbestos Claims Facility v. Berry & Berry* (1990) 219 Cal.App.3d 9, 14 [267 Cal.Rptr. 896].)

The San Francisco and Alameda County Superior Courts have each designated all cases filed in their respective courts involving death and ***967** injury due to asbestos exposure as complex litigation under section 19 of the Standards, and in each of those jurisdictions a procedure has been established for the issuance of general orders applicable to every asbestos case in that court. (See *Asbestos Claims Facility v. Berry & Berry, supra*, 219 Cal.App.3d at p. 14.) The record in this case reflects that Solano County has adopted similar procedures.

(2) It is also well established that courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them. (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1377 [5 Cal.Rptr.2d 882].) "In addition to their inherent equitable power derived from the historic power of equity courts, all courts have inherent supervisory or administrative powers which enable them to carry out their duties, and which exist apart from any statutory authority. (*Bauguess v. Paine* (1978) 22 Cal.3d 626, 636-637 [150 Cal.Rptr. 461, 586 P.2d 942]; *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 287-288 [245 Cal.Rptr. 873].) 'It is beyond dispute that " Courts have inherent power ... to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council." [Citation.]' (*Citizens Utilities Co. v. Superior Court* (1963) 59 Cal.2d 805, 812-813 [31 Cal.Rptr. 316, 382 P.2d 356], fn. omitted.) That inherent power entitles trial courts to exercise reasonable control over all proceedings connected with pending litigation ... in order to insure the orderly administration of justice. (See *Hays v. Superior Court* (1940) 16 Cal.2d 260, 264-265 [105 P.2d 975].) 'Courts are not powerless to formulate rules of procedure where justice demands it.' (*Adamson v. Superior Court* (1980) 113 Cal.App.3d 505, 509 [169 Cal.Rptr. 866], citing *Addison v. State of California* (1978) 21 Cal.3d 313, 318-319 [146 Cal.Rptr. 224, 578 P.2d 941].) The Legislature has also recognized the authority of courts to manage their proceedings and to adopt suitable methods of practice. (See Code Civ. Proc., §§ 128, 187.)" (*Asbestos Claims Facility v. Berry & Berry, supra*, 219 Cal.App.3d at p. 19.)

As Owens-Illinois correctly points out, however, regardless of their source of authority, "trial judges have no authority to issue courtroom local rules which conflict with any statute" or are "inconsistent with law." (*Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, 1160 [57 Cal.Rptr.2d 200]; *Asbestos Claims Facility v. Berry & Berry, supra*, 219 Cal.App.3d at p. 19.) If the burden-shifting instruction embodied in Solano County General Order No. 21.00 conflicts with any statewide statute, rule of law, or Judicial Council rule, then it is an inappropriate exercise of that court's powers under section 19 of the Standards, as described in *Asbestos Claims Facility v. Berry & Berry, supra*, 219 Cal.App.3d at page 14. Nor could such a conflicting ***968** instruction, adopted by the superior court of a county and applicable only to cases filed in that county, be viewed as a valid exercise of the court's inherent judicial powers to adopt procedures for resolving, among other matters, recurring evidentiary issues in complex asbestos litigation brought within its jurisdiction.

Assuming for sake of argument the legal validity of a burden-shifting instruction such as that adopted in Solano County, obvious concerns are raised by a situation in which a fundamental theory of tort liability

(alternative liability) is applied or not applied to a category of cases (asbestos personal injury actions) depending only on an exercise of local rulemaking authority in matters of complex litigation. Although we question the propriety of resolving by local court rule a matter as substantive as whether the doctrine of "alternative liability" is applicable to asbestos-related latent personal injury actions, the scope of the Solano County Superior Court's local rulemaking authority need not be pursued further here. As next shown, the burden-shifting instruction embodied in Solano County General Order No. 21.00 should not have been given in this case because the theoretical predicate for a burden shift on causation-i.e., the need of an asbestos plaintiff to rely on a theory of alternative liability to establish causation and thereby perfect his action to recover damages for asbestos-related latent injuries-is lacking.

2. *Alternative Liability and Burden Shifting.*

(1b) We are in basic agreement with Owens-Illinois and those courts that have concluded asbestos plaintiffs can meet their burden of proving legal causation under traditional tort principles, without the need for an "alternative liability" burden-shifting instruction. Indeed, the burden-shifting instruction offered in Solano County appears in conflict with certain aspects of these basic tort principles, and with standardized instructions on which the liability phase jury in this case was also instructed.

Generally, the burden falls on the plaintiff to establish causation. (*Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 597 [163 Cal.Rptr. 132, 607 P.2d 924] (*Sindell*).) Most asbestos personal injury actions are tried on a products liability theory. In the context of products liability actions, the plaintiff must prove that the defective products supplied by the defendant were a substantial factor in bringing about his or her injury. (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 127 [104 Cal.Rptr. 433, 501 P.2d 1153]; *Endicott v. Nissan Motor Corp.* (1977) 73 Cal.App.3d 917, 926 [141 Cal.Rptr. 95, 9 A.L.R.4th 481]; see BAJI No. 3.76.)

(3) California has definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact determinations. (***969***Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1044, fn. 2, 1052, fn. 7 [1 Cal.Rptr.2d 913, 819 P.2d 872].) Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury. (*Id.* at pp. 1052-1053; Rest.2d Torts, § 431, subd. (a), p. 428; BAJI No. 3.76 (8th ed. 1994).) The substantial factor standard generally produces the same results as does the "but for" rule of causation which states that a defendant's conduct is a cause of the injury if the injury would not have occurred "but for" that conduct. (*Mitchell v. Gonzales, supra*, 54 Cal.3d at p. 1053; Prosser & Keeton on Torts (5th ed. 1984) § 41, p. 266.) The substantial factor standard, however, has been embraced as a clearer rule of causation-one which subsumes the "but for" test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact. (*Mitchell v. Gonzales, supra*, 54 Cal.3d at pp. 1052-1053; *Thomsen v. Rexall Drug & Chemical Co.* (1965) 235 Cal.App.2d 775, 783 [45 Cal.Rptr. 642]; Prosser & Keeton on Torts, *supra*, § 41, pp. 266-268.)

The term "substantial factor" has not been judicially defined with specificity, and indeed it has been observed that it is "neither possible nor desirable to reduce it to any lower terms." (Prosser & Keeton on Torts, *supra*, § 41, p. 267.) This court has suggested that a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not a substantial factor. (*People v. Caldwell* (1984) 36 Cal.3d 210, 220 [203 Cal.Rptr. 433, 681 P.2d 274].) Undue emphasis should not be placed on the term "substantial." For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the "but for" test, has been invoked by defendants whose conduct is clearly a "but for" cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. (Prosser & Keeton on Torts (5th ed., 1988 supp.) § 41, pp. 43-44.) Misused in this way, the substantial factor test "undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby." (*Mitchell v. Gonzales, supra*, 54 Cal.3d at p. 1053.)

(1c) An instruction shifting the burden of proof on causation constitutes a fundamental departure from these principles, and can only be justified on a showing of necessity for application of the specific theory of causation-alternative liability-first approved by this court in the celebrated case of *Summers, supra*, 33 Cal.2d 80. Solano County General Order No. 21.00 was apparently based on the alternative liability theory

and patterned on a similar burden-shifting instruction adopted in Alameda County [FN9]

> FN9 The validity of the Alameda County Superior Court burden-shifting instruction-Alameda County Complex Asbestos Litigation General Order No. 7.07-upon which the Solano County instruction was patterned, is pending before us in *Coughlin v. Owens-Illinois, Inc., supra,* 49 Cal.App.4th 1879, review granted April 21, 1994 (S037837), further action deferred October 17, 1996. It appears from the record in this case that the Solano County instruction did, indeed, originate from the Alameda County instruction, which in turn was perceived as a necessary response to the asbestos plaintiff lawyers' argument that a plaintiff's inability to trace or prove which defendant's asbestos product's fibers in fact caused or contributed to their latent diseases and injury would preclude recovery without such an instruction. The 1987 Alameda County order adopting a burden-shifting instruction cited as authority only *Summers, supra,* 33 Cal.2d 80, and *Pereira v. Dow Chemical Co.* (1982) 129 Cal.App.3d 865 [181 Cal.Rptr. 364], which opinion summarily applied the alternative liability theory to a plaintiff's indivisible injury resulting from occupational exposure to toxic chemcials. In urging the Solano County Superior Court to adopt the burden-shifting instruction, the attorneys for asbestos plaintiffs cited primarily the same decisions, and argued that without the instruction they could not prove causation because it was medically impossible to identify which defendant's product's fibers were the actual causes of their clients' injuries.

Summers involved a hunting accident in which two quail hunters negligently fired their shotguns in the direction of the plaintiff at about the same ***970** time. A single birdshot pellet struck plaintiff in the eye, causing serious injury. It was impossible to determine which of the negligent hunters had fired the single pellet, but it was clear only one of them had to have directly caused the injury. This court concluded both hunters could be found jointly and severally liable for plaintiff's injuries. We observed that each defendant was a wrongdoer who had acted negligently toward an innocent plaintiff, and that together the two had brought about a situation in which the negligence of one of them had injured the plaintiff. Under the then applicable traditional proximate cause standards, the plaintiff would have been unable to establish which defendant had caused his eye injury. To remedy this problem, the lower court shifted to each defendant the burden of proving, if he could, that he was *not* the cause of plaintiff's injury. We approved of the procedure. (33 Cal.2d at p. 86.)

A number of important factors present in *Summers* thus combined to lead this court to conclude that it would be fair and just to apply the theory of alternative liability and its concomitant burden-shifting rule. First, all the tortfeasors were named as defendants and before the court-the two hunters. In certainty one of them had caused the plaintiff's eye injury; there were no other potential tortfeasors. Second, it was established in *Summers* that each hunter was a wrongdoer who had acted negligently in firing his shotgun in the direction of the plaintiff at about the same time. Nor were there any facts to distinguish the nature or extent of the negligent conduct of each defendant; they were coequals from the standpoint of fault. Third, the plaintiff's injury was instantaneous and indivisible (as opposed to a latent, progressively deteriorating injury). Fourth, there was no contributing or concurrent causation-one of the hunters was the cause-in-fact of the entirety of plaintiff's injury resulting from a single shotgun pellet lodging in his eye. There was no factual basis on which to *apportion* "fault" or liability for the injury. Finally, given the nature of the injury, the plaintiff in *Summers* was ***971** without any evidentiary means whatsoever to prove from which hunter's shotgun the injurious single pellet had been fired. In short, given the facts of *Summers*, without the burden-shifting instruction the tortfeasors would have escaped liability, leaving the injured plaintiff without the legal means to seek redress for his negligently inflicted injuries.

The *Summers* alternative liability theory was incorporated in the Restatement Second of Torts, section 433B, subdivision (3), pages 441-442 (Section 433B(3)), which provides: "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each actor to prove that he has not caused the harm."

The express language of Section 433B(3) therefore envisions the theory of alternative liability to be applicable as between two or more defendants only where all have been shown to be tortfeasors in the first instance, and where the conduct of only one of them caused the harm. The comments to Section 433B(3) are in accord. Comment g to Section 433B(3), at page 446, states that the burden shifts to the defendant only if the plaintiff can demonstrate that all defendants "acted tortiously and that the harm resulted from the conduct of ... one of them." And comment h indicates that the theory of alternative liability is generally limited to cases where the defendants' conduct creates a substantially similar risk of harm ("The cases thus far decided in which the rule stated in Subsection (3) has been applied have all been cases in which all of the actors involved have been joined as defendants. All of these cases have involved conduct simultaneous in time, or substantially so, and all of them have involved conduct of substantially the same character, creating substantially the same risk of harm, on the part of each actor...."). (*Ibid.*)

The majority of courts have refused to extend the doctrine of alternative liability and its burden-shifting rule to asbestos-related latent personal injury actions brought against multiple suppliers of asbestos products. These cases have found the factors which support application of *Summers* alternative liability and burden shifting readily distinguishable from the facts typically involved in complex asbestos litigation.

For example, in *Goldman v. Johns-Manville Sales Corp.* (Ohio 1987) 514 N.E.2d 691 (*Goldman*), the Supreme Court of Ohio rejected application of *Summers* alternative liability/burden shifting to asbestos personal injury actions, concluding that given the nature of such litigation, it is often the case that the culpable party or parties will not be before the court, making a *Summers*-type burden shift unfair to the named defendants standing trial. The ***972** *Goldman* court observed that "[i]n asbestos litigation, it is often uncertain that the culpable party is before the court. There are over one hundred sixty-five companies that have produced or supplied these products. Special Project: An Analysis of the Legal, Social and Political Issues Raised by Asbestos Litigation (1983) 36 Vanderbilt L.Rev. 573, 581, fn. 22. In addition, the largest producer of asbestos products, Johns-Manville, is no longer amenable to suit because of its reorganization. Even if Johns-Manville were amenable to suit, however, the only way to make sure that the guilty defendant was before the court would be to sue *all* asbestos companies." (*Goldman, supra,* 514 N.E.2d at p. 697, italics in original.)

The *Goldman* court also observed that the wide variation in form and toxicity of asbestos products further distinguishes asbestos cases from the facts of *Summers*, making the burden-shifting rule inappropriate in such cases. "Asbestos-containing products do not create similar risks of harm because there are several varieties of asbestos fibers, and they are used in various quantities, even in the same class of product." (*Goldman, supra,* 514 N.E.2d at p. 697.)

In *Vigiolto v. Johns-Manville Corp.* (W.D.Pa. 1986) 643 F.Supp. 1454 (*Vigiolto*), the United States District Court for the Western District of Pennsylvania likewise rejected application of *Summers* alternative liability/burden shifting to asbestos litigation. Focusing on the differing propensities of various forms of asbestos products to cause injury and disease, the *Vigiolto* court quoted from a decision of the Supreme Court of Florida that explained: " 'Asbestos products ... have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others. *See generally* Locks, *Asbestos-Related Disease Litigation: Can the Beast be Tamed?,* 28 Vill.L.Rev. 1184 (1982-1983); Note, *Issues in Asbestos Litigation,* 34 Hastings L.J. 871, 889-95 (1983); Comment, *An Examination of Recurring Issues in Asbestos Litigation,* 46 Alb.L.Rev. 1307, 1325-29 (1982). This divergence is caused by a combination of factors, including: the specific type of asbestos fiber incorporated into the product; the physical properties of the product itself; the percentage of asbestos used in the product. There are six different asbestos silicates used in industrial applications and each presents a distinct degree of toxicity in accordance with the shape and the aerodynamics of the individual fibers. Further, it has been established that the geographical origin of the mineral can affect the substance's harmful effects. A product's toxicity is also related to whether the product is in the form of a solid block or a loosely packed insulating blanket and to the amount of dust a product generates. The product's form determines the ability of the asbestos fibers to become airborne and, hence, to be inhaled or ingested. The greater the product's susceptibility to produce ***973** airborne fibers, the greater the product's

potential to produce disease. Finally, those products with high concentrations of asbestos fibers have corresponding high potentials for inducing asbestos-related injuries.' " (*Vigiolto, supra*, 643 F.Supp. at p. 1463, quoting *Celotex Corp. v. Copeland* (Fla. 1985) 471 So.2d 533, 537-538.)

In *Sindell, supra*, 26 Cal.3d 588, this court too *rejected* application of a pure *Summers* alternative liability theory-in the case that went on to establish an important variation of that doctrine, "market share liability"-under circumstances where all potential tortfeasors that may have actually caused plaintiff's injuries were not before the court as named defendants in the lawsuit.

Sindell involved a class action for personal injuries allegedly resulting from prenatal exposure to the antimiscarriage drug diethylstilbestrol (DES) which had been manufactured by any one of a potentially large number of defendants. Plaintiff could not identify which particular defendant had manufactured the drug responsible for her injuries. However, her complaint alleged that defendants were jointly and individually negligent in that they had manufactured, marketed and promoted DES as a safe drug to prevent miscarriage without adequate testing or warning of its dangerous side effects; collaborated in their marketing methods, promotion and testing of the drug; relied on each others' test results; adhered to an industry-wide safety standard; and produced the drug from a common and mutually agreed upon generic formula. (26 Cal.3d at pp. 604-605.)

In concluding that a pure *Summers*-type alternative liability theory was *unavailable* to plaintiffs under those facts, we explained in *Sindell*: "There is an important difference between the situation involved in *Summers* and the present case. There, all the parties who were or could have been responsible for the harm to the plaintiff were joined as defendants. Here, by contrast, there are approximately 200 drug companies which made DES, any of which might have manufactured the injury-producing drug.

"Defendants maintain that, while in *Summers* there was a 50 percent chance that one of the two defendants was responsible for the plaintiff's injuries, here since any one of 200 companies which manufactured DES might have made the product that harmed plaintiff, there is no rational basis upon which to infer that any defendant in this action caused plaintiff's injuries, nor even a reasonable possibility that they were responsible.

"These arguments are persuasive if we measure the chance that any one of the defendants supplied the injury-causing drug by the number of possible ***974** tortfeasors. In such a context, the possibility that any of the five defendants supplied the DES to plaintiff's mother is so remote that it would be unfair to require each defendant to exonerate itself. There may be a substantial likelihood that none of the five defendants joined in the action made the DES which caused the injury, and that the offending producer not named would escape liability altogether. While we propose, *infra*, an adaptation of the rule in *Summers* which will substantially overcome these difficulties, defendants appear to be correct that the [*Summers* alternative liability/burden-shifting] rule, as previously applied, cannot relieve plaintiff of the burden of proving the identity of the manufacturer which made the drug *causing* her injuries." (*Sindell, supra*, 26 Cal.3d at pp. 602-603, fns. omitted, italics added.) [FN10]

> FN10 It should be noted there is no contention here that a *Sindell* "market share" theory of liability is applicable to asbestos actions. Plaintiffs have expressly indicated in their briefs they do not contend *Sindell* market share liability is applicable to this case.

Although many of the above cited cases focus on the fact that not all potential tortfeasors may be before the court to ensure that the *actual* tortfeasor will be held liable if it cannot disprove its role in causing plaintiff's injuries, or that different toxicities and brands of asbestos products and their differing effects on different asbestos-related diseases make it inappropriate to apply a *Summers* alternative liability/burden-shifting rule to asbestsos cases, we believe the most fundamental reason why a burden-shifting instruction is unnecessary to proving an asbestos-related cancer latent injury case becomes clear when the limits on the plaintiff's burden of proof on causation are properly understood. A fuller analysis of the medical problems and uncertainties accompanying factual proof of causation in an asbestos cancer case will serve to illustrate the point.

At the most fundamental level, there is scientific uncertainty regarding the biological mechanisms by

which inhalation of certain microscopic fibers of asbestos leads to lung cancer and mesothelioma. Although in some cases medical experts have testified that asbestos-related cancer is the final result of the fibrosis (scarring) process (see *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1, 37-39 [52 Cal.Rptr.2d 690]), a general reference on the subject describes the link between fibrosis and carcinogenesis as "a debated issue for which further extensive analysis is needed." (1 Encyclopedia of Human Biology (1991) Asbestos, p. 423.) An answer to this biological question would be legally relevant, because if each episode of scarring contributes cumulatively to the formation of a tumor or the conditions allowing such formation, each significant exposure by the plaintiff to asbestos fibers would be deemed a cause of the plaintiff's cancer; if, on the other hand, only one fiber or group of fibers actually causes the ***975** formation of a tumor, the others would not be legal causes of the plaintiff's injuries.

If, moreover, the question were answered in favor of the latter (single cause) theory, another question-apparently unanswerable-would arise: *which* particular fiber or fibers actually caused the cancer to begin forming. Because of the irreducible uncertainty of the answer, asbestos-related cancer would, under the single-fiber theory of carcinogenesis, be an example of alternative causation, i.e., a result produced by a single but indeterminable member of a group of possible causes. The disease would thus be analogous to the facts of the hunting accident in *Summers, supra*, 33 Cal.2d 80.

Apart from the uncertainty of the causation, at a much more concrete level uncertainty frequently exists whether the plaintiff was even exposed to dangerous fibers from a product produced, distributed or installed by a particular defendant. The long latency periods of asbestos-related cancers mean that memories are often dim and records missing or incomplete regarding the use and distribution of specific products. In some industries, many different asbestos-containing products have been used, often including several similar products at the same time periods and worksites. Not uncommonly, plaintiffs have been unable to prove direct exposure to a given defendant's product. (See, e.g., *Lineaweaver v. Plant Insulation Co., supra*, 31 Cal.App.4th at pp. 1420-1421; *Dumin v. Owens-Corning Fiberglas Corp.* (1994) 28 Cal.App.4th 650, 655-657 [33 Cal.Rptr.2d 702]; *Viglioto, supra*, 643 F.Supp. at pp. 1455-1456.)

Finally, at a level of abstraction somewhere between the historical question of exposure and the unknown biology of carcinogenesis, the question arises whether the risk of cancer created by a plaintiff's exposure to a particular asbestos-containing product was significant enough to be considered a legal cause of the disease. Taking into account the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, any other potential causes to which the disease could be attributed (e.g., other asbestos products, cigarette smoking), and perhaps other factors affecting the assessment of comparative risk, should inhalation of fibers from the particular product be deemed a "substantial factor" in causing the cancer? (See, e.g., *Greathouse v. Amcord, Inc.* (1995) 35 Cal.App.4th 831, 837 [41 Cal.Rptr.2d 561]; *Lineaweaver v. Plant Insulation Co., supra*, 31 Cal.App.4th at pp. 1416-1417.)

The burden of proof as to exposure is not disputed in this case. Even with the jury instruction at issue, plaintiffs bore the burden of proof on the issue of exposure to the defendant's product; plaintiffs do not complain of that ***976** burden, which is properly theirs under California law. Only in one circumstance have we relieved toxic tort plaintiffs of the burden of showing exposure to the defendant's product: where hundreds of producers had made the same drug from an identical formula, practically precluding patients from identifying the makers of the drugs they took. (*Sindell, supra*, 26 Cal.3d at pp. 610-613.) Plaintiffs do not here argue that a comparable situation exists with asbestos makers justifying adoption of a market-share liability theory. (See *ante*, fn. 10, at p. 974.)

Nor is the burden of proof as to the mechanism of carcinogenesis disputed here; defendant *concedes* that plaintiff does not bear such a burden to "connect the manufacturer and the fibers." Asbestos plaintiffs, Owens-Illinois acknowledges, "are *not* required to identify the manufacturer of specific fibers" that caused the cancer. We agree: Plaintiffs cannot be expected to prove the scientifically unknown details of carcinogenesis, or trace the unknowable path of a given asbestos fiber. But the impossibility of such proof does not dictate use of a burden shift. Instead, we can bridge this gap in the humanly knowable by

holding that plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability [FN11] was a substantial factor in contributing to the aggregate *dose* of asbestos the plaintiff or decedent inhaled or ingested, and hence to the *risk* of ***977** developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that *actually* produced the malignant growth.

> FN11 The *Lineaweaver* court articulated what it believed should be the standard of proof applicable to medical evidence of the biological processes that cause injury or disease, in evaluating whether exposure to the defendant's asbestos products was a *substantial factor* in causing the disease or injuries. The standard is this: "is there a reasonable medical probability based upon competent expert testimony that the defendant's conduct contributed to plaintiff's injury. [Citations.]" (*Lineaweaver v. Plant Insulation Co., supra*, 31 Cal.App.4th at p. 1416, fn. omitted.)
>
> We recognize *Lineweaver* was a negligence case, and that the above quoted standard was derived from medical malpractice cases. (*Lineaweaver v. Plant Insulation Co., supra*, 31 Cal.App.4th at p. 1416, fn. 2; see, e.g., *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1498 [7 Cal.Rptr.2d 608]; 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 967 p. 357 ["the evidence must be sufficient to allow the jury to infer that, in the absence of the defendant's negligence, there was a reasonable medical probability that the plaintiff would have obtained a better result."].) We nonetheless find the above quoted standard, as modified and articulated in *Lineaweaver, supra*, 31 Cal.App.4th at page 1416, particularly well suited to proof of causation through expert medical evidence when applying the substantial factor test to asbestos personal injury actions brought on a negligence or products liability theory. The standard of "reasonable medical probability" has been adopted in at least one reported decision involving a carcinogenic pharmaceutical. (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402 [209 Cal.Rptr. 456]; see also *Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 476 and fn. 11 [38 Cal.Rptr.2d 739] [citing the standard in an asbestos latent personal injury case tried on a products liability theory, but noting the court in *Lineaweaver, supra*, 31 Cal.App.4th 1409, had modified the standard slightly].) Moreover, we agree with the observation of the *Lineaweaver* court that the reference to "medical probability" in the standard "is no more than a recognition that asbestos injury cases (like medical malpractice cases) involve the use of medical evidence." (*Lineaweaver, supra*, 31 Cal.App.4th at p. 1416, fn. 2.)

In refining the concept of legal cause we must also ensure that the triers of fact in asbestos-related cancer cases know the precise contours of the plaintiff's burden. The generally applicable standard instructions on causation are insufficient for this purpose. Those instructions tell the jury that every "substantial factor in bringing about an injury" is a legal cause (BAJI No. 3.76), even when more than one such factor "contributes concurrently as a cause of the injury" (BAJI No. 3.77). They say nothing, however, to inform the jury that, in asbestos-related cancer cases, a particular asbestos-containing product is deemed to be a substantial factor in bringing about the injury if its contribution to the plaintiff or decedent's *risk* or *probability* of developing cancer was substantial.

Without such guidance, a juror might well conclude that the plaintiff needed to prove that fibers from the defendant's product were a substantial factor *actually contributing* to the development of the plaintiff's or decedent's cancer. In many cases, such a burden will be medically impossible to sustain, even with the greatest possible effort by the plaintiff, because of irreducible uncertainty regarding the cellular formation of an asbestos-related cancer. We therefore hold that, in the trial of an asbestos-related cancer case, although no instruction "shifting the burden of proof as to causation" to defendant is warranted, the jury should be told that the plaintiff's or decedent's exposure to a particular product was a substantial factor in causing or bringing about the disease if in reasonable medical probability it contributed to the plaintiff or

decedent's *risk* of developing cancer.

We turn, finally, to the aspect of uncertainty about causation that *is* directly disputed by the parties here-the question of which exposures to asbestos-containing products contributed significantly enough to the total occupational dose to be considered "substantial factors" in causing the disease. Who should bear the burden of proof, including the risk of nonpersuasion, on that question? On this point, we agree with defendant: in the absence of a compelling need for shifting the burden, it should remain with the plaintiff. The fundamental justification for a *Summers*-type shift of the burden is that without it all defendants might escape liability and the plaintiff be left "remediless." (*Summers, supra,* 33 Cal.2d at p. 86.) On the issue of which exposures to asbestos were substantial factors increasing the ***978** risk of cancer, the difficulties of proof do not in general appear so severe as to justify a shift in the burden of proof. The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. A standard instruction (BAJI No. 3.77) tells juries that each of several actors or forces acting concurrently to cause an injury is a legal cause of the injury "regardless of the extent to which each contributes to the injury." A plaintiff who suffers from an asbestos-related cancer and has proven exposure to inhalable asbestos fibers from several products will not, generally speaking, face insuperable difficulties in convincing a jury that a particular one of these product exposures, or several of them, were substantial factors in creating the risk of asbestos disease or latent injury. No burden-shifting instruction is therefore necessary on this question, and in the absence of necessity the justification for shifting part of the plaintiff's ordinary burden of proof onto a defendant also disappears.

While the above analysis provides fully adequate grounds for rejecting use of a burden-shifting instruction in the asbestos-related cancer context, we also note that, in other respects as well, asbestos-related cancer cases do not fit easily into the alternative liability model represented by *Summers*. As courts in California and other jurisdictions have observed, unlike the situation in *Summers*, asbestos cases often have less than the complete set of possible tortfeasors before the court, and do not display the same symmetry of "comparative fault" or "indivisible injury" as was the factual case in *Summers*.

As we have explained (*ante,* at pp. 972-973), in *Goldman, supra,* 514 N.E.2d 691, the Supreme Court of Ohio *rejected* application of *Summers* alternative liability/burden shifting to asbestos personal injury actions, concluding that given the nature of such litigation, it is often the case that the culpable party or parties will not be before the court, and that the wide variation in form and toxicity of asbestos products further distinguishes asbestos cases from the facts of *Summers*, making the burden-shifting rule inappropriate in such cases. Similarly, in *Vigiolto, supra,* 643 F.Supp. 1454, the United States District Court for the Western District of Pennsylvania likewise rejected application of *Summers* alternative liability/burden shifting to asbestos litigation, focusing on the differing propensities of various forms of asbestos products to cause injury and disease, and their " 'widely divergent toxicities.' " (*Vigiolto, supra,* 643 F.Supp. at p. 1463, quoting *Celotex Corp. v. Copeland, supra,* 471 So.2d at pp. 537-538; see *ante,* at pp. 972-973.)

The court in *Lineaweaver v. Plant Insulation Co., supra,* 31 Cal.App.4th 1409 (*Lineaweaver*) likewise rejected a burden shift for similar reasons. ***979** "Unlike *Summers*, there are hundreds of possible tortfeasors among the multitude of asbestos suppliers. As our Supreme Court has recognized, the probability that any one defendant is responsible for plaintiff's injury decreases with an increase in the number of possible tortfeasors. (*Sindell v. Abbott Laboratories, supra,* 26 Cal.3d at pp. 602-603.) When there are hundreds of suppliers of an injury-producing product, the probability that any of a handful of joined defendants is responsible for plaintiff's injury becomes so remote that it is unfair to require defendants to exonerate themselves. (*Id.*, at p. 603.) The probability that an individual asbestos supplier is responsible for plaintiff's injury may also be decreased by the nature of the particular product. Asbestos products have widely divergent toxicities. (*Mullen v. Armstrong World Industries, Inc.* (1988) 200 Cal.App.3d 250, 256 [246 Cal.Rptr. 32].) Unlike the negligent hunters of *Summers*, all asbestos suppliers did not fire the same shot. Yet, under a burden-shifting rule, all suppliers would be treated as if they subjected plaintiff to a hazard identical to that posed by other asbestos products." (*Lineaweaver, supra,* 31 Cal.App.4th at p. 1418.)

If there were a need for a burden-shifting instruction in order to relieve plaintiffs of the impossible

task of proving which fiber or fibers actaully caused their cancers, it might well be possible to tailor the instruction to overcome these problems. For example, the Alameda County burden-shifting instruction, unlike Solano County General Order No. 21.00, requires all known asbestos suppliers to which the plaintiff was exposed be joined, except those who have settled or are subject to a bankruptcy court stay order. It might also be possible to fashion an instruction that shifted the burden on causation only after the plaintiff had proven, in addition to exposure as such, sufficiently lengthy, intense and frequent exposure as to render the defendant's product a substantial factor contributing to the risk of cancer. As explained earlier, however, there is no need for such a tailored burden shifting instruction; instead, we have determined the jury should simply be told that substantial factor causation can be shown through evidence of exposure to a defendant's product that in reasonable medical probability contributed to the plaintiff or decedent's risk of developing cancer. In any event, Solano County General Order No. 21.00 is clearly *not* properly tailored in the manner just described, and would therefore be erroneous even if a burden shift was deemed appropriate in an asbestos case such as this one.

Plaintiffs, in support of an extension of *Summers* alternative liability/burden shifting to asbestos litigation, also rely heavily on *Menne v. Celotex Corp.* (10th Cir. 1988) 861 F.2d 1453 (*Menne*). In *Menne* the Tenth Circuit Court of Appeals approved the concept of a burden-shifting instruction in an ***980** asbestos-related cancer case "whereby the plaintiff's burden of proving causation is relaxed and defendants are charged with proving the absence of causation.... so that injured, innocent plaintiffs could overcome the frequently impossible burden of proving proximate cause under traditional tort standards." (*Id.* at p. 1464, fn. omitted.) The *Menne* court recognized that the burden shift it proposed was a *variation* of the alternative liability theory derived from this court's decision in *Summers* because the asbestos defendants before the court were more accurately described as *concurrent* rather than alternative possible causes of plaintiff's injuries. (*Id.* at pp. 1465-1466.) Consequently, the *Menne* court chose to refer to the burden-shifting rule it fashioned as "concurrent liability" rather than "alternative liability." (*Id.* at pp. 1467, fn. 21, 1468.)

We agree with the observation of the court in *Lineaweaver, supra,* 31 Cal.App.4th 1409, that the rationale of *Menne* is flawed. The *Menne* court concluded that "[s]hifting the burden [of proof] seems at least as fair where *some*, if not all, defendants are shown to have contributed *some* of the harm as where only *one* of them is thought to have caused *all* the harm: in the former situation a liable defendant will be shown at least to have actually caused *some* harm; in the latter a defendant who is entirely innocent of causing any of the ... injury can be found liable." (*Menne, supra,* 861 F.2d at p. 1467, italics in original.) The *Lineaweaver* court concluded that such reasoning "simply begs the causation question. If plaintiff had, as the *Menne* court assumes, shown that some defendants caused the harm, then plaintiff would have proven causation against some defendants and would have no need for a burden-shifting rule against all defendants. In truth, *Menne* ... would require every joined defendant to exonerate itself upon nothing more than plaintiff's showing of exposure to defendants' asbestos products, some of which *may* have caused harm. Again, we return to probabilities and, as discussed, the probability that a particular asbestos supplier joined as a defendant has caused a plaintiff's injury is often remote given the hundreds of possibly responsible parties and the unequal hazards posed by different asbestos products." (*Lineaweaver, supra,* 31 Cal.App.4th at p. 1419.)

Finally, plaintiffs also place considerable reliance on *Pereira v. Dow Chemical Co., supra,* 129 Cal.App.3d 865 (*Pereira*) in support of their claim that *Summers* alternative liability/burden shifting should be extended to asbestos litigation. *Pereira* was a toxic chemical spill case, not an asbestos latent injury action. The plaintiff in *Pereira* developed a kidney disorder after spilling a toxic resin (DER 599) on his skin during the course of his employment. The plaintiff sued the manufacturer of DER 599 and also sued three other chemical manufacturers who supplied other toxic chemicals to his employer (Midcor). (*Id.* at pp. 868-869, 872.) As an alternative to the ***981** theory that his renal failure was caused by the single DER 599 spill, the plaintiff also alleged that his injuries were caused by cumulative exposure to four separate chemicals supplied to his employer by the four named defendants over a five-year period. (*Id.* at p. 872.) The trial court in *Pereira* entered summary judgments in defendants' favor, concluding plaintiff had failed to adequately establish causation under traditionally applicable tort principles.

The *Pereira* Court of Appeal reversed. The entirety of the *Pereira* court's rationale for applying *Summers* alternative liability/burden shifting to the facts before it can be found in the following single paragraph of the opinion: "Under the circumstances, it is not plaintiffs' duty to identify which of the vapors caused or contributed to the chronic renal failure but, rather, [it] is the duty of the defendants who supplied Midcor with their products to prove the contrary. *Summers v. Tice* (1948) 33 Cal.3d 80, 85-86 [199 P.2d 1, 5 A.L.R.2d 91], states that ' "The real reason for the rule that each joint tortfeasor is responsible for the whole damage is the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did [it] all; let them be the ones to apportion it among themselves." ' (See also *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 600 [163 Cal.Rptr. 132, 607 P.2d 924, 2 A.L.R.4th 1061].)" (*Pereira, supra*, 129 Cal.App.3d at p. 873.)

Several concerns immediately come to mind regarding the soundness of the underpinnings of the holding in *Pereira*. First, the case arose on a summary judgment motion; hence plaintiff need only have shown a reasonable *possibility* that the defendants' chemical products cumulatively contributed to his kidney failure, according to his alternative theory of liability in the case. (*Pereira, supra*, 129 Cal.App.3d at p. 872.) There was no factual record as yet developed to distinguish the harmful properties of the various chemicals to which plaintiff had been exposed, or to establish the probabilities that each, singly or in some combination, might have proximately caused plaintiff's kidney failure. In short, the *Pereira* court appears to have authorized a *Summers*-type burden shift without regard to the plaintiff's ability to otherwise establish proximate legal causation, on a proper evidentiary record, under traditionally applicable tort principles.

Second, the above noted single passage from *Summers* quoted and relied on in *Pereira* is really addressed to the matter of *apportionment of fault and damages*, i.e., the fairness, from the plaintiff's perspective, of applying a rule of *joint* and several liability where plaintiff cannot otherwise establish apportionment of fault and damages among the various named defendants. Shifting the burden of *apportionment of damages* to the defendants under such circumstances is not a new notion, for it has long been recognized that ***982** a defendant has the right to join other parties who it believes bear a share of the responsibility for plaintiff's damages. Our opinion in *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578 [146 Cal.Rptr. 182, 578 P.2d 899], made clear that one sued for personal injury could join other concurrent tortfeasors in the original action in order to allocate proportionate responsibility, or could seek equitable indemnity from such tortfeasors in proportion to their fault. (*Id.* at pp. 591-598, 604-607; see also *DaFonte v. Up-Right, Inc., supra*, 2 Cal.4th 593, 598.)

Here, in contrast, we are concerned not with an instruction that merely shifts the burden of equitable apportionment of fault and damages to the defendants to settle among themselves, but instead with an instruction that shifts the burden of proof on a threshold component of proximate legal causation necessary to establish the defendant's liability. We have explained why asbestos cases are distinguishable in several important respects from those factors in *Summers* that justified application of a pure "alternative liability" theory and its concomitant burden shifting rule in that case. We conclude the *Pereira* court's single paragraph of analysis, and its seemingly misplaced reliance on the sole quoted passage from *Summers* noted above, cannot withstand scrutiny as valid precedent supportive of a burden-shifting instruction such as the one offered in Solano County.

In conclusion, our general holding is as follows. In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant's defective asbestos-containing products, [FN12] *and* must further establish in reasonable medical probability that a particular exposure or series of exposures was a "legal cause" of his injury, i.e., a *substantial factor* in bringing about the injury. In an asbestos-related cancer case, the plaintiff need *not* prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it contributed to the plaintiff or decedent's *risk* of developing cancer. The jury should be so ***983** instructed. [FN13] The standard instructions on substantial factor and concurrent

causation (BAJI Nos. 3.76 & 3.77) remain correct in this context and should also be given.

FN12 We do not here endorse any one particular standard for establishing the requisite *exposure* to a defendant's asbestos products, as the issue has not been raised or briefed in this case. We note that a number of different formulations have been applied, both in the reported California cases, and in federal and sister-state jurisdictions. (See, e.g., *Dumin v. Owens-Corning Fiberglas Corp., supra*, 28 Cal.App.4th at p. 655 [applying "the most generous application of a lenient causation standard"]; *In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 816-817; *Blackston v. Shook & Fletcher Insulation Co.* (11th Cir. 1985) 764 F.2d 1480, 1485 [stringent approach requiring particularized proof that the plaintiff came into contact with the defendant's product]; *Lockwood v. AC & S, Inc.* (1987) 109 Wn.2d 235 [744 P.2d 605, 613] [lenient approach; sufficient if plaintiff proves defendant's product was at his or her work site, but resolution depends on particular circumstances of each case].)

FN13 Because plaintiffs' decedent died of asbestos-related lung cancer, our discussion here has focused on asbestos-related cancers rather than on asbestosis. We do not determine whether the standards and related instruction discussed herein apply in *asbestosis* cases, but observe, on the basis of the scientific evidence before us, little ground to suppose a burden-shifting instruction would be appropriate in a case involving asbestosis.

Turning to the case at bench, we find the use of the burden-shifting instruction embodied in Solano County General Order No. 21.00 to have been erroneous. In its objections to the general order, Owens-Illinois expressly conceded that asbestos plaintiffs could prove causation without tracing a fiber from a particular product to the cellular origin of the illness. The superior court should have accepted this concession and rejected the burden-shifting instruction as unnecessary. As discussed above, the court could properly have instead instructed the jury in this case that plaintiffs could prove causation by showing that exposure to Owens-Illinois's product Kaylo was in reasonable medical probability a substantial factor contributing to the decedent's risk of developing lung cancer.

3. *Prejudice.*

(4) Lastly, we face the question of prejudice from the giving of the erroneous burden-shifting instruction in this case. Owens-Illinois asserts that the instruction deprived it of its jury trial right on causation and "[t]he verdict must be reversed on this basis alone." We have, however, recently considered and rejected precisely this theory of inherent prejudice from instructional error in civil cases. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 573-580 [34 Cal.Rptr.2d 607, 882 P.2d 298].) Instead, we held, instructional error requires reversal only " 'where it seems probable' that the error 'prejudicially affected the verdict' " (*Id.* at p. 580.) The reviewing court should consider not only the nature of the error, "including its natural and probable effect on a party's ability to place his full case before the jury," but the likelihood of actual prejudice as reflected in the individual trial record, taking into account "(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Id.* at pp. 580-581.) Applying this analysis, we conclude defendant has failed to demonstrate a miscarriage of justice arose from the erroneous instruction.

First, the instruction in no way impaired defendant's ability to put its full case on substantial factor causation before the jury. The burden-shifting instruction would not, by its nature, result in exclusion of relevant defense ***984** evidence, and nothing we have found in the record suggests the defense was precluded from presenting any evidence it possessed on the question of whether its product was a substantial factor increasing plaintiff's risk of cancer. Both parties introduced evidence relevant to determining the proportion of asbestos-containing insulation used at Mare Island, during the period of decedent's employment there, that was supplied by defendant. Both parties also presented expert medical testimony on the relationship between asbestos exposure and lung cancer. A defense expert opined that while each occupational exposure contributed some amount to the risk of cancer, a very light or brief exposure could be considered "insignificant or at least nearly so" in the "context" of other, very heavy exposures. Plaintiffs' expert presented a generally contrary opinion, to the

effect that each exposure, even a relatively small one, contributed to the occupational "dose" and hence to the risk of cancer.

Second, other instructions minimized the importance of burden of proof as to the substantial factor issue. Pursuant to BAJI No. 3.77, the jury was told that each concurrent factor contributing to the injury is a legal cause "regardless of the extent to which each contributes to the injury." Even if plaintiffs had borne the burden of proving exposure to Kaylo was a substantial factor creating decedent's risk of cancer, it is unlikely the jury, in light of BAJI No. 3.77, would have accepted defendant's argument that the degree of risk such exposure contributed was too small to be considered a legal cause of the illness.

Third, the arguments of counsel suggest the burden-shifting instruction played little or no role at trial. The defense argued primarily that plaintiffs had not met their burden of showing decedent was ever exposed to inhalable fibers from Kaylo, defendant's product. Plaintiffs' counsel, of course, argued plaintiffs had met that burden. Secondarily, both sides discussed what portion of decedent's asbestos exposure was attributable to Kaylo and whether such exposure was a substantial factor compared to all the other sources of cancer risk. Neither attorney drew the jury's attention to the instruction shifting the burden on this issue. Plaintiffs' counsel, in fact, expressly took on the burden the instruction shifted to the defense: "In this case, we don't have to prove that the entire injury of the plaintiffs was caused by Kaylo. *We have to prove that Kaylo was a part of that.* [¶] In the jury instructions you'll see something called a substantial contributing factor. That's a definition of a legal cause." (Italics added.) Defense counsel, of course, did not correct his colleague's misstatement.

Finally, the record does not contain any indications the jury was actually misled. To the contrary, the jury's verdict suggests that, regardless of the ***985** burden shift, it accepted much of the defense's *factual* theory, concluding that exposure to Kaylo contributed a relatively small amount to decedent's cancer risk, but rejected defendant's argument that such a small contribution should be considered insubstantial. Thus the jury found inhalation of fibers from Kaylo was a substantial causative factor, but allocated only 1.2 percent of the total legal cause to defendant's comparative fault. (2.5 percent of the total cause was allocated to the decedent's own fault, 25 percent to that of decedent's employer, and the remainder, divided by type of product, to makers of other asbestos-containing products used at the shipyard.) From the jury's low estimate of defendant's share of causation, it appears they resolved most of the factual uncertainty in defendant's favor despite the burden-shifting instruction. In the absence of any instruction or evidence that a small amount was necessarily insubstantial, and guided by BAJI No. 3.77's command that every contributing cause was a legal cause regardless of the degree of its contribution, the jury concluded even 1.2 percent of the cause was, on the facts of this case, substantial. A different result seems unlikely to have ensued had they been correctly instructed plaintiffs bore the burden of showing exposure to Kaylo was a substantial factor increasing the decedent's risk of developing lung cancer.

We are, for these reasons, unconvinced the instructional error was prejudicial.

IV. *Conclusion.*

Although the Court of Appeal correctly determined Solano County General Order No. 21.00 should not have been given in this case, no miscarriage of justice has been shown to have resulted from the trial court's error in giving the burden-shifting instruction. However, that aspect of the Court of Appeal's judgment reversing the trial court's judgment for failing to permit Owens-Illinois to present a tobacco company defense was error requiring reversal under *Richards v. Owens-Illinois, Inc., supra*, 14 Cal.4th 985, 988-989. The judgment of the Court of Appeal is reversed.

George, C. J., Kennard, J., Werdegar, J., Chin, J., and Brown, J., concurred.

MOSK, J.

I dissent.

As in the companion case, *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520 [___ Cal.Rptr.2d ___, ___ P.2d ___], the majority's holding will deprive numerous innocent plaintiffs suffering from so-called "latent" diseases caused by exposure to asbestos in the workplace of full ***986** compensation for injuries inflicted by tortfeasors. In my view, the burden-shifting instruction at issue is generally consistent with state law and was properly given in this matter. Although the point is not tech-

nically at issue here, I would also observe that use of the burden-shifting instruction should *not* require waiver of any punitive damages claim.

I.

Charles Rutherford worked as a sheet metal worker at the Mare Island Naval Shipyard for 40 years. During 10 of those years, from 1940 to 1950, he worked on ships around asbestos insulators. He brought this action, against various manufacturers of asbestos, including Owens-Illinois, Inc. (hereafter Owens-Illinois), after he discovered that he had contracted lung cancer; after his death, the action was amended by his wife and daughter to allege wrongful death. Owens-Illinois manufactured the product "Kaylo," containing asbestos; Kaylo was one of the products used at Mare Island between 1940 and 1950.

In the first phase of a trifurcated trial, the jury found that Rutherford had cancer legally caused by his inhalation of asbestos fibers. By the second phase of trial, all defendants had settled except for Owens-Illinois. The burden-shifting instruction given to the jury in this phase, Solano County Complex Asbestos Litigation General Order No. 21.00, required plaintiffs to prove, by a preponderance of the evidence, the following: (a) the asbestos product manufactured or distributed by Owens-Illinois was defective; (b) Rutherford's injury was legally caused by his exposure to or contact with asbestos products; and (c) he was exposed to, or had contact with, an asbestos product manufactured by Owens-Illinois. The burden then shifted to Owens-Illinois to prove, by a preponderance of the evidence, that its product was not the legal cause of the injury. By electing the burden-shifting instruction, plaintiffs were deemed to waive any claim against Owens-Illinois for punitive damages.

The jury found for plaintiffs. Owens-Illinois does not dispute the jury's determination that its product was defective. Nor does it dispute the jury's finding that Rutherford's injury was legally caused by his exposure to asbestos or that its products were used at Rutherford's workplace. It contends that it should not have been required to carry the burden of proof that its product was not the legal cause of the injury. [FN1]

FN1 For purposes of products liability, a cause of injury is something that is a "substantial factor" in bringing about an injury. (See *Endicott v. Nissan Motor Corp.* (1977) 73 Cal.App.3d 917, 926 [141 Cal.Rptr. 95, 9 A.L.R.4th 481]; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052-1054 [1 Cal.Rptr.2d 913, 819 P.2d 872]; Rest.2d Torts, § 431, p. 428.) The majority understand the term as including any factor that is more than "infinitesimal" or "theoretical," but propose what appears to be a stricter standard for plaintiffs in asbestos cases, i.e., proof of the "biological processes" causing the injury to a reasonable "medical probability."

Unlike the majority, I conclude that the burden-shifting instruction was proper. Its rationale derives from the nature of asbestos-related injury. ***987** Plaintiffs suffering from the effects of industrial exposure to asbestos typically were exposed to the substance from many products. Here, for example, the plaintiffs sought to prove that asbestos-related cancer is caused by the cumulative effect of all such exposure. Thus, although any given exposure may not have been enough itself to cause injury, each exposure contributed to the inflammation process that eventually results in asbestos-related disease. The question is only the extent of harm caused by each such exposure. [FN2]

FN2 This theory-that all defendants have contributed to the harm, but that the degree of harm is uncertain-is distinct from the theory of "alternative causation" covered under BAJI No. 3.80, in which one defendant is a legal cause of the injury, but one or more are definitely *not*. (See *Summers v. Tice* (1948) 33 Cal.2d 80 [199 P.2d 1, 5 A.L.R.2d 91].) It is well established that a burden-shifting instruction is appropriate in alternative causation cases. (*Ibid.*; *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588 [163 Cal.Rptr. 132, 607 P.2d 924, 2 A.L.R.4th 1061].)

It appears that relatively light exposure to asbestos places a worker at risk for asbestos-related diseases. (See *Borel v. Fibreboard Paper Products Corporation* (5th Cir. 1973) 493 F.2d 1076, 1083; *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1, 37-39 [52 Cal.Rptr.2d 690].) Nonetheless, a defendant may contend that its contribution to the total asbestos exposure was so slight that it cannot be considered a

substantial factor. As a practical matter, it is, moreover, difficult or impossible to determine which exposure or exposures actually caused the disease. Without a burden-shifting instruction, if each defendant argues that its product was only a small part of a plaintiff's total exposure, and that it therefore could not have been a substantial factor in causing his injury, there is a risk that a jury might find that *no* one manufacturer was responsible for the injury, even though all of the manufacturers together caused the harm. This is particularly true in light of the exceptionally long latency periods from initial exposure to the onset of asbestos-related disease and the nature of the typical industrial environment, involving multiple exposures to various asbestos products over a period of time. [FN3]
***988**

> FN3 Asbestos defendants are also more likely to have access to information concerning the use of their product at a specific workplace; to the extent that such information no longer exists, e.g., through routine destruction of business records, it is fair to place the burden on defendants. Moreover, it appears that many asbestos manufacturers knew, or should have known, about the hazards of exposure to their products in the workplace long before such information was available to individuals like Rutherford. (See *Buttram v. Owens-Corning Fiberglas Corp.*, *supra*, 16 Cal.4th at p. 546, fn. 3 (dis. opn. of Mosk, J.) ["In this matter ... the jury found that '[u]se of an asbestos-containing product manufactured, supplied or distributed by Owens-Corning Fiberglas [Kaylo] involved a substantial danger known or knowable to Owens-Corning Fiberglas that would not be readily recognized by the ordinary consumer of the product' and that it 'failed to give an adequate warning of the danger.' "]; *Borel v. Fibreboard Paper Products Corporation*, *supra*, 493 F.2d at pp. 1083-1085.)

Without the burden-shifting instruction, it would appear that many innocent plaintiffs who were unknowingly exposed to products such as Kaylo in the workplace would face serious, even insurmountable, difficulties in establishing that exposure to a specific defendant's defective product was a substantial cause of injury. Indeed, although the majority assert that, "in general," no "insuperable barriers" prevent a plaintiff from meeting the burden of proof, even defendant concedes that in many cases the placement of the burden of proof will be dispositive. This is particularly true in light of the majority's requirement that plaintiffs must bear the formidable burden of establishing legal cause through factors including frequency of exposure, regularity of exposure, proximity of the asbestos product to plaintiffs, and other possible sources of plaintiffs' injury. With a burden-shifting instruction, the risk is avoided because each defendant bears the burden of proving that its own contribution to plaintiff's exposure was *not* a substantial factor in his resulting disease. [FN4]

> FN4 A burden-shifting instruction is particularly appropriate in cases, like this, involving numerous defendants. "In concurrent cause cases involving just two or three wrongdoers, a plaintiff frequently can demonstrate the substantiality of each defendant's contribution even though the exact proportion of each's contribution to the single harm may not be ascertainable. As the number of wrongdoers mounts, however, it becomes increasingly difficult to demonstrate each[] [tortfeasor's] substantial contribution to the whole. It is under such circumstances that a burden shift with respect to causation can be usefully employed." (*Menne v. Celotex Corp.* (10th Cir. 1988) 861 F.2d 1453, 1466, fn. 19.) Plaintiffs here named 19 different defendants. Other manufacturers or distributors whose asbestos products were used at the Mare Island facility were not joined because they were subject to a bankruptcy stay order.

The burden-shifting instruction also finds support in the holding in *Pereira v. Dow Chemical Co.* (1982) 129 Cal.App.3d 865 [181 Cal.Rptr. 364]. *Pereira* was an action to recover damages for personal injuries for a permanent kidney disorder sustained by an employee after a chemical spill at his place of employment. The plaintiff also claimed injury from the cumulative effect of his exposure to chemical products manufactured or distributed by the various defendants, which were used at his workplace for several years. He was unable, however, to prove which exposure or exposures caused his injury. The Court of Appeal held that the burden of proof on the issue should rest with the defendants. "Under the circumstances, it is not plaintiffs' duty to identify which of the vapors caused

or contributed to the chronic renal failure but, rather, it is the duty of the defendants who supplied [his employer] with their products to prove the contrary." (*Id.* at p. 873.)

Owens-Illinois argues that the burden-shifting instruction was improper because plaintiffs in other jurisdictions have been able to prove, without ***989** such burden shifting, that a defendant's product was a substantial factor in causing asbestos-related disease. It is unclear, however, precisely what was the plaintiffs' burden of proof in those jurisdictions, e.g., whether the court imposed a more lenient standard of proof of exposure than the one adopted here. If the burden-shifting instruction were truly unnecessary, it seems unlikely that Owens-Illinois would so strenuously urge that we hold it invalid.

Under the circumstances of this case, I believe the burden-shifting instruction was proper. It bears repeating that plaintiffs' burden remained substantial: they were required to establish that the Owens-Illinois's product, Kaylo, was defective, that Rutherford was exposed to Kaylo, and that he sustained an asbestos-related injury. Only then did the burden of proof shift to Owens-Illinois to show that his exposure to its product was not a substantial factor, i.e., a legal cause, of the injury.

II.

Although I conclude that the trial court properly gave the burden-shifting instruction in this matter, it erred in conditioning its use on plaintiffs' waiver of any claim for punitive damages. It appears that the trial court relied on *Magallanes v. Superior Court* (1985) 167 Cal.App.3d 878 [213 Cal.Rptr. 547]. Its reliance was misplaced.

Magallanes involved a suit against multiple defendants based on the market share theory of liability we crafted in *Sindell v. Abbott Laboratories, supra,* 26 Cal.3d 588. *Sindell* involved a situation in which the plaintiff was unable to identify which of numerous defendants manufactured the drug that actually caused her injury. We held that it was reasonable to "measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the [drug] sold by each of them ... bears to the entire production of the drug sold by all defendants for that purpose." (*Id.* at pp. 611-612.) The burden then would shift to the defendants to demonstrate that they could not have made the drug that injured the plaintiff. (*Id.* at p. 612.) *Magallanes* held that punitive damages are not available in such a case because they were intended to individualize punishment of wrongdoers and, in a *Sindell*-type action, there could be no finding of individual wrongdoing.

Magallanes is, of course, distinguishable from the present case. Plaintiffs did not base their action on a market share theory. They were required, under the burden-shifting instruction, to prove that they were exposed to asbestos ***990** manufactured by the specific defendant. Under the circumstances, I discern no valid reason why they should have been precluded from seeking punitive damages.

Cal. 1997.
Rutherford v. Owens-Illinois, Inc.
16 Cal.4th 953, 941 P.2d 1203, 67 Cal.Rptr.2d 16, Prod.Liab.Rep. (CCH) P 15,051, 97 Cal. Daily Op. Serv. 6981, 97 Daily Journal D.A.R. 11,233

END OF DOCUMENT

Supreme Court of California
SAIL'ER INN, INC., et al., Petitioners,
v.
EDWARD J. KIRBY, as Director, etc., et al., Respondents.

L.A. No. 29811.
May 27, 1971.

SUMMARY

In an original proceeding in mandamus in the Supreme Court, petitioners challenged the constitutionality of Bus. & Prof. Code, § 25656, prohibiting females from tending bar except in certain situations.

The Supreme Court held that the statute was unconstitutional as violative of Cal. Const., art. XX, § 18, declaring that a person may not be disqualified because of sex from entering or pursuing a lawful business, vocation, or profession, and also as violative of the equal protection clauses of the federal and state Constitutions. The court held, further, that the state statute under attack was invalid as to certain licensees as being in conflict with 42 U.S.C. § 2000e-2, a part of the Civil Rights Act of 1964, and ordered the issuance of a peremptory writ of mandate compelling the Director of the Department of Alcoholic Beverage Control to cease license revocation proceedings based on Bus. & Prof. Code, § 25656, and to cease enforcement of that statute. (Opinion by Peters, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Administrative Law § 125--Judicial Review and Control--Exhaustion of Administrative Remedies.

Where a person is placed in the untenable situation of having to choose whether to obey possibly conflicting federal and state laws and face a penalty under the one he chooses to disobey, it would be improper to require him to exhaust his administrative remedies as a prerequisite to an application for judicial relief.

(2) Administrative Law § 134--Judicial Review and Control--Mandamus.

Mandamus is an appropriate writ for the review of the exercise of quasi-judicial power by constitutionally authorized statewide agencies, such as the Department of Alcoholic Beverage Control.

(3) Administrative Law § 132--Judicial Review and Control--Certiorari.

Certiorari is an appropriate writ for the review of the exercise of quasi-judicial power by constitutionally authorized statewide agencies, such as the Department of Alcoholic Beverage Control.

(4) Administrative Law § 126--Judicial Review and Control--Exhaustion of Administrative Remedies--Exceptions to Doctrine.

The general rule that mandamus will issue only after final order or decision of the administrative agency which is involved is subject to a limited number of exceptions.

(5) Alcoholic Beverages § 30--Licenses and Permits--Mandamus.

Mandate to prevent revocation of liquor licenses by the Department of Alcoholic Beverage Control for hiring female bartenders in violation of Bus. & Prof. Code, § 25656, is available to petitioners charged with violating that statute, and is also available to petitioners not yet charged, but who wish to employ female bartenders and fear enforcement of the statute by the department.

(6) Mandamus and Prohibition § 6--Conditions Affecting Issuance--Inadequacy of Legal Remedy.

The issuance of an alternative writ of mandate by the Supreme Court constitutes a determination that the legal remedy is inadequate in the particular case, and that the court's exercise of its jurisdiction in the case is proper.

(7) Constitutional Law § 162--Equal Protection of Laws, Class Legislation and Uniformity of Operation--Bases of Classification.

Pursuant to Cal. Const., art. XX, § 18, sex alone may not be used to exclude a person from a vocation, profession or business.
[See **Cal.Jur.2d,** Constitutional Law, § 283.]

(8) Constitutional Law § 162--Equal Protection of Laws, Class Legislation and Uniformity of Operation--Bases of Classification.

Cal. Const., art. XX, § 18, constitutes a restraint upon the law-making power of the state, and renders legislative enactments contrary to its provisions void.

(9) Constitutional Law § 162--Equal Protection of Laws, Class Legislation and Uniformity of Operation--Bases of Classification.

Cal. Const., art. XX, § 18, does not admit of exceptions based on popular notions of what is a proper, fitting, or moral occupation for persons of either sex.

(10) Constitutional Law § 162--Equal Protection of Laws, Class Legislation and Uniformity of Operation--Bases of Classification.

Cal. Const., art. XX, § 18, in no way prevents the Legislature from dealing effectively with the evils and dangers inherent in selling and serving alcoholic beverages, but merely precludes resort to legislation against women, rather than against the particular evil sought to be curbed. (Overruling *Ex Parte Hayes*, 98 Cal. 555 [33 P. 337].)

(11) Alcoholic Beverages § 9.26--Alcoholic Beverage Control Act--Offenses-- Female Bartenders--Validity of Statute.

Bus & Prof. Code, § 25656, prohibiting females from tending bar except in certain situations, is repugnant to Cal. Const., art. XX, § 18, declaring that a person may not be disqualified because of sex from entering or pursuing a lawful business, vocation, or profession, and is, therefore, void.

(12) Constitutional Law § 13--Operation and Effect of Constitutions-- Supremacy.

A state law that interferes with, or is contrary to, federal law is void under the supremacy clause of the United States Constitution.

(13) Alcoholic Beverages § 5Federal Constitution and Statutes.

U. S. Const., Amend. XXI, § 2, relating to transportation of intoxicating liquors in violation of state laws, does not reach all alcoholic beverage situations that would otherwise fall within Congress' commerce clause powers and, furthermore, some balancing and accommodation must take place even in those situations covered by the express language of the amendment.

(14) Labor § 1.1--Fair Employment Practices--Equal Employment Opportunities

Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e through 2000e-15), relating to equal employment opportunities, was passed to prevent the impact of racial and sexual discrimination in employment on interstate commerce, was not enacted to regulate the flow of alcohol as a commodity in interstate commerce, and does not conflict with U.S. Const., Amend. XXI, § 2.

(15) Labor § 1.1--Fair Employment Practices--Equal Employment Opportunities--Weight of Guidelines Promulgated by Administrative Agency.

Guidelines promulgated by the federal Equal Employment Opportunity Commission are entitled to great deference.

(16) Alcoholic Beverages § 9.26--Alcoholic Beverage Control Act--Offenses-- Female Bartenders--Validity of Statute.

Bus & Prof. Code, § 25656, prohibiting females from tending bar except in certain situations, is not based on a bona fide occupational qualification necessary to the operation of a bar, and is, therefore, in direct conflict with 42 U.S.C. § 2000e-2, a part of the Civil Rights Act of 1964, prohibiting certain employment practices.

(17) Labor § 1.1--Fair Employment Practices--Equal Employment Opportunities.

Whether a condition constitutes a "bona fide occupational qualification reasonably necessary to the normal operation of" a particular business or enterprise, within contemplation of 42 U.S.C. § 2000e-2, is a matter of evidence.

(18) Alcoholic Beverages § 9.26--Alcoholic Beverage Control Act--Offenses-- Female Bartenders--Validity of Statute.

Bus & Prof. Code, § 25656, prohibiting females from tending bar except in certain situations, conflicts with 42 U.S.C. § 2000e-2, a part of the Civil Rights Act of 1964, and, as to those liquor licensees who employ the requisite 25 employees and otherwise come within the prohibition of the federal statute, the state statute is invalid and must fall.

(19) Alcoholic Beverages § 9--Regulation--State Statutes--Constitutional Restrictions--Equal Protec-

tion.

The power of the state to regulate alcoholic beverages is necessarily subject to the demands of the equal protection clause of the Fourteenth Amendment.

(20) Constitutional Law § 120--Fundamental Rights, Privileges and Immunities--Right to Engage in Occupations.

Limitations on the right to work may be sustained only after the most careful scrutiny.

(21) Constitutional Law § 120--Fundamental Rights, Privileges and Immunities--Right to Engage in Occupation--Bartending as Lawful Occupation.

Bartending and related jobs, although carefully regulated, are lawful occupations.

(22) Constitutional Law § 162--Equal Protection of Laws, Class Legislation and Uniformity of Operation--Classification--Sex as Basis.

With respect to constitutional equal protection provisions, sexual classifications are properly treated as suspect, particularly where made with respect to a fundamental interest, such as employment.

(23) Alcoholic Beverages §2Regulation--Control of Improprieties.

The Legislature may pass laws to prevent improprieties in connection with the sale of alcoholic beverages.

(24) Constitutional Law § 156(4)--Equal Protection of Laws, Class Legislation and Uniformity of Operation--Reasonableness of Classification-- Relation to Object and Purpose of Statute.

Where the class singled out by the Legislature in a statute has no necessary connection with the evil sought to be prevented, and where that evil can be directly prevented through nondiscriminatory legislation, the statute must be struck down as an invidious discrimination against that class.

(25) Alcoholic Beverages § 9.26--Alcoholic Beverage Control Act--Offenses-- Female Bartenders--Validity of Statute.

A compelling state interest in support of the classification set forth in Bus. & Prof. Code, § 25656, cannot be established on the rationale that female bartenders would be an unwholesome influence on the public. (Disapproving *Hargens v. Alcoholic Beverage etc. App. Bd.*, 263 Cal. App.2d 601 [69 Cal.Rptr. 868], and *People v. Jemnez*, 49 Cal. App.2d Supp. 739 [121 P.2d 543], to the extent that they conflict with the views stated herein.)

(26) Alcoholic Beverages § 9.26--Alcoholic Beverage Control Act--Offenses-- Female Bartenders--Validity of Statute.

The classification created by Bus. & Prof. Code, § 25656, prohibiting females from tending bar except in certain situations, is invidious, wholly arbitrary, and unconstitutional under the equal protection clauses of the state and federal Constitutions.

COUNSEL

Manuel H. Miller and Julius A. Dix for Petitioners.

Richard Gladstein, Gladstein, Leonard, Patsey & Andersen, and Herma Hill Kay as Amici Curiae on behalf of Petitioners.

Thomas C. Lynch and Evelle J. Younger, Attorneys General, and Henry G. Ullerich, Deputy Attorney General, for Respondents. ***6**

PETERS, J.

Petitioners, holders of on-sale liquor licenses, seek a writ of mandate to prevent the Department of Alcoholic Beverage Control from revoking their licenses because they hired women bartenders, contrary to the prohibition contained in section 25656 of the Business and Professions Code. [FN1] Section 25656 prohibits women from tending bar except when they are licensees, wives of licensees or are, singly or with their husbands, the sole shareholders of a corporation holding the license. [FN2] Petitioners and amicus curiae contend that the code section violates article XX, section 18 of the California Constitution, the 1964 Federal Civil Rights Act (42 U.S.C.A. § 2000e-2), and the equal protection clauses of the United States and California Constitutions. [FN3]

FN1 Petitioners have standing to raise the constitutional rights of those women excluded from bartending because they are also criminally liable under that statute for hiring women bartenders, and face possible license revocation as well. (See *Griswold v. Connecticut* (1965) 381 U.S. 479, 481 [14

L.Ed.2d 510, 512-513, 85 S.Ct. 1678].)

FN2 Section 25656 of the Business and Professions Code provides: "Every person who uses the services of a female in dispensing wine or distilled spirits from behind any permanently affixed fixture which is used for the preparation or concoction of alcoholic beverages, or in mixing alcoholic beverages containing distilled spirits, on any premises used for the sale of alcoholic beverages for consumption on the premises, or any female who renders such services on such premises, is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than one hundred dollars ($100) or by imprisonment in the county jail for not more than three months, or by both such fine and imprisonment.

"The provisions of this section do not apply to the dispensing of wine or distilled spirits or to the mixing of alcoholic beverages containing distilled spirits by any on-sale licensee, or to the dispensing of wine or distilled spirits or to the mixing of such beverages by the wife of any licensee on the premises for which her husband holds an on-sale license, or to the dispensing of wire or distilled spirits or to the mixing of such spirits by a female, when she is the sole shareholder or when she and her husband are the sole shareholders of the corporation which holds the on-sale license for the premises."

FN3 After the petition was filed in this case, the Fair Employment Practices Act (Lab. Code, § 1410 et seq.) barring discrimination in employment, was amended to include discrimination on the basis of sex. (Stats. 1970, ch. 1508, p. 40.) The Fair Employment Practices Act makes it an unlawful employment practice to discriminate on the basis of sex except where such discrimination is based on a bona fide occupational qualification, as does the 1964 Federal Civil Rights Act (42 U.S.C.A. § 2000e-2, see section II, *infra.*). Because we find section 25656 invalid on other grounds, we need not reach the question whether the amendment impliedly repeals section 25656.

Petitioners challenge the constitutionality of the statute on its face; no material facts are disputed. [FN4] They raise important legal issues of statewide ***7** significance. (1)Two of them are placed in the untenable situation of having to choose whether to obey possibly conflicting federal and state laws and face a penalty under the one they choose to disobey. In light of these extraordinary circumstances, it would be improper to require them to exhaust their administrative remedies.

FN4 The Attorney General concedes that petitioners Sail'er Inn, Inc. and Walter Robson each have 25 employees, thereby bringing them under the 1964 Civil Rights Act. Petitioners Angelo E. Gianone and Josephine Van Epps apparently do not have the requisite 25 employees nor does it appear that the Alcoholic Beverage Control Department has begun or threatened proceedings against them for violation of section 25656.

(2, 3)Mandamus, like certiorari, is an appropriate writ for the review of the exercise of quasi-judicial power by constitutionally authorized statewide agencies such as the Department of Alcoholic Beverage Control (Cal. Const., art. XX, § 22; *People v. County of Tulare*, 45 Cal.2d 317, 319 [289 P.2d 11]; *Boren v. State Personnel Board*, 37 Cal.2d 634, 637 [234 P.2d 981]; see also Kleps, *Certiorarified Mandamus Reviewed: The Courts and California Administrative Decisions-1949-1959*, 12 Stan.L.Rev. 554, 555, 563, fn. 35.) (4)While ordinarily mandamus will issue only after final order or decision of the administrative agency, a limited number of exceptions to the exhaustion doctrine have long been recognized in this state. (See, e.g., *County of Alpine v. County of Tuolumne* (1958) 49 Cal.2d 787 [322 P.2d 449]; *United States v. Superior Court* (1941) 19 Cal.2d 189 [120 P.2d 26]; *Diaz v. Quitoriano*, 268 Cal. App.2d 807, 812 [74 Cal.Rptr. 358].)

The writ of mandate "may be issued by any court ... to any inferior tribunal, corporation, board, or person ... to compel the admission of a party to the use and enjoyment of a *right* or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person." (Italics added.) (Code Civ. Proc., § 1085.) In a number of cases, mandamus has been held to issue to prohibit official conduct where prohibition would not lie be-

cause the threatened official act was not judicial but ministerial in nature. (*Miller v. Greiner*, 60 Cal.2d 827, 830 [36 Cal.Rptr. 737, 389 P.2d 129]; *Perry v. Jordan*, 34 Cal.2d 87 [207 P.2d 47]; *Evans v. Superior Court*, 20 Cal.2d 186 [124 P.2d 820]; see 3 Witkin, Cal. Procedure (1954) § 77, pp. 2575-2577.)

(5)Accordingly, although the remedy of certiorari might be appropriate as to the petitioners who have been charged with violations of section 25656, mandate is also appropriate, and mandate is an appropriate remedy for those petitioners not yet charged but who wish to employ female bartenders and fear enforcement of the section by defendant.

(6)By issuing the alternative writ, we have determined that the legal remedy is inadequate, and the exercise of our jurisdiction in this case is proper. (*San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 945 [92 Cal.Rptr. 309, 479 P.2d 669]; ***8***Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 773 [87 Cal.Rptr. 839, 471 P.2d 487]; *Hagan v. Superior Court* (1960) 53 Cal.2d 498 [2 Cal.Rptr. 288, 348 P.2d 896].)

I. SECTION 18 OF ARTICLE XX OF THE STATE CONSTITUTION

Article XX, section 18 of the California Constitution provides that "[a] person may not be disqualified because of sex, from entering or pursuing a lawful business, vocation, or profession." [FN5]

> FN5 Section 18 was amended slightly by general election of November 3, 1970. Prior to that, the section read as follows: "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession."

(7)In explicit and unqualified language, this section makes it clear that sex alone may not be used to bar a person from a vocation, profession or business. (See, e.g., *Carter v. City of Los Angeles* (1948) 31 Cal.2d 341, 346 [188 P.2d 465]; *Matter of Maguire* (1881) 57 Cal. 604.) Provisions of the Constitution are "mandatory and prohibitory, unless by express words they are declared to be otherwise." (Cal. Const., art I, § 22.) (8)Section 18 constitutes a restraint upon the law-making power of the state, and legislative enactments contrary to its provisions are void.

Well before the turn of the century this court enunciated the meaning and effect to be given this section of the Constitution in a case quite similar to the instant one. *Matter of Maguire, supra.*, 57 Cal. 604, held that a San Francisco ordinance which prohibited women from waiting on customers between 6 p.m. and 6 a.m. in a place where liquor was sold conflicted with section 18.

Justice Thornton, expressing the opinion of three of the four justices in the majority, said: "As we understand the section, it does establish, as the permanent and settled rule and policy of this State, that *there shall be no legislation either directly or indirectly incapacitating or disabling a woman from entering on or pursuing any business, vocation, or profession* permitted by law to be entered on and pursued by those sometimes designated as the stronger sex.... [T]here are no exceptions in this section, and neither we nor any other power in the State have the right or authority to insert any, whether on the ground of immorality or any other ground. All these are considerations of policy, the determination of which belonged to the convention framing and the people adopting the Constitution; and their final and conclusive judgment has been expressed and entered in the clear and unmistakable language of the Constitution itself, ..." (Italics added.) (*Matter of Maguire, supra.*, 57 Cal. at p. 608.) [FN6] ***9**

> FN6 The fourth member of the majority, in his concurring opinion, took the position that, while sentimentality or prejudice cannot be grounds for prohibiting women from entering or pursuing a particular business or profession, the Legislature may require that the sexes pursue their chosen occupation separately where the "*conjoint* pursuit" of that occupation leads to indecency and immorality.

(9)As *Maguire* made clear, section 18 does not admit of exceptions based on popular notions of what is a proper, fitting or moral occupation for persons of either sex. Although an inability to perform the tasks required by a particular occupation, sex-linked or not, may be a justification for discrimination against job applicants, under section 18, mere prejudice, however ancient, common or socially acceptable, is not.

If section 18 is to be endowed with any force and

meaning it must invalidate section 25656. It is clear that bartending is a lawful vocation, that women are as capable of mixing drinks as men, and that section 25656 nonetheless disqualifies the vast majority of women from entering the bartending occupation.

The Attorney General makes two arguments based on the notion that women are incapable of tending bar. First, he suggests that the Legislature may have concluded that a male bartender or owner must be present in a liquor establishment to preserve order and protect patrons, a function which he contends a woman could not perform. This argument ignores modern day reality. Today most bars, unlike the saloons of the Old West, are relatively quiet, orderly and respectable places patronized by both men and women. Even if they were not, many bars employ bouncers whose sole job is to keep order in the establishment. Furthermore, the experience in the states which permit women to tend bar indicates that the dire moral and social problems predicted by the Attorney General do not arise. (See, e.g., *Paterson Tavern & G. O. A. v. Borough of Hawthorne* (1970) 57 N.J. 180, 186 [270 A.2d 628, 631]; *Anderson v. City of St. Paul* (1948) 226 Minn. 186, 209 [32 N.W.2d 538, 550-551] (dissenting opinion by Loring, C.J.).)

Second, the Attorney General argues that the statute was designed to protect women since fewer women can be injured by inebriated customers if they are not permitted to work behind a bar. It is difficult to believe that women working behind the bar would be more subject to such dangers than the cocktail waitresses who are now permitted to work among the customers.

But even if we assume that bartending is more dangerous than waiting on tables, there is no evidence that women bartenders are more likely than male bartenders to suffer injury at the hands of customers. The desire to protect women from the general hazards inherent in many occupations cannot be a valid ground for excluding them from those occupations under ***10** section 18. Women must be permitted to take their chances along with men when they are otherwise qualified and capable of meeting the requirements of their employment. (See Kanowitz, Women and The Law (1969) pp. 33-34.) We can no more justify denial of the means of earning a livelihood on such a basis than we could deny all women drivers' licenses to protect them from the risk of injury by drunk drivers. Such tender and chivalrous concern for the well-being of the female half of the adult population cannot be translated into legal restrictions on employment opportunities for women.

(10)A third contention raised by the Attorney General is that section 25656 as intended to prevent improprieties and immoral acts. Section 18 in no way prevents the Legislature from dealing effectively with the evils and dangers inherent in selling and serving alcoholic beverages; it merely precludes resort to legislation against women rather than against the particular evil sought to be curbed. [FN7]

> FN7 We overrule *Ex parte Hayes* (1893) 98 Cal. 555 [33 P. 337], which took the patently untenable position that article XX, section 18, does not limit the power of the state to regulate the manner in which retail liquor businesses are conducted. Article XX, section 22, which provides for alcoholic beverage control, states that constitutional provisions inconsistent with section 22 are repealed. Section 18 is in no way inconsistent with section 22.

We reiterate what Justice Thornton said so long ago in *Maguire* in response to the contention that permitting women to serve drinks leads to immorality: "[T]he law-making power of the State is ample to make laws affecting both sexes alike, and not inhibited by the Constitution, which will accomplish the object so much desired-to prevent practices hurtful to public morality. The Constitution was not framed with a disregard of the important considerations urged upon us in this regard. It merely directs that a law which is framed to accomplish this object by affecting or operating upon lawful callings, shall affect both sexes alike." (*Matter of Maguire, supra.*, 57 Cal. at p. 609.)

(11)Section 25656 is repugnant to article XX, section 18, of the California Constitution and is therefore void.

II. THE 1964 CIVIL RIGHTS ACT

Petitioners urge that section 25656 conflicts with the nondiscriminatory hiring provision contained in title VII of the federal Civil Rights Act of 1964 (42 U.S.C.A. § 2000e-2(a)). (12)A state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law is void

under the supremacy clause of the United States Constitution (U.S. Const., art. VI, cl. 2; ***11***Free v. Bland* (1962) 369 U.S. 663, 666 [8 L.Ed.2d 180, 183, 82 S.Ct. 1089]; *Gibbons v. Ogden* (1824) 22 U.S. (9 Wheat.) 1, 11 [6 L.Ed. 23, 25]; *Richards v. Griffith Rubber Mills* (D.Ore. 1969) 300 F.Supp. 338, 340; *Rosenfeld v. Southern Pacific Company* (C.D.Cal. 1968) 293 F.Supp. 1219, 1224).

The Attorney General urges, however, that the federal Civil Rights Act does not apply because section 2 of the Twenty-first Amendment to the United States Constitution precludes federal interference with state regulation of alcoholic beverages. Section 2 provides that "[t]he *transportation or importation into any State*, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited." (Italics added.) The Attorney General contends that this amendment "cedes vast plenary powers" to the states to regulate alcoholic beverages "unfettered" by the commerce clause. Since the 1964 Civil Rights Act was passed pursuant to Congress' commerce clause power, it is contended that a state's power to regulate liquor is also unfettered by the 1964 Civil Rights Act.

This argument must fail. The Twenty-first Amendment clearly was not intended to work such a wholesale "repeal" of the commerce clause in the area of alcoholic beverage control. When national prohibition was terminated by section 1 of the Twenty-first Amendment, section 2 was added as a "saving clause" to protect the laws of states which chose to retain prohibition against a possible conflict with the commerce clause. (See *United States v. Colorado Wholesale W. & Liq. Deal. Ass'n.* (D.Colo. 1942) 47 F.Supp. 160, 162, revd. 144 F.2d 824, revd. 324 U.S. 293 [89 L.Ed. 951, 65 S.Ct. 661]; *Joseph Triner Corporation v. Arundel* (D.Minn. 1935) 11 F.Supp. 145, 146-147.) The language of the amendment clearly reflects the purpose, since it prohibits the importation or transporting of liquor only into states where such importation will be in violation of the laws thereof.

Section 2 represents the incorporation of a somewhat narrowed version of the Webb-Kenyon Act (37 Stats. 699, 27 U.S.C.A. § 122 (1913)) into the Constitution. (*Washington Brewers Institute v. United States* (9th Cir. 1943) 137 F.2d 964, 967, cert. den. 320 U.S. 776 [88 L.Ed. 465, 64 S.Ct. 89]; Note, *The Twenty-First Amendment Versus the Interstate Commerce Clause* (1946) 55 Yale L.J. 815, 816-818.) The Webb-Kenyon Act was passed in 1913 under the title "[a]n Act divesting intoxicating liquors of their interstate character in certain cases." Its purpose was to "•prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught."' (***12***Seaboard Air Line Ry. v. North Carolina* (1917) 245 U.S. 298, 303 [62 L.Ed. 299, 303, 38 S.Ct. 96].)

Although some early cases painted state powers under section 2 of the Twenty-first Amendment with a broad brush, later decisions have taken a position more in keeping with the original intent of the amendment. (See, e.g., *Seagram & Sons v. Hostetter* (1966) 384 U.S. 35, 42 [16 L.Ed.2d 336, 342, 86 S.Ct. 1254]; *Hostetter v. Idlewild Liquor Corp.* (1964) 377 U.S. 324 [12 L.Ed.2d 350, 84 S.Ct. 1293].) In *Hostetter v. Idlewild Liquor Corp.*, *supra.*, the Supreme Court restated the effect of the Twenty-first Amendment: "•Since the Twenty-first Amendment ... the right of a state to prohibit or regulate the *importation* of intoxicating liquor is not limited by the commerce clause.'" (Italics added.) (*Id.*, at p. 330 [12 L.Ed.2d at p. 355].) The court rejected the argument that the Twenty-first Amendment gave the states plenary power over alcoholic beverages: "To draw a conclusion ... that the Twenty-first Amendment has somehow operated to •repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would ... be an absurd over-simplification. If the Commerce Clause had been *pro tanto* •repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect." (*Id.*, at pp. 331-332 [12 L.Ed.2d at p. 356].)

The court then went on to declare that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case? (*Id.*, at p. 332 [12 L.Ed.2d at p. 356].) [FN8]

FN8 See Note, *The Supreme Court, 1963 Term: State Taxation and Regulation* (1964)

> 78 Harv.L.Rev. 143, 237, 240, which concludes that the recognition of an accommodation between the Twenty-first Amendment and the commerce clause "casts doubt on cases holding that the amendment frees the states completely from commerce clause limitations."

(13)Thus it is apparent that the Twenty-first Amendment not only does not reach all alcoholic beverage cases which would otherwise fall within Congress' commerce clause powers, but even in those situations covered by the express language of the amendment, some balancing and accommodation must take place.

Section 25656 is not even tangentially related to "transportation or importation" of liquor into California, and therefore does not fall within the literal language of the Twenty-first Amendment. The statute merely ***13** regulates employment at the retail level, and has nothing to do with the flow of alcoholic beverages into the state.

But even if the amendment were broadly construed to cover all state laws regulating the liquor business, the interests and issues at stake in employment discrimination cases present no conflict with the intent and purposes of the Twenty-first Amendment. (14)Title VII of the Civil Rights Act was passed to prevent the impact of racial and sexual discrimination in employment on interstate commerce. It was not enacted to regulate the flow of alcohol as a commodity in interstate commerce. Since the aim of the Civil Rights Act is so wholly different from that of the Twenty-first Amendment, the two provisions in no way clash with each other. This is an appropriate case for the accommodation suggested in *Hostetter v. Idlewild Liquor Corp., supra.*.

We turn to the question whether section 25656 is in direct conflict with section 2000e-2 of the Civil Rights Act of 1964. (42 U.S.C.A. § 2000e-2.)

Section 2000e-2(a) makes it unlawful to hire or to "limit, segregate, or classify" employees in any way which would tend to deprive an employee of employment opportunities on the basis of sex. [FN9] Section 2000e-2(e) permits an exception only where there is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, ..." [FN10]

> FN9 Section 2000e-2(a) provides: "It shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

> FN10 Section 2000e-2(e) dates in relevant part: "Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees ... on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, ..."

In determining whether prohibiting women from tending bar falls within the bona fide occupational qualification exception to the federal statute, we are necessarily influenced by the guidelines promulgated by the Equal Employment Opportunity Commission. (29 C.F.R. § 1604.1.) (15)These guidelines, which are entitled to "great deference" (*Udall v. Tallman* (1965) 380 U.S. 1, 16 [13 L.Ed.2d 616, 625, 85 S.Ct. 792]), state that "assumptions of the comparative employment characteristics" ***14** of women in general (29 C.F.R. § 1604.1(a)(1)(i)) and "sterotyped characterizations" of the sexes (29 C.F.R. § 1604.1(a)(1)(ii)) do not warrant the application of the bona fide occupational qualification exception. Thus, under the guidelines only an individual inquiry into a particular woman applicant's qualifications, or, at most, a clearly justifiable general classification with respect to a particular job category meets the requirements of section 2000e-2. [FN11]

> FN11 "The Commission believes that [pro-

> tective] State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect....“ (29 C.F.R. § 1604.1(b)(2).)

(16)Applying the Equal Employment Opportunity Commission's guidelines, one court has stated the test of a bona fide occupational qualification is whether ”all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.“ (*Weeks v. Southern Bell Telephone & Telegraph Company* (5th Cir. 1969) 408 F.2d 228, 235.)

Courts, following the guidelines, have invalidated weight-lifting restrictions for women (*Bowe v. Colgate-Palmolive Company* (7th Cir. 1969) 416 F.2d 711; *Richards v. Griffith Rubber Mills, supra.*, 300 F.Supp. 338; *Rosenfeld v. Southern Pacific Company, supra.*, 293 F.Supp. 1219), hours limitations (*Caterpillar Tractor Co. v. Grabiec* (S.D.Ill. 1970) 317 F.Supp. 1304) and exclusionary job categories (*Weeks v. Southern Bell Telephone & Telegraph Company, supra.*, 408 F.2d 228 (switchman); *McCrimmon v. Daley* (E.D.Ill. 1970) 2 F.E.P. Cases 971 (barmaid ordinance)). *McCrimmon* specifically held that a Chicago ordinance permitting only women liquor licensees, or the wives, daughters, sisters or mothers of licensees to tend bar conflicts with title VII of the Civil Rights Act.

Applying these standards to section 25656, we must hold that that statute is not based upon a bona fide occupational qualification necessary to the operation of a bar and is therefore in direct conflict with section 2000e-2 of the Civil Rights Act.

Certainly, as we state above, women as a class are as capable as men of mixing drinks and are permitted to do so in many states. The technical capabilities of women are not, however, at issue here. The Legislature concedes this point when it exempts women licensees and wives of male licensees from the general prohibition without regard to their capacity to prepare spirits for consumption by patrons of liquor establishments. ***15**

The more serious contention that a bartender must be physically strong enough to protect himself against inebriated customers and to maintain order in the bar, and that women as a class are unable to do so, must also be rejected. (17)Whether a condition constitutes ”a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise“ is a matter of evidence. (*Phillips v. Martin Marietta Corp.* (1971) 400 U.S. 542 [27 L.Ed.2d 613, 91 S.Ct. 496].) The state has made no showing whatever that bartenders are endangered by their work and require physical strength, not possessed by women, for self defense and to maintain order.

The reason for the lack of such a showing is apparent. As we have pointed out, the saloon days of the Wild West are long gone. Nowadays the typical bar does not provide a setting for violence and danger, if in fact it ever did. At most, the dangers feared by the Attorney General may justify discrimination only in a particular establishment where, first, the employer can prove that such problems arise, and, second, that ”substantially all women“ lack the requisite strength to deal with such problems. (*Weeks v. Southern Bell Telephone & Telegraph Co., supra.*, 408 F.2d 228, 235.) Such perils cannot serve as the basis for a blanket statewide statutory prohibition against the employment of women bartenders.

(18)We conclude that section 25656 conflicts with section 2000e-2 of the Civil Rights Act. As to those liquor licensees who employ the requisite 25 employees and otherwise come within the prohibition of section 2000e-2, section 25656 is invalid and must fall. [FN12]

> FN12 We cannot agree with the contrary reasoning in *Krauss v. Sacramento Inn* (E.D. Cal. 1970) 314 F.Supp. 171, nor are we bound by its holding; see, e.g., *People v. Luros* (1971) 4 Cal.3d 84, 91, fn. 8 [92 Cal.Rptr. 833, 480 P.2d 633]; *In re Whitehorn* (1969) 1 Cal.3d 504, 511, fn. 2 [82 Cal.Rptr. 609, 462 P.2d 361], holding that state Supreme Courts are not bound by lower federal court rulings on constitutional questions.

III. EQUAL PROTECTION

Finally, it is contended that section 25656 violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and article I, sections 11 and 21, of the California, Constitution [FN13] in that it prohibits women from tending bar unless they or their husbands hold the liquor license; but does not impose a comparable limitation on men.

FN13 The California and federal tests for equal protection are substantially the same. (*County of L.A. v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 380 [196 P.2d 773].)

We recognize that the state has particularly broad powers with respect to the manufacture of and traffic in alcoholic beverages because of the ***16** dangers to the public health and safety inherent in their sale and use. (See *Allied Properties v. Dept. of Alcoholic Beverage Control* (1959) 53 Cal.2d 141, 147 [346 P.2d 737].) (19)Nonetheless, the power of the state to regulate alcoholic beverages is necessarily subject to the demands of the equal protection clause of the Fourteenth Amendment. (See, e.g., *Seagram & Sons v. Hostetter, supra.*, 384 U.S. 35, 50 [16 L.Ed.2d 336, 347]; *Parks v. Allen* (5th Cir. 1970) 426 F.2d 610, 613; *Hornsby v. Allen* (5th Cir. 1964) 326 F.2d 605, 609.) [FN14]

FN14 *State Board v. Young's Market Co.* (1936) 299 U.S. 59, 64 [81 L.Ed. 38, 41, 57 S.Ct. 77], cited in the Attorney General's brief, is not to the contrary. In that case, the Supreme Court upheld California's license fee on imported beer against an equal protection attack, stating that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth." The case stands for the proposition that the power given the states under the Twenty-first Amendment to forbid or regulate importation of alcoholic beverages creates two classes of beverage, those imported from out of state and domestic beverages. (See, *Hornsby v. Allen, supra.*, 326 F.2d 605, 609.) Since the Twenty-first Amendment creates this particular classification, and the Fourteenth and Twenty-first Amendments are of equal dignity, the classification created by the Twenty-first Amendment cannot be invalidated by the Fourteenth. The instant case does not involve the classification created by the Twenty-first Amendment.

Before deciding whether the statute violates the equal protection clauses of the state and federal Constitutions we must determine the proper standards for reviewing the classification which the statute creates.

We have followed the two-level test employed by the United States Supreme Court in reviewing legislative classifications under the equal protection clause. (*In re Antazo* (1970) 3 Cal.3d 100, 110-111 [89 Cal.Rptr. 255, 473 P.2d 999]; *Westbrook v. Mihaly, supra.*, 2 Cal.3d 765, 784-785; *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 578-579 [79 Cal.Rptr. 77, 456 P.2d 645]; see also, Note: *Developments in the Law-Equal Protection* (1969) 82 Harv.L.Rev. 1065, 1076-1077, 1088.)

"In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. [Citations.] [¶] On the other hand, in cases involving 'suspect classifications' or touching on 'fundamental interests,' the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law, are *necessary* ***17** to further its purpose." (*Westbrook v. Mihaly, supra.*, 2 Cal.3d 765, 784-785.)

The instant case compels the application of the strict scrutiny standard of review, first, because the statute limits the fundamental right of one class of persons to pursue a lawful profession, and, second, because classifications based upon sex should be treated as suspect.

We have held that the state may not arbitrarily foreclose any person's right to pursue an otherwise lawful occupation. (*Purdy & Fitzpatrick v. State of California, supra.*, 71 Cal.2d 566, 579.) The right to work and the concomitant opportunity to achieve economic security and stability are essential to the

pursuit of life, liberty and happiness. As early as 1915, the United States Supreme Court declared that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of [the Fourteenth] Amendment to secure." (*Truax v. Raich* (1915) 239 U.S. 33, 41 [60 L.Ed. 131, 135, 36 S.Ct. 7].) The California Legislature accords statutory recognition to the right to work by declaring the opportunity to seek, obtain and hold employment without discrimination a civil right. (Lab. Code, § 1411.) (20) Limitations on this right may be sustained only after the most careful scrutiny. (*Purdy & Fitzpatrick v. State of California, supra.*, 71 Cal.2d 566, 579; cf. *Allgeyer v. Louisiana* (1897) 165 U.S. 578, 589-590 [41 L.Ed. 832, 835-836, 17 S.Ct. 427]; *Truax v. Raich, supra.*, 239 U.S. 33, 41; *Endler v. Schutzbank* (1968) 68 Cal.2d 162, 169, fn. 4, 169-170 [65 Cal.Rptr. 297, 436 P.2d 297]; *Blumenthal v. Board of Medical Examiners* (1962) 57 Cal.2d 228, 235 [18 Cal.Rptr. 501, 368 P.2d 101].) (21) Bartending and related jobs, though carefully regulated, are lawful occupations and the strict standard of review is therefore justified on this ground.

We find that strict review is also required because of the characteristic upon which the classification in the statute is based. The United States Supreme Court has not designated classifications based on sex "suspect classifications" requiring close scrutiny and a compelling state justification for their constitutionality. [FN15] Nonetheless, courts have begun to treat ***18** sex classifications as at least marginally suspect (see, e.g., *Commonwealth v. Daniel* (1968) 430 Pa. 642 [243 A.2d 400, 402-403]; Note: *Longer Sentence for Females ...* (1969) 82 Harv.L.Rev. 921, 923), and one federal district court has explicitly recognized these classifications as such. (*United States v. York* (D.Conn. 1968) 281 F.Supp. 8, 14.)

> FN15 See, e.g., *Goesaert v. Cleary* (1948) 335 U.S. 464 [93 L.Ed. 163, 69 S.Ct. 198], and *Muller v. Oregon* (1908) 208 U.S. 412 [52 L.Ed. 551, 28 S.Ct. 324], both of which were decided well before the recent and major growth of public concern about and opposition to sex discrimination. No judge today would justify classification based on sex by resort to such openly biased and wholly chauvinistic statements as this one made by Justice Brewer in *Muller*: "[H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved.... Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights.... Doubtless there are individual exceptions ... but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality." (*Id.*, at pp. 421-422 [52 L.Ed. at p. 556].)

An analysis of classifications which the Supreme Court has previously designated as suspect reveals why sex is properly placed among them. [FN16] Such characteristics include race (see, e.g., *Loving v. Virginia* (1967) 388 U.S. 1, 9 [18 L.Ed.2d 1010, 1016, 87 S.Ct. 1817]; *McLaughlin v. Florida* (1964) 379 U.S. 184, 191-192 [13 L.Ed.2d 222, 227-229, 85 S.Ct. 283]), lineage or national origin (see, e.g., *Korematsu v. United States* (1944) 323 U.S. 214, 216 [89 L.Ed. 194, 198-199, 65 S.Ct. 193]; see also *Sei Fuji v. State of California* (1952) 38 Cal.2d 718, 730 [242 P.2d 617]), alienage (*Takahashi v. Fish Comm.* (1948) 334 U.S. 410, 420 [92 L.Ed. 1478, 1487-1488, 68 S.Ct. 1138]; *Truax v. Raich, supra.*, 239 U.S. 33; *Purdy & Fitzpatrick v. State of California, supra.*, 71 Cal.2d 566, 579), and poverty, especially in conjunction with criminal procedures (see, e.g., *Douglas v. California* (1963) 372 U.S. 353, 356-357 [9 L.Ed.2d 811, 814-815, 83 S.Ct. 814]; *Griffin v. Illinois* (1956) 351 U.S. 12, 17 [100 L.Ed. 891, 898, 76 S.Ct. 585]; see also, *In re Antazo, supra.*, 3 Cal.3d 100).

> FN16 See also Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendent?* (1971) 84 Harv.L.Rev. 1499, 1506-1516, for a recent and excellent analysis of the proper standard of review of classifications based on sex.

Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from non-

suspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. (See Note: *Developments in the Law-Equal Protection*, *supra.*, 82 Harv.L.Rev. 1065, 1173-1174.) The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. (See *Karczewski v. Baltimore and Ohio Railroad Company* (N.D.Ill. 1967) 274 F.Supp. 169, 179.) Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices. ***19**

Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. (See Note: *Developments in the Law-Equal Protection*, *supra*., 82 Harv. L.Rev. 1065, 1125-1127.) Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote [FN17] and, until recently, the right to serve on juries in many states. [FN18] They are excluded from or discriminated against in employment and educational opportunities. [FN19] Married women in particular have been treated as inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts. [FN20] ***20**

FN17 The Nineteenth Amendment which gave women the right to vote in national elections was not passed until 1920. Women remain underrepresented in federal and state legislative bodies and in political party leadership. (See, e.g., American Women, Report of the President's Commission on the Status of Women, *supra.*, pp. 46-52; *Calderon v. City of Los Angeles* (1971) 4 Cal.3d 251, 258, fn. 6 [93 Cal.Rptr. 361, 481 P.2d 489].)

FN18 Women became eligible to serve on all federal juries only by virtue of the Civil Rights Act of 1957. It now appears that women may not be denied the right to serve on a jury (*White v. Crook* (M.D.Ala. 1966) 251 F.Supp. 401, 408), but the United States Supreme Court has held that a state may relieve women from jury service unless they seek it out. (*Hoyt v. Florida* (1961) 368 U.S. 57 [7 L.Ed.2d 118, 82 S.Ct. 159].)

FN19 The President's Task Force on Women, relying on figures provided by the Bureau of the Census and the Bureau of Labor Statistics, reported the following: "Sex bias takes a greater economic toll than racial bias. The median earnings of white men employed year-round full-time is $7,396, of Negro men $4,777, of white women, $4,279, of Negro women $3,194. Women with some college education, both white and Negro, earn less than Negro men with 8 years of education. [¶] Women head 1,723,000 impoverished families, Negro males head 820,000. One-quarter of all families headed by white women are in poverty. More than half of all headed by Negro women are in poverty. Less than a quarter of those headed by Negro males are in poverty. Seven percent of those headed by white males are in poverty. [¶] The unemployment rate is higher among women than men, among girls than boys. More Negro women are unemployed than Negro men, and almost as many white women as white men are unemployed (most women on welfare are not included in the unemployment figures-only those actually seeking employment.)" (A Matter of Simple Justice: The Report of The President's Task Force on Women's Rights and Responsibilities (1970) p 18; see also Kanowitz, Women and The Law, *supra.*, pp. 100-101; Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII (1965) 34 Geo.Wash.L.Rev. 232, 234.*)

The President's Commission on Women reports that "substantial discrimination [in education] does exist." It cites higher admission standards for women than men not only in graduate school but in undergraduate schools as well. It states that "Discrimination in education is one of the most damaging injustices women suffer. It denies them equal education and equal employment opportunity, contributing to a second class self image." (A Matter of Simple Justice: The Report of The President's Task Force on

Women's Rights and Responsibilities, *supra.*, p. 7; see also American Women: Report of the President's Commission on the Status of Women, *supra.*, p. 11.)

FN20 See, e.g., Kanowitz, Women and The Law, *supra.*, pp. 35-99; American Women: Report of the President's Task Force on Women's Rights and Responsibilities, *supra.*, p. 47; cf., The California Sole Trader Statute, Code of Civil Procedure sections 1811-1821, which requires court approval before a wife may engage in an independent business.

Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. (22)We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment.

We now consider whether the state has established a compelling state interest. A number of state interests have been urged for the classification created by the statute. Two Court of Appeal cases which uphold section 25656 against equal protection challenge (*Hargens v. Alcoholic Bev. etc. App. Bd.* (1968) 263 Cal. App.2d 601 [69 Cal.Rptr. 868]; *People v. Jemnez* (1942) 49 Cal.App.2d Supp. 739 [121 P.2d 543]) suggest two interests served by the statute; first that women who do not have an interest by way of ownership or marriage in the liquor license will not be sufficiently restrained form committing "improprieties," and, second, that women bartenders would be an "unwholesome influence" on young people and the general public.

The first rationale rests upon the peculiar and wholly unacceptable generalization that women in bars, unrestrained by husbands or the risk of losing a liquor license, will commit improper acts. This rationale fails as a compelling state interest because it is wholly arbitrary and without support in logic or experience.

There is no reason to believe that women bartenders would have any less incentive than male bartenders to obey the laws governing the sale of alcoholic beverages and the rules set down by their employers in order to retain their jobs and promote their own well-being. Nor is there any basis for presuming that male licensees, charged with overseeing their establishments and carrying out their responsibilities under the law, would be less able to carry out these responsibilities with respect to women bartenders than to the male bartenders or female cocktail waitresses the law permits them to hire.

(23)The Legislature may, of course, pass laws to prevent "improprieties" in connection with the sale of alcoholic beverages. It has, in fact, passed laws aimed at the very evils which section 25656 allegedly prevents. (See, e.g., Bus. & Prof. Code, § 25657, which makes it a misdemeanor ***21** to employ anyone to encourage the purchase of alcoholic beverages; § 24200 which permits license revocation when continuation of the license would be contrary to public welfare or morals; and § 25601 which makes it a misdemeanor to keep a disorderly house.) (24)Where the evil which the Legislature seeks to prevent can be directly prevented through nondiscriminatory legislation, and where the class singled out by the Legislature has no necessary connection with the evil to be prevented, the statute must be struck down as an invidious discrimination against that class.

(25)The second rationale-that women bartenders would be an "unwholesome influence" on the public-is even weaker than the first. The claim of unwholesomeness is contradicted by statutes which permit women to work as cocktail waitresses, serve beer and wine from behind a bar (Bus. & Prof. Code, § 25655), or tend bar if they or their husbands hold a liquor license. The objection appears to be based upon notions of what is a "ladylike" or proper pursuit for a woman in our society rather than any ascertainable evil effects of permitting women to labor behind those "permanently affixed fixtures" known as bars. Such notions cannot justify discrimination against women in employment.

Hargens v. Alcoholic Bev. etc. App. Bd., supra., 263 Cal.App.2d 601 and *People v. Jemnez, supra.*, 49 Cal.App.2d Supp. 739, to the extent that they conflict with the views stated herein, are disapproved.

Finally, the Attorney General argues that this case is governed by *Goesaert v. Cleary, supra.*, 335 U.S. 464, which held constitutional a Michigan statute forbidding any female to act as bartender unless she was the wife or daughter of the male owner of a licensed liquor establishment. The rationale for the classification in that case was that the "oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight." (*Id.*, at p,. 466 [93 L.Ed. at p. 166].) This holding ignores the obvious objection, raised in the dissent, that a male owner, although he is always absent from his bar, may employ his wife and daughter while a female owner may not work in a bar or employ her daughter even though a man is always present to keep the order.

Although *Goesaert* has not been overruled, its holding has been the subject of academic criticism (Kanowitz, Women and The Law, *supra.*, pp. 33-34; Oldham, *Sex Discrimination and State Protective Laws* (1967) 44 Denver L.J. 344, 373-374); and its sweeping statement that the states are not constitutionally precluded from "drawing a sharp line between the sexes" (*Goesaert v. Cleary, supra.*, 335 U.S. at p. 466 [93 L.Ed. at p. 165]) has come under increasing limitation, (See ***22***Paterson Tavern & G. O. A. v. Borough of Hawthorne, supra.*, 57 N.J. 180, 186 [270 A.2d 628, 630-631]; *Seidenberg v. McSorleys' Old Ale House, Inc.* (S.D.N.Y. 1969) 308 F.Supp. 1253, 1260; *United States v. Yolk, supra.*, 281 F.Supp. 8, 16; *White v. Crook, supra.*, 251 F.Supp. 401, 408.)

We need not, however, speculate as to the continuing validity of *Goesaert*. The rationale for upholding the statute in that case cannot sustain our statute. Section 25656 does not preclude all women from being bartenders or prohibit them from bartending except where they are under the supervision of a male relative. It permits a female owner or sole shareholder to tend bar. The classification made by the section thus cannot be justified on the basis of the protection of female bartenders by their male relatives and we can think of no other legitimate state purpose to which it is rationally related. (See *McCrimmon v. Daley* (7th Cir. 1969) 418 F.2d 366, 369-370, which distinguishes *Goesaert* where a Chicago ordinance permitted a female licensee and her female employee to tend bar.)

(26)We conclude that the classification created by section 25656 is invidious and wholly arbitrary. The state has not only failed to establish a compelling interest served by it, but it has failed to establish any interest at all. Section 25656 is unconstitutional under the equal protection clauses of the state and federal Constitutions.

For the reasons stated, we find section 25656 invalid. Let the peremptory writ of mandate issue compelling the Director of the Department of Alcoholic Beverage Control to cease license revocation proceedings based upon section 25656 of the Business and Professions Code and to cease enforcement of the section.

Wright, C. J., McComb, J., Tobriner, J., Mosk, J., Burke, J., and Sullivan, J., concurred. ***23**

Cal.
Sail'er Inn, Inc. v. Kirby
5 Cal.3d 1, 485 P.2d 529, 95 Cal.Rptr. 329, 3 Fair Empl.Prac.Cas. (BNA) 550, 46 A.L.R.3d 351

END OF DOCUMENT

SANTA BARBARA SCHOOL DISTRICT et al., Petitioners,
v.
THE SUPERIOR COURT OF SANTA BARBARA COUNTY, Respondent; C. RAYMOND MULLIN et al., Real Parties in Interest.
C. RAYMOND MULLIN et al., Plaintiffs and Respondents,
v.
SANTA BARBARA SCHOOL DISTRICT et al., Defendants and Appellants

L.A. No. 30054., L.A. No. 30086.

Supreme Court of California
January 15, 1975.

SUMMARY

In a class action under a complaint alleging two causes of action concerning the validity of the composition and election of a city board of education and one cause challenging the validity of a desegregation plan adopted at a board meeting, the trial court filed a memorandum of intended decision declaring an intent to enjoin implementation of the plan and also expressing the court's intent with respect to the other causes. However, before findings and conclusions were filed, the Supreme Court issued an alternative writ of prohibition limited in effect to the part of the intended decision concerned with implementation of the plan. Judgment was rendered on the first two causes. (Superior Court of Santa Barbara County, No. 96260, John T. Rickard, Judge.)

The Supreme Court ordered defendants' appeal from the judgment transferred from the Court of Appeal to it for consideration simultaneously with the writ proceeding. The judgment was reversed and the cause remanded with directions to enter judgment for defendants on the two causes relating to validity of the election and composition of the board. And a peremptory writ of prohibition issued to restrain the trial court's intended action in all respects except in enjoining implementation of the desegregation plan which had purportedly been adopted. It was held that the board had been without jurisdiction to adopt the plan at the meeting as a result of the failure of the posted agenda for that meeting to give adequate notice that the particular plan would be considered at the meeting. Additionally, the court held that as enacted in Proposition 21, Ed. Code, § 1009.6, barring the assignment of pupils on the basis of race, is unconstitutional as applied to school districts manifesting segregation, but that the parts of the proposition which repealed Ed. Code, §§ 5002, 5003, declaring state policy of eliminating racial imbalance in schools, were severable from the invalid part and independently valid. And under the view that there is no constitutional right to a separate and elected elementary board of education and no unconstitutional infirmity in designating a city's board of education, elected from the full territory within its jurisdiction, to govern the lesser and wholly included elementary school district, the Supreme Court held that the Santa Barbara Board of Education, which has been designated by the Legislature to govern the city's elementary school district, may lawfully be the common governing board of the city's high and elementary school districts, even though they are not coterminous.

In Bank. (Opinion by Sullivan, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Schools § 10--School Districts--Assignment of Pupils on Basis of Race.

Ed. Code, § 1009.6, which bars assignment of pupils on the basis of race, is unconstitutional as applied to school districts manifesting either de jure or de facto segregation.

(2) Schools § 10--School Districts--Validity of Repealing Provisions of Initiative.

Inasmuch as a policy in favor of neighborhood schools is a reasonably conceivable one and such an expression of policy can in no way limit or affect the constitutional obligations of school districts, the provisions found in §§ 2, 3, and 4 of Proposition 21, repealing Ed. Code, §§ 5002, 5003, which had declared the state policy of eliminating racial imbalance in schools and had delineated factors to be considered in implementing the policy, and also repealing certain administrative guidelines, cannot be struck down as constitutionally impermissible.

(3) Schools § 10--School Districts--Severability of Initiative Provisions.

The fact that, as enacted in Proposition 21, Ed. Code, § 1009.6, barring the assignment of pupils on the basis of

race, is unconstitutional as applied to school districts manifesting segregation, does not necessarily invalidate the repealing provisions of the proposition, inasmuch as the repealing provisions are severable from the unconstitutional part not only mechanically, but also as to purpose and method, and are of independent validity and not inconsistent with the elimination of the invalid part.

(4a, 4b) Schools § 51 (5)--Administrative Officers--Boards--Meetings-- Jurisdiction.

Under Ed. Code, § 966, requiring the posting of an agenda 48 hours prior to a proposed meeting of a school board, the board cannot change its posted agenda within the 48-hour period next immediately preceding a regular meeting. If the board wishes to change the agenda substantially within that period, it must postpone a meeting at least 48 hours. Thus, where concerned parents and citizens could reasonably infer from the posted agenda that only those desegregation plans which had been previously presented would be considered at the meeting, the board had no jurisdiction to consider or approve a plan which was not presented until that meeting and which differed substantially from all the previously presented plans.

(5) Schools § 51 (5)--Administrative Officers--Boards--Meetings--Posted Agenda.

The proper posting of a school board meeting agenda, as required by Ed. Code, § 966, cannot be replaced by newspaper publicity.

(6) Schools § 51 (6)--Administrative Officers--Boards--Rights, Powers and Duties--Desegregation.

In desegregating a school system, a school board is not limited in the exercise of its powers to those acts reasonably necessary to effectuating desegregation.

(7) Schools § 77--Actions and Liability--Judicial Control Over Official Acts--Prohibition.

Prohibition was available to prevent the trial court from exceeding its jurisdiction by carrying out its memorandum of intended decision, insofar as the decision would amount to a substitution of the trial court's views for those of a school board with respect to a matter within the board's discretion concerned with the closing down of certain schools.

[See **Cal.Jur.2d, Rev.,** Schools, § 217; Am.Jur.2d, Schools, § 52.]

(8) Schools § 51 (1)--Administrative Officers--One Board as Governing Districts Which Are Not Coterminous.

There is no constitutional right to a separate, elected elementary board of education and no constitutional infirmity in designating a city's board of education, elected from the full territory within its jurisdiction, to govern the lesser and wholly included elementary school district. Therefore, the Santa Barbara Board of Education, which has been designated by the Legislature to be the governing board of the city's elementary school district, and which is elected in compliance with the "one man, one vote" rule, may lawfully be the common governing board of the elementary and high school districts despite the fact that they are not coterminous. And election of the board is not subject to attack on the theory that the election is also an election of the governing board of the elementary school district and that such latter election violates the "one man, one vote" rule as causing the dilution of the votes of electors residing in the elementary school district by the votes of non-resident electors.

COUNSEL

George P. Kading, County Counsel, Robert D. Curiel, Chief Assistant County Counsel, Marvin Levine and Don H. Vickers, Deputy County Counsel, for Petitioners and for Defendants and Appellants.

Michael Lawson, A. L. Wirin, Fred Okrand, Laurence R. Sperber, Nathaniel S. Colley, Primo Ruiz, Fred J. Hiestand, Gene Livingston, Jerome B. Falk, Jr., William F. McCabe, Peter Galiano, Robert A. Stafford, Stafford, Buxbaum & Chackmak, Gervaise Davis III, Walker, Schroeder, Davis & Brehmer and Anthony G. Amsterdam as Amici Curiae on behalf of Petitioners.

Price, Postel & Parma, Gary R. Ricks and Hollister, Brace & Angle for Real Parties in Interest and for Plaintiffs and Respondents.

No appearance for Respondent.

Bagley, Bianchi & Sheeks, William T. Bagley, Robert L. McWhirk, Levy & Van Bourg, Victor J. Van Bourg and Stewart Weinberg as Amici Curiae. ***319**

SULLIVAN, J.

In this class action brought against two school districts and their common governing board of education, we are called upon to determine the validity of a desegregation plan for elementary schools. Our task also requires us to examine and pass upon the constitutionality of a recent initiative measure enacting certain anti-busing legislation and repealing existing statutes dealing with the prevention

and elimination of racial and ethnic imbalance in pupil enrollment. Additionally we must examine the validity of the pertinent statute permitting the board of education in question to be the common governing board of the high school district and the elementary school district here involved. In essence, plaintiffs make two independent but cognate attacks - one against the board's plan and the other against the board itself. We take them up in that order, separately stating the facts proper to each. We first turn our attention to the desegregation plan.

I

Defendant Santa Barbara Board of Education (hereafter Board and referred to as defendant in the singular) is the common governing board of defendants Santa Barbara School District and Santa Barbara High School District. Defendant Norman B. Scharer is the Superintendent of Schools of Santa Barbara (superintendent).

Culminating a period of five years' planning and study aimed at correcting the racial imbalance in elementary schools, the Board on February 3, 1972, resolved "to move immediately toward the total desegregation of all Santa Barbara elementary schools beginning in September 1972." The Board adopted the following four-step procedure to effectuate this resolution: (1) the issuance by February 22, 1972, of a statement of policy on desegregation; (2) the creation of a "Task Force Committee for Desegregation," consisting of 22 members, to develop criteria for the study of proposed desegregation plans and to present such criteria to the Board no later than March 2, 1972; (3) the establishment of an "Education and Integration Study Committee," consisting of more than 100 members, under the chairmanship of the superintendent, to review various plans submitted for carrying out the desegregation-integration policy and to present to the Board, no later than May 4, 1972, two or three alternate plans; and (4) the determination that "[o]n May 18, 1972, this Board of Education will adopt one plan to be implemented as fully as possible in September 1972." ***320**

Both committees met numerous times and completed all work on schedule. On March 2, 1972, the Board adopted 12 criteria for guidance in reviewing the proposed desegregation plans. One of the criteria stated that any desegregation plan should "provide for optimum use of and be capable of being implemented within existing facilities."

Nine desegregation plans were received and studied initially by the "Task Force" and thereafter by the larger Education and Integration Study Committee. The latter committee by a vote of 74 to 4 recommended to the Board a specific desegregation plan known as the Hord-Mailes-Christian-Belden Plan, named after the four sponsoring elementary school principals. The committee also approved two alternate plans and prior to May 4, 1972, presented all three to the Board. These three plans, together with the West-Anderson plan not recommended by the committee, were formally presented to the Board at its meeting held on May 4, 1972.

Due to various objections raised by members of the Board in the ensuing discussion at that meeting, the superintendent decided to develop his own plan. On May 16, 1972, just two days prior to the Board meeting scheduled for final adoption of a desegregation plan, the superintendent announced, in an article appearing in the Santa Barbara News Press, that he proposed recommending a new desegregation plan at that meeting. The next day the same newspaper contained a longer article describing the general outlines of the so-called "Administration Plan." That night the plan was discussed at a meeting of the Education and Integration Study Committee. However, there was no time for study or review prior to the Board meeting the following night.

At its meeting on the next night - May 18, 1972 - the Board discussed the three plans recommended by the committee, the West-Anderson Plan and the Administration Plan. The last named plan was presented orally because it had not yet been reduced to writing. Despite two petitions signed by 3,000 people requesting a postponement for further study, the Administration Plan was adopted by the Board as orally presented. On June 8, 1972, the plan was summarized in writing and submitted to the State Department of Education for approval.

On June 9, 1972, C. Raymond Mullin and Howard G. Larson, on behalf of themselves and of all other voters, parents and taxpayers similarly situated, commenced the instant action seeking: (1) a writ of mandate to compel a special election of the Board and (2) declaratory ***321** and injunctive relief to prevent the implementation of the allegedly unlawful and inadequate desegregation plan. The complaint contained three causes of action: The first two which we discuss separately (see Part II, *infra*) concerned the validity of the election and composition of the Board; the third cause of action alleged that the adoption of the Administration Plan by the Board was: (1) invalid for failure to give notice as required by the Education Code and (2) an abuse of discretion, in that the Board hurriedly

adopted an inadequately studied plan which failed to desegregate all the elementary schools, despite the closing of two elementary schools altogether and the changing of the kindergarten to grade six pattern in two other schools.

Following an eight-day trial, the court filed a memorandum of intended decision. In respect to the third count [FN1] which attacked the validity of the Administration Plan, the court declared its intention to enjoin implementation of the plan. It rested this contemplated action on two bases. First, the court concluded that the Board had no jurisdiction to close the schools since it had failed to include notice of the proposed closure of two schools in its published agenda as required by section 966 of the Education Code. The court determined that the closure of the schools was such an integral part of the Administration Plan that the whole plan must fall. Secondly, the court concluded that the Board abused its discretion by adopting the Administration Plan requiring the closure of two schools since such closure was not reasonably necessary to the effective desegregation of the elementary schools.

FN1 The memorandum of intended decision also included a proposed decision on the first two causes of action as well, which is discussed in Part II of this opinion.

Before findings of fact and conclusions of law, based on the court's memorandum of intended decision were filed, defendants presented to this court a petition invoking our original jurisdiction and seeking a writ of prohibition restraining the trial court from entering judgment in accord with the memorandum of intended decision. We issued an alternative writ of prohibition. [FN2] On August 28, 1972, plaintiffs petitioned this court to modify the alternative writ so as to omit any stay of the trial court's proposed order enjoining implementation of the plan. Since in issuing the alternative writ, we had determined that the petition had made a prima facie showing that the proposed action of the trial court ***322** was in excess of its jurisdiction and therefore that its proposed enjoining of the Administration Plan must be prohibited pending our final determination of the issue, we denied the petition for modification.

FN2 As prayed for in the petition, the alternative writ of prohibition was limited in effect to the intended decision on the third cause of action. The trial court thereafter entered judgment on the first two causes of action and defendants appealed. We ordered such appeal transferred from the Court of Appeal to this court so that we could consider it simultaneously with the writ proceeding.

Subsequently an additional factor was injected into the resolution of the above proceeding with the adoption by the electorate at the general election held on November 7, 1972, of the initiative measure denominated Proposition 21. Section 1 of that proposition added to the Education Code section 1009.6 providing: "No public school student shall, because of his race, creed, or color, be assigned to or be required to attend a particular school." Sections 2 and 3 of Proposition 21 repealed sections 5002 and 5003 [FN3] respectively of the Education Code, which had declared the state policy of eliminating racial imbalance in California schools and had delineated the various factors to be considered in implementing this policy. Section 4 of Proposition 21, repealed the administrative guidelines toward achieving racial balance in the schools adopted by the State Board of Education. (§§ 14020 and 14021 of tit. 5 of the Cal. Admin. Code.) ***323**

FN3 Section 5002 provides: "It is the declared policy of the Legislature that persons or agencies responsible for the establishment of school attendance centers or the assignment of pupils thereto shall prevent and eliminate racial and ethnic imbalance in pupil enrollment. The prevention and elimination of such imbalance shall be given high priority in all decisions relating to school sites, school attendance areas, and school attendance practices."

Section 5003 provides: "(a) In carrying out the policy of Section 5002, consideration shall be given to the following factors:

"(1) A comparison of the numbers and percentages of pupils of each racial and ethnic group in the district with their numbers and percentages in each school and each grade.

"(2) A comparison of the numbers and percentages of pupils of each racial and ethnic group in certain schools with those in other schools in adjacent areas of the district.

"(3) Trends and rates of population change among racial and ethnic groups within the total district, in each school, and in each grade.

"(4) The effects on the racial and ethnic composition of each school and each grade of alternate plans for selecting or enlarging school sites, or for establishing or altering school attendance areas and school attendance practices.

"(b) The governing board of each school district shall periodically, at such time and in such form as the Department of Education shall prescribe, submit statistics sufficient to enable a determination to be made of the numbers and percentages of the various racial and ethnic groups in every public school under the jurisdiction of each such governing board.

"(c) For purposes of Section 5002 and this section, a racial or ethnic imbalance is indicated in a school if the percentage of pupils of one or more racial or ethnic groups differs significantly from the districtwide percentage.

"(d) A district shall study and consider plans which would result in alternative pupil distributions which would remedy such an imbalance upon a finding by the Department of Education that the percentage of pupils of one or more racial or ethnic groups in a school differs significantly from the district-wide percentage. A district undertaking such a study may consider among feasibility factors the following:

"(1) Traditional factors used in site selection, boundary determination, and school organization by grade level.

"(2) The factors mentioned in subdivision (a) of this section.

"(3) The high priority established in Section 5002.

"(4) The effect of such alternative plans on the educational programs in that district.

"In considering such alternative plans the district shall analyze the total educational impact of such plans on the pupils of the district. Reports of such a district study and resulting plans of action, with schedules for implementation, shall be submitted to the Department of Education, for its acceptance or rejection, at such time and in such form as the department shall prescribe. The department shall determine the adequacy of alternative district plans and implementation schedules and shall report its findings as to the adequacy of alternative district plans and implementation schedules to the State Board of Education. A summary report of the findings of the department pursuant to this section shall be submitted to the Legislature each year.

"(e) The State Board of Education shall adopt rules and regulations to carry out the intent of Section 5002 and this section."

Since the Administration Plan was adopted by the Board pursuant to and in furtherance of the repealed code sections, and since the plan involved the assignment of various ethnic minority students to certain schools in order to create a racial balance among the elementary schools in the district, Proposition 21, if valid, would provide an independent basis to support the trial court's intended invalidation of the Administration Plan. This court has, therefore, allowed various amici curiae to file briefs directed to the question of the validity and constitutionality of Proposition 21.

In 1970 the Legislature had added to the Education Code, [FN4] section 1009.5 which provided: "No governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or guardian." This court in *San Francisco Unified School Dist.* v. *Johnson* (1971) 3 Cal.3d 937 [92 Cal.Rptr. 309, 479 P.2d 669] observed that this section was reasonably susceptible of two interpretations: "The ambiguity of section 1009.5 inheres in the phrase '*require*e any student or pupil to be transported.' [Fn. omitted.] (Italics added.) One may 'require' a student to be transported by punishing a refusal or by physically forcing him onto a school bus; in a second sense, one may 'require' a student to be transported by *assigning* him to a school beyond walking distance of his home." (

FN4 Hereafter, unless otherwise indicated, all section references are to the Education Code. *Id*. at p. 945.) We reasoned that if the section were construed to prohibit assignment of pupils to a school beyond a reasonable walking distance from the pupil's home it would be unconstitutional. Applying the doctrine that where possible

> a statute will be construed in a manner that would uphold its constitutionality, we accordingly held that "section 1009.5 does no more than prohibit a school district from compelling ***324** students, without parental consent, to use means of transportation furnished by the district." (*Id*. at p. 942.)

Shortly after our decision in *Johnson*, the Legislature passed the Bagley Act adding sections 5002 and 5003 (see fn. 3, *ante*) which directed school districts to "eliminate racial and ethnic imbalance in pupil enrollment" and specified certain factors to be considered in developing plans to achieve racial balance. The proponents of Proposition 21 in their published argument in support of the proposition characterized the Bagley Act as a "forced integration measure ... which could only be accomplished through forced busing ... without regard to neighborhood schools or parental consent." They asserted opposition to "mandatory busing for the sole purpose of achieving forced integration" and to "reassign[ing] pupils from their neighborhood schools to achieve racial and ethnic balance." Proposition 21 purported to eliminate this evil by repealing the Bagley Act (§§ 5002 and 5003), as well as the complementary administrative regulations, and by adding section 1009.6 which would prohibit forced integration and mandatory busing by denying the school district's power to assign pupils to schools on the basis of race.

Defendants and various amici curiae urge that Proposition 21 is unconstitutional in its entirety, both insofar as it added section 1009.6 and as it repealed sections 5002 and 5003 along with the administrative guidelines.

We declared in *Johnson* that section 1009.5, if construed to bar assignment of pupils to a school beyond reasonable walking distance "would be unconstitutional if applied to districts manifesting racial segregation, whether de jure or de facto in character." (*San Francisco Unified School Dist. v. Johnson, supra*, 3 Cal.3d at p. 954.) Section 1009.6 which bars the assignment of pupils on the basis of race is unconstitutional in the same manner and for the same reasons set forth by us in *Johnson*. We deem it unnecessary to repeat here at length our rationale in that case; our opinion speaks for itself. We merely outline here its essentials, and underscore our conclusions with reference to subsequent United States Supreme Court cases.

First: We emphasized in *Johnson* that "Often the most effective program, and at times the only program, which will eliminate segregated schools requires pupil reassignment and busing. ... Since the U.S. Supreme Court has held that under the Constitution school boards in *de jure segregated districts* are 'clearly charged with the affirmative duty to ***325** take whatever steps might be necessary' to eliminate segregation 'root and branch,' a statute which would proscribe a principal, and in some cases essential and exclusive step to achieve that end, must obviously violate constitutional requirements." (*San Francisco Unified School Dist. v. Johnson, supra*, 3 Cal.3d 937, 955.) (Italics added.)

Approximately three months after we expressed these views in *Johnson* in dealing with section 1009.5, the United States Supreme Court in *Board of Education v. Swann* (1971) 402 U.S. 43 [28 L.Ed.2d 586, 91 S.Ct. 1284] struck down a statute virtually identical with section 1009.6 [FN5] (added to the code in 1972 by Proposition 21) with an unmistakably clear and forceful expression of the same constitutional mandate. "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid ... all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate dual school systems. [¶] Similarly, the flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. ... [¶] We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, 'or for the purpose of creating a balance or ratio,' will similarly hamper the ability of local authorities to effectively remedy constitutional violations." (

> FN5 North Carolina General Statutes section 115-176.1 (Supp. 1969) provides in relevant part: "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited ...." *Id*. at p. 46 [28 L.Ed.2d at p. 589].)

Second: We further held in *Johnson* that section 1009.5 was unconstitutional as applied to school districts manifesting de facto as well as de jure racial segregation. Citing a number of decisions of lower federal courts (3 Cal.3d at p. 956, fns. 21-23), we observed that they had not drawn a clear distinction between de facto and de jure

segregation and that some of them had defined de facto segregation as "that resulting from residential patterns in a nonracially motivated neighborhood school system." (*Id.* at p. 956, fn. omitted; citing inter alia, *Keyes v. School District Number One, Denver, Colorado* (D.Colo. 1970) 313 F.Supp. 61, 73-75; *Swann v. Charlotte-Mecklenburg Bd. of Educ.* (4th Cir. 1970) 431 F.2d 138, 141; 3 Cal.3d at p. 956, fns. 21 and 22.) We noted the necessary ***326** influence of school board decisions on the racial composition of residential areas.

Canvassing these federal precedents we concluded: "Thus under the current pattern of court decisions, neither school districts nor lower courts can determine with any confidence whether a pattern of school segregation should be classed as de facto or de jure. Consequently, if we held section 1009.5 unconstitutional only as applied to districts of de jure segregation, no school board in California ... could ascertain whether section 1009.5 could constitutionally apply within its district. Such a holding would, therefore, entail uncertain enforcement of section 1009.5, a confusion which would inhibit and delay school boards in their efforts to bring about full equality of educational opportunity. The *Green* decision [*Green v. County School Board* (1968) 391 U.S. 430 (20 L.Ed.2d 716, 88 S.Ct. 1689)] calls for desegregation now; a statute which imports confusion and delay in the uprooting of de jure segregation violates both the rule prohibiting partial enforcement of legislation, when such enforcement entails the danger of vague future application, and the mandate of the Supreme Court of the United States." (*San Francisco Unified School Dist. v. Johnson, supra*, 3 Cal.3d at p. 957.)

(1) This reasoning has been substantially buttressed by the recent decision of the United States Supreme Court in *Keyes v. School District, No. 1, Denver, Colo.* (1973) 413 U.S. 189 [37 L.Ed.2d 548, 93 S.Ct. 2686]. In *Keyes* the high court defined de jure segregation as "current condition of segregation resulting from intentional state action." (*Id.* at p. 205 [37 L.Ed.2d at pp. 561-562].) As potentially probative of an intentional segregative action on the part of school boards, the court referred to "policies and practices with respect to schoolsite location, school size, school renovations and additions, student-attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff etc." (*Id.* at pp. 213-214 [37 L.Ed.2d at p. 566].)

The high court further emphasized that segregatory intent on the part of the school board is not limited to actions in the immediate present. "We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'"" (*Id.* at p. 210 [37 L.Ed.2d at p. 564].) We read this to mean that a school board therefore can ascertain ***327** whether the segregation present in its district is de jure or de facto only by examining the full history of acts by the school authorities and determining if, at any time in that course of action, some acts were undertaken with segregatory intent. We think it is clear that no school board or lower court can ascertain with any degree of confidence whether section 1009.6 can constitutionally apply in its district and we further believe that therefore a determination by this court that section 1009.6 can apply to districts manifesting de facto segregation would involve uncertain enforcement and improperly delay elimination of de jure segregation.

The Supreme Court has continuously reiterated its commitment to eliminating de jure racial segregation and its unwillingness to accept any limitation upon procedures necessary to the resolute and thorough accomplishment of that task. To allow school authorities to rest content in the assumption that the pattern of segregation in their district is de facto and therefore to claim that section 1009.6 prohibits them from eliminating that segregation by pupil assignment on the basis of race implemented through busing, would impermissibly impede the constitutionally mandated task of rooting out de jure segregation. "[I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." (*Board of Education v. Swann, supra*, 402 U.S. at p. 45 [28 L.Ed.2d at p. 589].)

The high court has also recognized the discouraging fact of the "dilatory tactics of many school authorities"; the "failure of local authorities to meet their constitutional obligations [has] aggravated the massive problem of converting from the state-enforced discrimination of racially separate school [s]." (*Swann v. Board of Education* (1971) 402 U.S. 1, 14 [28 L.Ed.2d 554, 565, 91 S.Ct. 1267].) In view of this history, it is all too clear to us that the elimination of de jure segregation would be seriously impeded if school authorities could claim a legal disability to assign or bus pupils merely by asserting that the segregation in their district was de facto in origin.

Consistently with our earlier holding in *Johnson* and indeed under the compulsion of the decisions of the United States Supreme Court in *Swann* and *Keyes* which confirm our views in *Johnson*, we hold, as ***328** indeed we must, that section 1009.6 as applied to school districts manifesting either de jure or de facto segregation is unconstitutional.

We proceed to consider a related issue. It will be recalled that Proposition 21 not only added section 1009.6 but also repealed sections 5002 and 5003 as well as certain administrative guidelines. (See fn. 3, *ante*.) Various amici curiae urge that the repealing provisions of Proposition 21 (i.e., §§ 2, 3 and 4) are also unconstitutional, on two grounds: (1) the repeal of these sections significantly encourages and involves the state in racial discrimination and (2) even if constitutional in themselves, the repealing provisions are tainted by the unconstitutional portion of Proposition 21 and cannot be severed from it.

On the first point amici argue that our holding in *Mulkey* v. *Reitman* (1966) 64 Cal.2d 529 [50 Cal.Rptr. 881, 413 P.2d 825] compels the conclusion that the repealing provisions are themselves unconstitutional. In *Mulkey* we held unconstitutional as violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution, article I, section 26 of the California Constitution, an initiative measure appearing as Proposition 14 on the statewide ballot in the general election of 1964 and adopted by the electorate. That proposition nullified state statutes aimed at eliminating racial discrimination in housing and barred the state from legislating in the future so as to limit the right of private discrimination in the sale or leasing of property. We there focused on the distinction between racial discrimination resulting from state action and that resulting from the private acts of individuals, framing the issue before us thusly: "The only real question ... is whether the discrimination results solely from the claimed private action or instead results at least in part from state action which is sufficiently involved to bring the matter within the proscription of the Fourteenth Amendment." (*Mulkey v. Reitman, supra*, 64 Cal.2d at p. 536.) Finding the requisite state action, we concluded: "Here the state has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is encouraged .... Certainly the act of which complaint is made is as much, if not more, the legislative action which authorized private discrimination as it is the final, private act of discrimination itself. ... When the electorate assumes to exercise the lawmaking function, then the electorate is as much a state agency as any of its elected officials." (*Id*. at p. 542.) Amici contend that the repealing portions of Proposition 21 (i.e., §§ 2, 3 and 4) similarly were intended to, and will result in, preserving racial discrimination and ***329** segregation, in this instance in the school systems, and thus that the very passage of Proposition 21 involves the state in racial discrimination.

However, *Mulkey* is actually of no assistance to the amici's argument. The mere fact that the initiative measures in both instances - Proposition 14 in *Mulkey* and Proposition 21 in the case at bench - represent state action proves nothing, since in the instant case, the state, *independent of the passage of Proposition 21*, is involved in education. Indeed in *Mulkey* we noted this critical difference: "[I]n *Jackson v. Pasadena City School Dist*., ... the state, because it had undertaken through school districts to provide educational facilities to the youth of the state, was required to do so in a manner which avoided segregation and unreasonable racial imbalance in its schools." (*Mulkey v. Reitman, supra*, 64 Cal.2d at p. 537.) Proposition 21 by repealing the involvement of the state government in discharging the state's duty not to segregate, neither abrogated the school district's constitutional duty not to segregate nor removed the state from involvement through local school districts in the field of education. There is no problem of state involvement under the Fourteenth Amendment - it is simply a question whether the state involvement shall be solely by the local school districts or shall include involvement by the state government as well.

Amici curiae assert that, prior to the adoption of sections 14020 and 14021 of title 5 of the California Administrative Code and the passage of sections 5002 and 5003, local school districts had been very slow in seeking and achieving racial balance in the school system. As a result of the adoption of these sections and their enforcement in the courts, there was a significantly increased activity directed toward preventing, reducing and eliminating racial imbalance in the schools. It appears clear, amici argue, that the repeal pursuant to Proposition 21 (see fn. 3, *ante*, and accompanying test) of sections 5002 and 5003 will have the effect of retarding, if not reversing, this process of establishing racial balance in the schools of California. Finally, it is urged, the avowed purpose of Proposition 21 was opposition to these sections as a "forced integration measure ... which could only be accomplished through forced busing ... without regard to neighborhood schools or parental consent." (Ballot Pamphlet, argument in favor of Proposition 21, as presented to the voters of the State of

California, General Election (Nov. 7, 1972).)

In one respect the gist of amici's argument is to ask this court to take judicial notice that local school districts fail to fulfill their constitutional obligation to desegregate, and thus to conclude that the passage of ***330** Proposition 21 constituted state involvement in racial discrimination. Even if it were within our province to take such judicial notice, no facts have been presented to us supportive of amici's contention.

In another respect, the essence of the argument is to assert that the policy of the Legislature declared in sections 5002 and 5003 is inherently invulnerable to change through an initiative measure. On the contrary, since racial balance determined according to a precise statutory formula is not a constitutional prerequisite but a matter of state policy, the people of California through the initiative process, have the power to declare state policy. The repealing provisions of Proposition 21 can conceivably be interpreted as an expression by the people of this state of their preference for a "neighborhood school policy." (See *Keyes v. School Dist. No. 1, Denver, Colo., supra*, 413 U.S. at p. 206 [37 L.Ed.2d at p. 562].) We deem it unnecessary to the resolution of the issues now before us to determine precisely what was the intention of the electorate in this respect and accordingly intimate no views on the subject. (2) We merely conclude that since a policy in favor of neighborhood schools is a reasonably conceivable one and since such an expression of policy can in no way limit or affect the constitutional obligations of school districts, the repealing provisions found in sections 2, 3 and 4 cannot be struck down as constitutionally impermissible. It may be that our assessment of the people's desires in this respect is erroneous; if so, constitutional processes are available to the people to reinstate what has been repealed.

We turn now to the second point of the argument, namely that the repealing sections of Proposition 21 (i.e., §§ 2, 3 and 4) cannot be severed from the unconstitutional portion thereof (i.e., § 1 adding § 1009.6 to the Ed. Code) and therefore the proposition in its entirety must fall as unconstitutional.

The rule on severability is set forth in *In re Blaney* (1947) 30 Cal.2d 643, 655 [184 P.2d 892]: "But if the statute is not severable, then the void part taints the remainder and the whole becomes a nullity. It is also true that in considering the issue of severability, it must be recognized that the general presumption of constitutionality, fortified by the express statement of a severability clause, normally calls for sustaining any valid portion of a statute unconstitutional in part. *This is possible and proper where the language of the statute is mechanically severable,* that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words. [Citations.] On the other hand, where there is no possibility of mechanical severance, as where the ***331** language is so broad as to cover subjects within and without the legislative power, and the defect cannot be cured by excising any word or group of words, the problem is quite different and more difficult of solution." (Italics added.) (In accord: *Villa v. Hall* (1971) 6 Cal.3d 227, 236 [98 Cal.Rptr. 460, 490 P.2d 1148]; *Mulkey* v. *Reitman, supra*, 64 Cal.2d 529, 543-544; *In re Portnoy* (1942) 21 Cal.2d 237, 242 [131 P.2d 1]; *In re Bell* (1942) 19 Cal.2d 488, 498 [122 P.2d 22]; *Bacon Service Corporation* v. *Huss* (1926) 199 Cal. 21, 32-33 [248 P. 235]; *McCafferty* v. *Board of Supervisors* (1969) 3 Cal.App.3d 190, 193 [83 Cal.Rptr. 229].)

Proposition 21 contained a severability clause. [FN6] The valid repealing portions can easily and accurately be mechanically severed from the invalid portion enacting section 1009.6. "Although not conclusive, a severability clause normally calls for sustaining the valid part of the enactment, especially when the invalid part is mechanically severable. [Citation.]" (*McCafferty v. Board of Supervisors, supra*, 3 Cal.App.3d at p. 193.) Such a clause plus the ability to mechanically sever the invalid part while normally allowing severability, does not conclusively dictate it. The final determination depends on whether "the remainder ... is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute" (*In re Bell, supra*, 19 Cal.2d 488, 498) or "constitutes a completely operative expression of the legislative intent ... [and] are [not] so connected with the rest of the statute as to be inseparable." (*In re Portnoy, supra*, 21 Cal.2d at p. 242.)

> FN6 "If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable."

Amici curiae merely assert that the various portions of the proposition are clearly inseparable. However, it seems that the valid and invalid portions of the proposition, while subsumed within an overall purpose to eliminate forced integration by busing without regard to the desirability of

maintaining neighborhood schools, reflect separable methods of achieving this purpose. The repealing provisions (the valid part) would eliminate a commitment to achieving racial balance in the schools, leaving local school districts with sole responsibility and without direction other than constitutional mandate; the enactment of section 1009.6 (the invalid part) went further and forced upon the local school districts the neighborhood school concept without forced busing as the only acceptable policy. Even though this restriction of local school ***332** district discretion is unconstitutional and therefore the full purpose of Proposition 21 cannot be realized, it seems eminently reasonable to suppose that those who favor the proposition would be happy to achieve at least some substantial portion of their purpose, namely to eliminate a state commitment to racial balance in the schools regardless of other considerations, and thereby to allow local control subject only to constitutional restriction. (3) Thus, the repealing provisions are not only mechanically severable in that they are physically separate sections of the proposition, but they are also severable as to purpose and method, of independent validity and not inconsistent with the elimination of the invalid part. We hold the repealing portions of Proposition 21 to be severable. We cannot say that these portions must necessarily fall, because we hold section 1009.6 unconstitutional. [FN7]

> FN7 Amici curiae also urge that a different test should be applied to the severability of portions of an initiative measure than the above described test applied to statutes passed by the Legislature. However, in applying settled rules of severability, we can discern no meaningful distinctions between statutes "enacted" by the people and statutes enacted by the Legislature. The cases cited by amici curiae (e.g., *Bennett v. Drullard* (1915) 27 Cal.App. 180 [149 P. 368]; *Alexander v. Mitchell* (1953) 119 Cal.App.2d 816 [260 P.2d 261]) involved the question of severability prior to submission to a vote and also tested severability by the degree of integration between the valid and invalid parts. However, integration is determined by the test set forth by us *supra*.

We therefore conclude that Proposition 21 does not provide an independent basis for sustaining the trial court's intended injunction of the implementation of the Administration Plan since section 1009.6 added to the Education Code by the proposition bars assignment of public school students by race and is therefore unconstitutional and void under the decisional law of the United States Supreme Court and of this court, regardless of the proposition's effective repeal of other sections of the code.

We accordingly proceed to address ourselves to the question whether entry of judgment by the trial court on the third count in accord with its memorandum of intended decision would be an act in excess of its jurisdiction. As we have already stated, the court intended to enjoin implementation of the Administration Plan on two grounds: (1) that the Board had no jurisdiction to close the Garfield and Jefferson Schools because it had failed to include notice of the proposed closure of these schools in its published agenda as required by section 966; (2) that the Board abused its discretion in adopting the Administration Plan which required the closure of the above two schools, when in fact their closure was not reasonably necessary to effective desegregation. ***333**

Section 966 requires a school board to act at meetings open to the public, with certain exceptions relating to personnel and pupil discipline matters, and to post an agenda 48 hours prior to the meeting containing "[a] list of items that will constitute the agenda for all regular meetings." [FN8] In *Carlson* v. *Paradise Unified Sch. Dist.* (1971) 18 Cal.App.3d 196 [95 Cal.Rptr. 650], the court held the provisions of section 966 are mandatory, so that noncompliance therewith by failing to list an item of business on the agenda invalidates the board's action in respect thereto. In *Carlson* the school board's agenda listed as one item "Continuation school site change." The action in fact taken was to move the "continuation school" to the Canyon View school building, to discontinue elementary education at that school, and to transfer the Canyon View elementary pupils to Ponderosa School. The court held that the agenda listing "was entirely inadequate notice to a citizenry which may have been concerned over a school *closure* ... was entirely misleading and inadequate to show the whole scope of the board's intended plans." (*Carlson v. Paradise Unified Sch. Dist., supra*, 18 Cal.App.3d at p. 200.)

> FN8 Section 966 provides in pertinent part: "Except as provided in Section 54957 of the Government Code or in Section 967, all meetings of the governing board of any school district shall be open to the public, and all actions ... shall be taken at such meetings and *shall* be subject to the following requirements: ... (b) A list of items that will constitute the agenda for all regular meetings *shall* be posted at a place where parents and teachers may view the same at least 48 hours prior to the time of said regular meeting ...." (Italics

added.)

In the case at bench, the posted agenda of the meeting of May 18, 1972, contained under the heading "Desegregation/Integration Plans" Item No. 3a which read as set forth in the margin. [FN9] At the meeting, the Board adopted the Administration Plan, which among other things, closed the Jefferson School and discontinued elementary school education at the Garfield School.

FN9 Item 3a headed "Desegregation/Integration Plans" read as follows:

"On February 3, 1972 the Board of Education set the following timetable in regard to a Desegregation/Integration Plan for the Elementary District:

"Thursday, May 4, 1972 - Presentation of plans to the Board
"Thursday, May 18, 1972 - Adoption of a plan by the Board
"September 1972 - Implementation of plan as fully as possible

"It is expected that the Board will take action at the meeting."

The trial court in its memorandum of intended decision concluded: "There was no possible way [the Administration Plan was not written and was not on file] that the public could discern from the posted agenda that the Board was about to consider the closure of two elementary schools, namely, Jefferson and Garfield, as indispensable ingredients of ***334** any desegregation plan. ... Any possible reference to such matters in a published newspaper article would in no event suffice to cure the deficiency. ... The Board did not comply with the provisions of section 966. It therefore lacked jurisdiction to adopt the Administration Plan .... The closure of the Jefferson and Garfield elementary schools is essential to this plan, and invalidates the same."

The Board contends that by listing adoption of a desegregation/integration plan, the posted agenda gave full and adequate notice of a wide range of possible Board actions including possible closure of schools. It is common knowledge that a desegregation/integration plan by its very nature involves a complete reworking of the school system and is likely to involve substantial changes in school attendance patterns, including pupil assignment away from neighborhood schools and busing. Thus, the agenda item gave fair warning to parents of students at any of the elementary schools that the adoption of a plan might result in their children's not attending their neighborhood school, that is Jefferson, Garfield or any other elementary school, as the case might be. The fact that their children might end up attending a different school due to closure of their current school rather than to pupil assignment or school pairing is of little moment. The critical point is that parents were on notice that the Board at its meeting on May 18, 1972, might act in such a way that their children would no longer be able to attend Jefferson or Garfield schools.

This case is therefore clearly distinguishable from *Carlson*. There the item "continuation school site change" would have in no way notified parents of children attending Canyon View Elementary School that their children would be affected by such action and certainly would not have warned them that the school might be closed. It gave fair notice to parents of continuation school students as to impending changes and to people generally concerned about financial expenditures and priorities. However, the item in no way warned Canyon View Elementary School parents that their interests might be vitally affected.

In the case at bench, by contrast, the item concerning the adoption of a "Desegregation/Integration Plan," in our view gives clear notice to parents of students attending Jefferson, Garfield or any other elementary school that their interests might be vitally affected. We do not believe that the agenda item must specify the particular means by which the students involved would be sent to different schools, as for example by pupil assignment, busing, pairing of schools or closure of schools. It ***335** seems to us that all such actions are fairly contained within the comprehensive language of the notice.

Indeed, if the agenda had simply indicated the adoption of a "Desegregation/Integration Plan for the Elementary District," we would entertain no doubt that it would have given adequate notice. However, item 3a on the agenda referred to the sequence of procedures adopted by the Board for formation of an integration plan throughout the year - "Thursday, May 4, 1972 - Presentation of plans to the Board. Thursday, May 18, 1972 - Adoption of a plan by the Board." (See fn. 9, *ante*.) Concerned parents and citizens could reasonably infer from this notice that no new

plans were to be presented on May 18 but rather that the Board would adopt one of the plans presented on May 4. If they had no objection to any of these plans, they might reasonably assume there was no need for them to attend the May 18 meeting.

However, the Administration Plan, which had *not* been presented at the May 4 meeting, differed radically from all the previous plans in many respects, most notably in providing for the closure of the Jefferson and Garfield schools. Parents of Jefferson and Garfield elementary school students had no notice that a plan involving closure of those two schools would be considered on May 18. Consequently we think that the notice by referring to the May 4 presentation of plans was misleading, by indicating that only those plans presented on May 4 would be considered for adoption on May 18. This is substantially confirmed by the very elaborate procedures adopted by the Board and participated in by the community in order to prepare and screen plans for presentation to the Board on May 4.

(4a) Section 966 specifies 48 hours' notice with respect to regular meetings. It is a fair construction of the section that a board cannot change its posted agenda within the 48-hour period next immediately preceding a regular meeting; in other words, if a board wishes to change substantially its agenda within that period, it must postpone a meeting at least 48 hours. Since the Administration Plan had not been presented at the May 4 meeting and since it differed substantially from all the other plans, the Board's decision to consider and act upon it represented a substantial deviation from the posted agenda and therefore required an amendment to the agenda and a postponement of the meeting for such a period of time as to provide no less than 48 hours' notice.

It is true that the Board could have adopted a plan involving the ***336** closure of schools, if it had posted an agenda merely giving general notice of intention to adopt a desegregation/integration plan. However, once the Board posted notice that it would adopt one of the plans theretofore presented at the May 4 meeting, it thereby limited its power to consider any other substantially different plan since otherwise the posted agenda would be fatally misleading. It then became necessary for the Board to amend the posted agenda and reschedule the meeting so as to afford notice for the period of time specified by the statute.

The Board contends that the misleading effect of the notice was cured by newspaper publicity indicating that a new plan was to be presented at the meeting of May 18. Two newspaper articles appeared explaining some of the details of the new plan. Only one of the two articles was released 48 hours or more before the meeting. (5) Moreover, newspaper publicity cannot replace the proper posting of an agenda. Section 966 requires notice by means of an agenda posted at a specified place. The newspaper article had no official status, its contents had not been checked or authorized by the Board, and there was no guaranty that it would have been read by all persons entitled to notice. On the other hand, under the statute all persons were presumed to know when and where the agenda of a meeting was to be posted and were entitled to rely on the contents of such statutory notice without being required to scour all newspapers and other publications for possible changes.

(4b) Accordingly we conclude that the trial court properly determined, albeit for the wrong reason, that the Board had no jurisdiction to consider or approve the Administration Plan due to its noncompliance with section 966. The trial court would therefore not act in excess of its jurisdiction in enjoining the implementation of the Administration Plan, unless and until the plan was adopted by the Board at a meeting preceded by the posting of an accurate and complete agenda as required by section 966.

The trial court, however, went further in its memorandum of intended decision and purported to permanently enjoin implementation of the Administration Plan on the ground that its adoption was an abuse of discretion by the Board since the closure of the two schools was not reasonably necessary to accomplish desegregation. [FN10] (6) The major premise in the trial court's reasoning - that in desegregating a school ***337** system, a school board is limited in the exercise of its powers to those acts reasonably necessary to effectuating desegregation - is utterly without support. The trial court concedes, as indeed it must, that the Board has power to close schools and convert them to other uses. It is, of course true that the Board is not free to exercise this power arbitrarily, but must act reasonably and in accordance with established procedure. "[A] court may not substitute its judgment for that of the administrative board [citation] and if reasonable minds may disagree as to the wisdom of the board's action, its determination must be upheld." (*Manjares v. Newton* (1966) 64 Cal.2d 365, 371 [49 Cal.Rptr. 805, 411 P.2d 901].) We have not found, nor have we been referred to, any authority supportive of the proposition that once a school board undertakes a desegregation/integration plan, its otherwise independent power to close schools becomes

limited to closing only those schools which must reasonably be closed in order to accomplish desegregation. Acceptance of such a proposition would blind school boards to the full realities of the world about them, as for example, by directing in effect that they are powerless to close unsafe schools because desegregation might be effectuated without such closure.

FN10 Plaintiffs also contend that the Board abused its discretion in adopting the Administration Plan because the plan does not meet the requirements of section 5003. Since we have held the repeal of this section valid, this argument must fail.

Indeed the case at bench presents exactly this situation. On August 12, 1971, the Board received a report that the Jefferson school was structurally unsafe within the requirements of section 15503. [FN11] The report recommended that a structural engineer be retained to determine whether the school should be repaired or abandoned, since if it cannot be repaired, it must be abandoned pursuant to section 15516. [FN12] On May 15, 1972, three days before the final meeting of the Board, the superintendent received a report concerning the rehabilitation or replacement costs of the Jefferson school. The report found that it would cost $621,800 to make the existing structure safe and $655,000 to build an entirely new building. Accordingly, in fashioning the Administration Plan, the superintendent made provision therein for closing the Jefferson school. The Board would certainly be properly exercising its discretion in a reasonable manner were it to approve abandoning this building in view ***338** of the extreme cost. The determination of the questions whether a new school was needed to replace this structure or whether existing facilities could handle the Jefferson school students due to an expected drop in elementary enrollment, was properly within the Board's discretion. We do not think that the Board in exercising this discretion was perforce limited to determining the reasonable necessity of replacing the building and thus automatically precluded from determining the necessity of assigning students in order to achieve desegregation.

FN11 Section 15503, added in 1959 as part of the Field Act, requires all school buildings, not constructed pursuant to the Field Act, to be examined by January 1, 1970, in order to determine whether the building is safe for school use according to the standards set forth in the Field Act (§ 15451 et seq.). If a school building is found to be unsafe, the governing board of that school district must prepare an estimate of the cost necessary to make the building safe.

FN12 Section 15516 provides: "No school building examined and found to be unsafe for school use pursuant to Section 15503 and not repaired or reconstructed in accordance with the provisions of this article shall be used as a school building for elementary and secondary school or community college purposes after June 30, 1975."

In 1969 the Board adopted a master plan to guide the development of the school district. Item 6 of that plan provided: "As soon as funds become available in the Elementary District to provide housing at expanded schools elsewhere, that Garfield School be closed and converted to a Special Education Center to provide for certain parts ... of the Special Education program." The superintendent incorporated this provision into his Administration Plan. Absent proof that there were no school facilities to absorb these students or no need for a special education center, [FN13] the Board, in the reasonable exercise of its discretion, could lawfully take this action. The mere fact that this action was part of a desegregation plan did not automatically strip the Board of its otherwise subsisting authority to act in this area, so that the establishment of an education center was contingent upon it being reasonably necessary to accomplish desegregation .

FN13 School boards have the authority to provide special education programs and facilities. (§§ 6500-6742, 6750-6946.)

(7) Since the trial court proposed to so limit the discretion of the Board, it would be substituting its judgment for that of the school board and therefore acting in excess of its jurisdiction. A writ of prohibition is the appropriate remedy where a threatened judgment of the trial court will be in excess of its jurisdiction. (*City & County of S.F.* v. *Superior Court* (1959) 53 Cal.2d 236, 243 [1 Cal.Rptr. 158, 347 P.2d 294]; 5 Witkin, Cal. Procedure (2d ed. 1971) Extraordinary Writs, §§ 36, 39, pp. 3810-3811, 3813.)

As to the instant writ proceeding (L.A. 30054) which is confined to plaintiffs' third cause of action below, we arrive at these final conclusions: (1) That section 1009.6 being unconstitutional and void does not bar the Board's Administration Plan for desegregation; (2) that the Board's power to close schools exists independently of its constitutional obligation to desegregate and is not contingent

upon such closure being ***339** reasonably necessary to effectuate desegregation; (3) that the posted agenda was defective insofar as it related to the closure of the two elementary schools because of the Board's failure to comply with section 966 and that, since said proposed action for closure was an inseparable part of the Administration Plan, the adoption of the plan as a whole was invalid because of such noncompliance; and (4) that in respect to the third count the trial court will not act in excess of its jurisdiction by enjoining the implementation of the Administration Plan upon the basis heretofore set forth by us, namely, for the failure of the Board to comply with section 966 but that in all other respects the intended action of the trial court as set forth in its memorandum of intended decision is in excess of the court's jurisdiction. Nothing herein, of course, shall prevent, or be deemed to prevent, the Board from adopting the Administration Plan at a new meeting held upon proper notice and in compliance with all other legal requirements.

It follows that in L. A. 30054, petitioners (defendants below) are not entitled to a peremptory writ of prohibition restraining respondent court from enjoining the implementation of the Administration Plan for failure of the Board to comply with section 966 but are entitled to such writ restraining the court's intended action in all other respects. (See *Brown v. Superior Court* (1949) 34 Cal.2d 559, 566 [212 P.2d 878]; see 5 Witkin, Cal. Procedure (2d ed. 1971) p. 3933.) The writ shall issue accordingly.

II

We now turn our attention to the appeal before us. (See fn. 2, *ante*.) This is from a judgment entered on the first two causes of action which were not stayed by our alternative writ of prohibition. The central issue here confronting us is whether the Board may lawfully be the common governing Board of both the Santa Barbara (elementary) School District and the Santa Barbara High School District despite the fact that such districts are not coterminous.

We deem it necessary to set forth the facts in some detail. The original Santa Barbara School District, which was organized sometime in the 1870's, comprised all the public schools within the city limits and conducted classes from kindergarten through high school, under the leadership of the school trustees. The initial charter for the City of Santa Barbara, adopted February 20, 1899, created a school department, consisting of all the public schools in the school district, governed by a ***340** five-man board of education. The charter specified the duties and powers of the board of education in great detail and provided that the board succeeded to all the property and rights of the former school trustees.

In 1902 this single geographical school district was divided functionally into two separate districts: the elementary school district (known as the Santa Barbara School District) and the high school district (known as the Santa Barbara High School District), comprising both junior and senior high schools. The two districts were coterminous; their boundaries were the city limits. The single board of education remained responsible for the governing of all the public schools in the school districts, since the charter was not amended following this functional division into two school districts. Upon the adoption of new charters in 1918 and again in 1927, former provisions dealing with the board of education were revised and simplified by replacing the detailed enumeration of the board's duties and powers with an incorporation of provisions set forth in the general laws of the state. Despite these revisions, nevertheless, the new charters retained a *single* board of education invested with control over all schools in that city. [FN14]

FN14 Section 83 of the Charter of the City of Santa Barbara adopted in 1927 provided:"The Board of Education shall consist of five members. ..."

Section 84 provided: "The Board of Education shall have the entire control and management of the public schools in the city of Santa Barbara in accordance with the constitution and general laws of the state and said board is hereby vested with all the powers and charged with all the duties of such control and management."

Sections 55 and 56 of the charter adopted in 1918 contained virtually identical provisions.

Indeed the 1927 charter specified a single board of education even though the two school districts were no longer coterminous themselves or with the city. From 1902 to 1930 while the elementary school districts remained virtually constant in size, incorporating only minor portions of adjacent unincorporated territory, the high school district annexed large portions of adjacent territory and far outstripped the elementary school district in size. By 1930 the pattern of annexations was complete. The high school district was comprised of the original high school district (i.e., coterminous with the city limits and the elementary

school district) plus the geographical area of four additional elementary school districts, Montecito Union School District, Cold Springs School District, Hope School District and Goleta Union School District. These four elementary school districts were annexed solely for the purpose of becoming part of the Santa Barbara High School District. They continued to function as ***341** wholly independent elementary school districts governed by their own elementary school board.

Despite these changes in the composition and size of the elementary and high school districts no change was made in the charter. That instrument continued to direct, as it did upon its adoption in 1927 that there be a single board of education having the entire control and management of all the public schools. In 1939, section 83 of the charter (see fn. 14, *ante*) was amended to provide that the members of the board should serve staggered six-year terms.

No further changes were made in the charter provisions concerning the board of education until a new charter was adopted in 1967. The new charter retained the provision for a single elective board of education, directed that its adoption should not affect boundaries of existing school districts and generally provided that all other requirements should be "as now or hereafter prescribed by the Education Code." [FN15] Despite the changes in language the new charter provisions continued essentially the same educational scheme. The changes appear to correspond with those introduced into the Education Code in 1963, since section 900 of the charter tracks the language of section 1223 of the code. [FN16] Thus, in short the charter directs that there shall be an elective board of education and leaves other requirements to those found in the code.

> FN15 Article IX of the charter headed, Board of Education, provides: "Section 900. State Law Governs. The manner in which, the times at which, and the terms for which the members of the Board of Education shall be elected or appointed, their qualifications, compensation and removal and the number which shall constitute such board shall be as now or hereafter prescribed by the Education Code of the State of California.
>
> "Section 901. Effect of Charter on District. The adoption of this Charter shall not have the effect of creating any new school district nor shall the adoption of this Charter have any effect upon the existence or boundaries of any present school district within the City or of which the City comprises a part."
>
> FN16 Section 1223 of the Education Code provides: "Except as provided in Section 1222, whenever the charter of any city fails to provide for the manner in which, the times at which, or the terms for which the members of the city board of education shall be elected or appointed, for their qualifications, removal, or for the number which shall constitute such board, the provisions of this division shall apply to the matter not provided for."

Section 1224 provides that the members of the board of education shall be elected at large from the territory within the boundaries of the school district or districts under the jurisdiction of the board of education, that for election purposes such territory shall include outside territory annexed to the city for school purposes, and that all qualified electors residing within the full territory shall be eligible to vote for, and ***342** to be a member of, the board of education. [FN17] Therefore all qualified electors residing within the high school district, which is geographically coterminous with the five elementary school districts - the Santa Barbara elementary school district plus the four annexed districts (Montecito, Cold Springs, Hope and Goleta) - are entitled to vote for the city board of education. At the time of trial, there were 80,203 registered voters residing within the high school district, of whom 38, 174 or 47.6 percent resided within the Santa Barbara elementary school district and 42,029 or 52.4 percent resided within the four annexed elementary school districts.

> FN17 Section 1224 provides: "The members of any elective city board of education shall be elected at large from the territory within the boundaries of the school district or districts which are under the jurisdiction of the city board of education, whether sitting as a board of education, high school board, or community college board, and any qualified elector of the territory shall be eligible to be a member of such city board of education.
>
> "When outside territory has been annexed to a city for school purposes it shall be deemed a part of the city for the purpose of holding the general municipal election, and shall form one or more election precincts, as may be determined by the legislative authority of the city. The qualified electors of the annexed territory shall vote only

for the board of education or the board of school trustees."

The four annexed elementary school districts continued to be governed by four separate elementary school boards elected separately by qualified electors residing within each elementary school district. The Santa Barbara elementary school district, however, did not have its own separate elementary school board. Instead, by virtue of the charter provisions and section 1222 of the Education Code incorporated in the charter (see fn. 15, *ante*), the Santa Barbara elementary school district was governed by the city board of education. [FN18] Thus, an elector residing within one of the four annexed districts, for example Montecito, would be entitled to cast two votes - one to elect members to the Montecito Elementary School Board from the residents within that district and one to elect members to the city board of education. An elector residing within the Santa Barbara elementary school district would be entitled to cast only one vote - that one being to elect the city board of education.

FN18 Section 1222 provides: "Whenever the charter of a city comprising in whole or in part an elementary school district, fails to provide for the manner in which, the times at which, and the terms for which the members of the board of education of such city are appointed, and for the number which shall constitute such board, *the governing board of the elementary school district* within which the city is located or with which the city is coterminous *is the board of education of the city*." (Italics added.)

As mentioned earlier, plaintiffs in their first two causes of action challenge the validity of the law permitting the city board of education to govern both the high school and the elementary school districts, despite the fact that the two districts are not coterminous. The first cause of ***343** action alleged that this system unconstitutionally diluted the vote of each registered voter and taxpayer within the elementary school district by over 100 percent by virtue of the votes cast by that portion of the electorate who live outside the Santa Barbara elementary school district. The second cause of action alleged that this system violated the requirements of section 924 that the governing board of an elementary school district shall consist of members elected at large from the territory comprising the elementary school district.

Following trial by the court on these two causes of action, the court made findings of fact, substantially as recited above and concluded in essence that the above voting scheme was unconstitutional as being violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution. We set forth in pertinent part in the margin the court's detailed conclusions. [FN19] ***344**

FN19 "4. Insofar as the Board governs the affairs of the Elementary School District the scheme which permits the votes of 38,174 resident electors to be counted equally with the votes of the 42,029 non-resident electors, who are in no way concerned with the government of the Elementary District, constitutes a clear denial, dilution and debasement of the vote of the resident electors of the Elementary District and a deprivation of their constitutional right to the equal protection of the law.

"

. . . . .

"7. The present dual function of the School Board governing a large high school district and much smaller elementary school district does not serve any governmental purpose, but is rather the result of unplanned, irregular annexations to the High School District.

"

. . . . .

"9. The fact in this case that voters who reside outside the boundaries of the Elementary School District, who exceed in number those who reside within the district, are given the right to vote for the School Board which formulates policy for the district, even though they are in no way subject to such policy and do not contribute any tax support thereto, is contrary to the principle that the government is to be chosen by the governed.

"10. The equal voting strength principle, which underlies the 'one person, one vote' doctrine, applies in this case to the electoral scheme currently employed in the election of members to the governing board of the Santa Barbara Elementary

School District. That principle is violated because the votes of qualified resident electors in the plaintiffs' class are being wrongfully denied, debased and diluted by the votes of non-qualified, non-resident electors in the Elementary District election.

"11. There is no State interest sufficiently compelling to justify the voting scheme described herein. That scheme is unconstitutional. It violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

"

. . . . .

"14. To interpret Section 1224 of the Education Code to sanction the election of a common governing board for two districts whose boundaries are not coterminous, by electing the members of such board at large from the territory of the larger district, which encompasses all of the area of the smaller district plus added territory of the larger district, is to unconstitutionally apply the statute.

"15. Section 1224 of the Education Code must be interpreted to grant common governing powers to an elective city board of education over two or more districts under its jurisdiction only in cases where the boundaries of the governed districts are coterminous. In a case such as here presented, where the boundaries of the districts are not coterminous, Section 1224 may not be so interpreted to grant multiple jurisdiction to such a single elective board."

By way of remedy the court concluded that the Santa Barbara elementary school district must be governed by an independent board of resident electors of the Santa Barbara elementary school district elected at large from the territory within the elementary school district; that the present city board of education should be allowed to continue as the governing board of the high school district; that a new board consisting of five members and governing only the elementary school district should be elected on April 17, 1973, by resident electors within the Santa Barbara elementary school district and take office on July 1, 1973; that the three members with the highest vote should serve until June 30, 1977, and the remaining two members should serve until June 30, 1975, each member of the board thereafter serving a four-year term. Judgment granting a peremptory writ of mandate was entered accordingly. This appeal by defendants followed. [FN20]

FN20 See footnote 2, *ante*, where the procedural history of this appeal as related to the disposition of the third cause of action is explained.

We begin by epitomizing the respective positions of the parties on the appeal. Plaintiffs contend that the method of electing members of the Santa Barbara Board of Education is invalid under the state and federal Constitutions as violative of the "one man, one vote" principle because the votes of *qualified, resident* electors in the elementary school district are debased and diluted by the votes of *nonqualified, nonresident* electors in the elementary district election. Plaintiffs argue that there should be, and the trial court properly ordered, a separate board of education to govern the elementary school district. Defendants, on the other hand, contend that the present method of electing members of the Board complies with applicable state law, that it does not violate the "one man, one vote" rule, and that the trial court's ruling on this issue is in error. (8) As we explain, *infra*, we conclude that there is no constitutional right to a separate, elected elementary board of education, that there is no constitutional infirmity in designating the city board of education, elected from the full territory within its jurisdiction, to govern the lesser, wholly included elementary school district and that the "one man, one vote" principle has no relevancy to this case.

The city board of education is elected. Each qualified elector residing within the high school district, the largest geographical area within the ***345** jurisdiction of the board of education, is eligible to become a member of the board and is entitled to vote in the election. The members are elected at large. Each vote counts equally and is weighted equally. Each qualified elector is governed by the board, subject to the policy adopted by the board, and liable for tax to support the board. It is clear and undeniable that the city board of education is elected in full compliance with the "one man, one vote" principle.

Indeed, as they must, plaintiffs concede the election of the city board of education is valid. However, plaintiffs claim that the election of the city board of education is also an election of the governing board of the Santa Barbara elementary school district and that the *latter* election violates the "one man, one vote" principle because the votes of nonresident electors dilute the votes of the electors

residing in the Santa Barbara elementary school district. There is no basis in law or fact to support this claim. There is a single city board of education which is elected in a single election by qualified resident electors. This single city board of education, by virtue of section 1222, (see fn. 18, *ante*) is the governing board of the Santa Barbara elementary school district. [FN21] The city board of education, which is elected in accordance with section 1224 (see fn. 17 *ante*) is designated by the Legislature in section 1222 to govern the Santa Barbara elementary school district.

FN21 See test accompanying footnotes 15 and 16, *ante*.

Thus, it is abundantly clear that the election of the city board of education is a single election of a single board. The real claim advanced by plaintiffs is that they, the resident voters, taxpayers and parents within the Santa Barbara elementary school district are entitled to be governed by an independent school board, comprised of members who reside within the district and elected solely by voters who reside in the district. The United States Supreme Court has held to the contrary. In *Sailors v. Board of Education* (1966) 387 U.S. 105, 108, 110-111 [18 L.Ed.2d 650, 653, 655, 87 S.Ct. 1549], the high court held that there is no constitutional right to elect members of boards of education: "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election. ... [¶] Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation. At least as respects nonlegislative ***346** officers, a State can appoint local officials or elect them or combine the elective and appointive system as was done here. ... For while there was an election here for the local school board, no constitutional complaint is raised respecting that election. Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy."

The principles announced in *Sailors* were recently applied in California in *O'Keefe v. Atascadero County Sanitation Dist.* (1971) 21 Cal.App.3d 719 [98 Cal.Rptr. 878] to a factual situation so closely analogous to the facts in this case that we regard that case as highly persuasive authority. In *O'Keefe* the residents of the Atascadero sanitation district, which was located in San Luis Obispo County, challenged the procedure by which the directors of the sanitation district were selected. The county is divided into five districts for the purpose of electing the board of supervisors. The sanitation district was located wholly within the boundaries of one of the five supervisorial districts. The population within the sanitation district was approximately 10 percent of the county population. By virtue of state law, the directors of the sanitation district were the board of supervisors. Since the residents of the sanitation district lived wholly within one supervisorial district, they were able to vote for only one director, while the other nonresident voters elected the other four directors of the sanitation district. The sanitation district residents claimed that their votes were diluted and debased by the votes of electors who resided outside the sanitation district but within the county.

The court concluded, however, that the directors of the sanitation district were not elected but designated by the Legislature and that the election of a board of supervisors was a single election of a single board. "The board of directors of a county sanitation district is not elected. Rather, the members of such board are designated in Health and Safety Code section 4730. The composition of the board is determined by the location of the district in relation to other political subdivisions within the county. ... [FN4] [¶] Since the board of directors is not chosen by election, the 'one man, one vote' principle is not applicable .... Appellant argues that the principle nevertheless is applicable under the facts alleged, ***347** because the county board of supervisors is elected [fn. omitted] and the members of the board of directors of the Sanitation District are 'in effect elected once removed.' ... [¶] Under section 4730 the members of the board of directors of a sanitation district are chosen by the Legislature, a method expressly sanctioned in *Sailors*." (*O'Keefe v. Atascadero County Sanitation Dist., supra*, 21 Cal.App.3d at pp. 724-726.)

FN4 "Health and Safety Code section 4730: 'The governing body of a sanitation district is a board of directors of not less than three members. ... If the district includes no territory which is in cities or sanitary districts, then the county board of supervisors is the board of directors of the district."'

As in *O'Keefe*, the members of the governing board of the Santa Barbara elementary school district are designated by the Legislature. The Legislature in section 1222 (see fn. 21, *ante*, and accompanying text) designates the city board

of education to be the governing board of the Santa Barbara elementary school district. This is an entirely proper procedure under *Sailors*. The fact that the city board of education is elected does not somehow constitute an election "once removed" of the governing board of the Santa Barbara elementary school district just as the election of the county board of supervisors did not constitute an election "once removed" of the directors of the sanitation district in *O'Keefe*.

We discern no constitutional infirmity in a system whereby the Legislature designates an elected city board of education to govern a lesser included elementary school district. We hold therefore that the present method of electing members of the Santa Barbara Board of Education is not violative of either the United States Constitution or the California Constitution and is in all respects valid under applicable state law. [FN22]

> FN22 The second cause of action claiming that the system whereby the city board of education is designated to serve as the governing board of the Santa Barbara elementary school district violated the provisions of section 924 has apparently been abandoned, since the trial court made no mention of it and since it has not been urged on appeal. Moreover, section 1222 rather than section 924 controls where a charter city with a city board of education is involved.

In L.A. 30054 let a peremptory writ of prohibition issue in accordance with the views herein expressed.

In L.A. 30086 the judgment is reversed and the cause is remanded to the trial court with direction to enter judgment in favor of defendants on the first and second stated causes of action set forth in plaintiffs' complaint. ***348**

Petitioners shall recover costs in L.A. 30054 and defendants shall recover costs in L.A. 30086.

Wright, C. J., McComb, J., Tobriner, J., Mosk, J., Clark, J., and Burke, J., [FN*] concurred. ***349**

> FN* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

Cal.

Santa Barbara Sch. Dist. v. Superior Court
13 Cal.3d 315, 530 P.2d 605, 118 Cal.Rptr. 637

END OF DOCUMENT

91 Cal.App.4th 1421, 111 Cal.Rptr.2d 374, 156 Ed. Law Rep. 277, 01 Cal. Daily Op. Serv. 7752, 2001 Daily Journal D.A.R. 9537
(Cite as: 91 Cal.App.4th 1421)

MELANIE WELCH, Plaintiff and Respondent,
v.
OAKLAND UNIFIED SCHOOL DISTRICT, Defendant and Appellant.
MARK PETROFSKY, Plaintiff and Respondent,
v.
OAKLAND UNIFIED SCHOOL DISTRICT, Defendant and Appellant.

No. A092262., No. A092270.

Court of Appeal, First District, Division 2, California.
Aug. 3, 2001.

SUMMARY

Two teachers who were dismissed from their teaching position on 15 days' notice of termination filed petitions for a peremptory writ of mandate. The trial court granted the petitions, finding that they were probationary employees entitled to 30 days' prior written notice of dismissal and a hearing under Ed. Code, § 44948.3, subd. (a)). (Superior Court of Alameda County, Nos. 815593-1 and 815548-1, Judith Donna Ford, Judge.)

The Court of Appeal affirmed the judgments. The court held that the school district could not claim that one of the plaintiffs was an intern under Ed. Code, § 44450 et seq., rather than a district intern under Ed. Code, § 44830.3, subd. (a), and therefore not a probationary employee, since the district had accepted funds in exchange for hiring "district interns" including plaintiff. In order to obtain funding from the California Commission on Teacher Credentialing (CTC), the district represented to the CTC that it would employ qualified "district interns" under Ed. Code, § 44325 or 44830.3. Plaintiff was hired as one of these qualified district interns. The court further held that both plaintiffs were probationary employees entitled to 30 days' prior written notice of dismissal and the right to appeal under Ed. Code, § 44948.3, subd. (a)). Opinion by Lambden, J., with Kline, P. J., and Ruvolo, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Schools § 44--Teachers--Dismissal--Notice--Teacher's Status as District Intern.

In proceedings in which a teacher petitioned for a peremptory writ of mandate after she was dismissed from her teaching position on 15 days' notice of termination, the school district could not claim that she was an intern under Ed. Code, § 44450 et seq., rather than a district intern under Ed. Code, § 44830.3, subd. (a), and therefore not a probationary employee entitled to 30 days' prior written notice of dismissal and the right to a hearing under Ed. Code, § 44948.3, subd. (a)). The district had accepted funds in exchange for hiring "district interns" including plaintiff. The California Commission on Teacher Credentialing (CTC) gave the district $1,500 for each intern it employed. In order to obtain this funding, the district represented to the CTC that it would employ qualified "district interns" under Ed. Code, §§ 44325 or 44830.3. Plaintiff was hired as one of these qualified district interns. Since the district not only represented to the CTC that plaintiff was a district intern but also accepted funds based on her being a district intern, it could not claim before the court that she was not a district intern. A court of equity or law does not allow one to take advantage of his or her own fraud, and it will refuse to lend its aid to assist in enforcing a fraudulent imposition upon government, public, or private individuals.

(2) Appellate Review § 144--Scope of Review--Questions of Law and Fact.

The appellate court independently reviews the superior court's legal conclusions about the meaning and effect of statutory provisions. For all factual issues, the appellate court looks to see if substantial evidence supported the order, and the appellate court resolves all conflicts in the relevant evidence against the party appealing and in support of the order.

(3) Statutes § 22--Construction--Reasonableness--Legislative Intent.

In construing a statute, courts employ the fundamental rule that a statute must be given a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mis-

91 Cal.App.4th 1421, 111 Cal.Rptr.2d 374, 156 Ed. Law Rep. 277, 01 Cal. Daily Op. Serv. 7752, 2001 Daily Journal D.A.R. 9537
(Cite as: 91 Cal.App.4th 1421)

chief or absurdity.

(4a, 4b) Schools § 44--Teachers--Dismissal--Notice--Teachers' Status as Probationary Employees.

A school district erred in dismissing two teachers from their teaching position on 15 days' notice of termination, since the teachers were probationary employees entitled to 30 days' prior written notice of dismissal and the right to appeal under Ed. Code, § 44948.3, subd. (a). The teachers were entitled to probationary status pursuant to Ed. Code, § 44885.5, subd. (a), which provides that a probationary employee of the district is any person who is employed as a district intern pursuant to statute and any person who has completed service in the district as a district intern pursuant to certain statutes and is reelected for the next succeeding school year to a position requiring certification qualifications. The statute does not use the phrase "any person" before each of the three requirements. Rather, the phrase is only used twice, which indicates that the statute is setting forth two categories of people, including district interns such as plaintiffs. Supporting this interpretation was a summary of the bill prepared by the Assembly Committee on Ways and Means, which stated that teacher trainees would be probationary employees. Accepting the district's interpretation of Ed. Code, § 44885.5, would not only have required an interpretation of the statute so that it was grammatically incorrect, but also have contravened Ed. Code, § 44920, which specifies that temporary employees are to be hired only if there are long-term vacancies due to a leave of absence.
[See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 205; West's Key Number Digest, Schools k. 133.6(7).]
(5) Statutes § 30--Construction--Language--Plain Meaning Rule--Conformation of Parts.

A statute must be construed in the context of the entire statutory scheme of which it is a part, in order to achieve harmony among its parts. However, it is a prime rule of construction that the legislative intent underlying a statute or statutes must be ascertained from its language; if the language is clear, there can be no room for interpretation, and effect must be given to its plain meaning.

COUNSEL

Roy A. Combs and Raymond W. Hamilton for Defendant and Appellant.

Law Offices of David Weintraub and David Weintraub for Plaintiff and Respondent.

LAMBDEN, J.

Melanie Welch (Welch) and Mark Petrofsky (Petrofsky) separately filed petitions for peremptory writ of mandate after they were dismissed from their teaching positions with the Oakland Unified School District (District) on a 15 days' notice of termination. The trial court granted the petitions, finding that they were probationary employees entitled to 30 ***1424** days' notice and a right to hearing under Education Code section 44948.3, subdivision (a). [FN1]

FN1 All further unspecified code sections refer to the Education Code.

The District appealed, and we consolidated both appeals. The District contends that Welch was an "intern," not a "district intern," and therefore she was a temporary rather than a probationary employee. Further, the District asserts that subdivision (a) of section 44885.5 requires at least a year of service for probationary status. Since it terminated the employment of Welch and Petrofsky prior to the completion of their first year of service, they were temporary employees. We are unpersuaded by the District's argument.

Background

Welch

In August 1998, the District offered Welch a teaching position; she was to start teaching on September 3, 1998. Welch was a participant in the Partnership Program at California State University, Hayward (CSUH), an approved program of teacher preparation under section 44830.3.

On September 17, 1998, the District initiated, on behalf of Welch, the application for an internship multiple subject teaching credential. CSUH verified her eligibility and forwarded her application to the California Commission on Teacher Credentialing (CTC). She received her credential effective from September 1, 1998, until October 1, 2000.

A little less than a month later, on October 7, 1998, Welch signed an employment contract with the District, which covered the 1998-1999 school year.

The contract was entitled "Teacher's Temporary Employment Contract," and it specified that either party could terminate the contract by giving 15 days' notice.

Welch began teaching at Calvin Simmons Middle School, but she was soon transferred to Lowell Middle School (Lowell). Welch asserts that on her first day at Lowell, on October 23, the principal asked her if she was a Christian and he informed her that the culture at the school was Christian. He told her that she would "not fit in if Jesus talking bothered [her]." A few days later the principal told her that he had spoken to his congregation about her and that his congregation and he had prayed for her because she is an atheist. The principal, however, denied this account. He said that he had told her that he had "prayed" for a math teacher, and she responded with, "Don't ***1425** pray for me, I am an atheist." When she proceeded to elaborate on the reasons for her being an atheist, he told her that this was not an issue at the school; the only issue was that the school needed a math teacher.

Subsequently, Welch alleges that a student disrupted her classroom and, in another incident, this same student attempted to attack her. She also stated that a parent burst into her classroom and threatened her. She met with the principal about filing a complaint but, according to Welch, he admonished her that if she complained about school safety he would "have 20 kids say [she] hit and kicked them." [FN2] Welch did file a complaint on October 30, 1998, with Laura Johnson (Johnson), Director of Middle Schools.

FN2 The principal denied ever making this statement.

A letter dated November 2, 1998, from the District notified Welch that it had placed her on administrative leave with pay effective November 2, 1998. The letter stated that it was investigating allegations of her erratic behavior, including hitting and kicking children at Lowell. The principal had received complaints from students and concerns from staff about Welch's behavior and he sent a memorandum to Johnson detailing the incidents reported to him.

By letter dated February 2, 1999, the District informed Welch that the District had decided to release her from her employment contract, and it would pay her through February 26, 1999. Welch filed a petition for peremptory writ of mandate on August 9, 1999. [FN3]

FN3 Subsequently, she filed an amended petition for peremptory writ of mandate.

Petrofsky

The District hired Petrofsky to teach during the 1998-1999 school year with his service to begin on September 3, 1998, and conclude on June 18, 1999. The contract contained the same essential terms and had the same title as the one signed by Welch.

Petrofsky had participated in Project Pipeline, an "approved" program of teacher preparation under section 44830.3. The District initiated an application for an internship teaching certificate on Petrofsky's behalf by sending all documents and fees to the CTC. Thus, Petrofsky obtained a district intern certificate effective from September 3, 1998, to October 1, 2000.

Due to allegations that Petrofsky used profanity and racially derogatory remarks to students, the District sent him a letter dated February 17, 1999, stating that he was being placed on administrative leave. By letter dated ***1426** February 24, 1999, the District notified Petrofsky that he was being released from his employment contract with the District and that he would be paid through March 16, 1999.

On August 4, 1999, Petrofsky filed a petition for peremptory writ of mandate. [FN4]

FN4 Petrofsky filed an amended petition on November 2, 1999.

Court Order

The court held a hearing on both petitions on the same date, and granted both petitions. The court found that Welch and Petrofsky had an internship credential making them district interns with rights related to dismissal from employment pursuant to sections 44830.3 and 44948.3. The court further found that a district intern is a probationary employee, and the termination of the teachers' employment on fewer than 30 days' notice and without an opportunity to appeal violated the Education Code. The court found the employment contract "to be an impermissible attempt to abrogate the mandatory duty of the [District] under the Education Code."

The District, the court ordered, must provide

91 Cal.App.4th 1421, 111 Cal.Rptr.2d 374, 156 Ed. Law Rep. 277, 01 Cal. Daily Op. Serv. 7752, 2001 Daily Journal D.A.R. 9537
(Cite as: 91 Cal.App.4th 1421)

Welch and Petrofsky all dismissal procedure rights under section 44948.3. The court also ordered backpay and benefits from the dates of dismissal. The court refused to award Welch and Petrofsky attorney fees pursuant to section 44944.

The District filed timely notices of appeal, and we consolidated both appeals.

Discussion

(1a) Pursuant to their employment contracts with the District, the District provided Welch and Petrofsky with a 15-day notice of the termination of their contracts. However, under section 44948.3, subdivision (a), the District must provide 30 days' prior written notice of dismissal and give the employee an opportunity to request a hearing if the employee is probationary. It is undisputed that the District did not provide either of them with 30 days' notice, nor did it give them an opportunity to appeal the termination. Under section 44948.3, subdivision (c), the statute's mandatory requirements regarding notice and the right to appeal only apply to probationary employees.

The District contends that it did not have to comply with the mandates of subdivision (a) of section 44948.3, because Welch was an intern hired under ***1427** the Teacher Education Internship Act of 1967 (§ 44450) and therefore a temporary employee under section 44920. In addition, even if she were a district intern, she did not have probationary status under section 44885.5, because she only had one year of employment. Petrofsky, the District concedes, was a district intern, but he, too, was a temporary employee because he had not completed a year of service. The trial court, according to the District, erred when it ruled that both Welch and Petrofsky were probationary employees entitled to the protections of section 44948.3, subdivision (a).

The District asserts that we should review de novo the trial court's statutory interpretation (*Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, 391-392 [20 Cal.Rptr.2d 164]). Welch and Petrofsky disagree and state that we must presume that the trial court ruled correctly (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [86 Cal.Rptr. 65, 468 P.2d 193]) and that the evidence and findings support the judgment (*Kompf v. Morrison* (1946) 73 Cal.App.2d 284, 286 [166 P.2d 350]). (2) In fact, we independently review the superior court's legal conclusions about the meaning and effect of statutory provisions (see, e.g., *Greenwood Addition Homeowners Assn. v. City of San Marino* (1993) 14 Cal.App.4th 1360, 1367 [18 Cal.Rptr.2d 350]; *Burden v. Snowden* (1992) 2 Cal.4th 556, 562 [7 Cal.Rptr.2d 531, 828 P.2d 672]), but for all factual issues we look to see if substantial evidence supported the order and we resolve all conflicts in the relevant evidence against the party appealing and in support of the order (see, e.g., *Wolfe v. City of Alexandria* (1990) 217 Cal.App.3d 541, 546 [265 Cal.Rptr. 881]).

A. *District Intern Under Section 44830.3, Subdivision (a)*

(1b) The District concedes that Petrofsky was a district intern pursuant to section 44830.3, subdivision (a), [FN5] but it asserts that Welch was not. It acknowledges that Welch had an internship multiple subject teaching credential issued by the CTC, but it asserts that this intern certificate is not the same as a "district intern certificate." The former is issued, according to the District, under the Teacher Education Internship Act of 1967 (§ 44450 et seq.), while the latter is issued pursuant to section 44830.3.

> FN5 Initially the District claimed that Petrofsky was not a district intern pursuant to section 44830.3.

Section 44830.3, subdivision (a) provides in relevant part: "The governing board of any school district that maintains kindergarten or grades 1 to 12, inclusive, ... may, in consultation with an accredited institution of higher education offering an approved program of pedagogical teacher preparation, ***1428** employ persons authorized by the Commission on Teacher Credentialing to provide service as district interns to provide instruction to pupils in those grades or classes as a classroom teacher...."

It is undisputed that CSUH had an approved teacher program pursuant to section 44830.3, subdivision (a), and both the District and the university jointly applied to the CTC for a credential for Welch. Still, the District asserts that she was not a district intern pursuant to this section; rather, she was an intern pursuant to section 44450 et seq. (The purpose of the internship programs under the Teacher Education Internship Act of 1967 is to enhance the preparation of teachers so that their learning combines theory and practice.) [FN6] (3) In determining the proper classifica-

tion under the statute, we employ the fundamental rule of statutory construction that a statute "must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." (*DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 17-18 [194 Cal.Rptr. 722].)

> FN6 Section 44451 provides: "The intent of the Legislature in enacting this article is to increase the effectiveness of teachers and other professional school service personnel in the public schools of California by placing theory and practice as closely together as possible in college and university programs for the preparation of teachers and professional school service personnel. The Teacher Education Internship Act of 1967 is enacted to encourage the development and maintenance of preparation programs that are realistic and practical in content and theory and are directly related to the individual functions and responsibilities practitioners in the public schools of California face. The desirability of joining theory and practice during the learning period has been demonstrated amply in teaching internship programs during the past several years both within and without the state."

(1c) The record indicates that not only did the District fail to advocate this technical distinction between "intern" and "district intern" in the past, it accepted money in exchange for hiring what it referred to as "district interns." In the declaration of Michael D. McKibbin (McKibbin), Project Officer of the Alternative Certification Division of CTC, he states that he was involved in the drafting, negotiating and enforcement of legislation, as well as supervising the financing of intern programs in California. He reported that the District received funding in the 1998-1999 school year for "district interns" it employed from its partnership program with CSUH. The CTC gave the District $1,500 for each intern it employed. In order to obtain this funding, the District represented to the CTC that it would employ qualified "district interns" under sections 44325 and/or 44830.3. Welch was hired as one of these qualified "district interns." Further, McKibbin stated that CTC issued Welch an internship multiple subject teaching credential effective September 3, 1998, based on the representations and recommendations of the District and CSUH. ***1429**

Because the District not only represented to the CTC that Welch was a district intern but also accepted funds based on her being a district intern pursuant to sections 44830.3 and/or 44325, its current position that she is not a district intern will not be entertained by this court. Giving any consideration to the District's argument would contravene one of the maxims of jurisprudence that "[n]o one can take advantage of his own wrong" (Civ. Code, § 3517). "A court of equity [or law] does not allow one to take advantage of his own fraud and will refuse to lend its aid to assist in enforcing a fraudulent imposition upon government, public, or private individuals." (*Bowman v. Bowman* (1932) 125 Cal.App. 602, 612 [13 P.2d 1049].) Since the District accepted funds on the condition that Welch was a district intern, equity dictates that it cannot now complain that she was really just an "intern" and therefore not entitled to probationary status.

B. *Section 44885.5*

(4a) The District asserts that even if Welch and Petrofsky were district interns they were not entitled to probationary status under section 44885.5, subdivision (a). This provision reads as follows: "Any school district shall classify as a probationary employee of the district any person who is employed as a district intern pursuant to Section 44830.3 and any person who has completed service in the district as a district intern pursuant to subdivision (b) of Section 44325 and Section 44830.3 and is reelected for the next succeeding school year to a position requiring certification qualifications. [¶] The governing board may dismiss or suspend employees classified as probationary employees pursuant to this subdivision in accordance with the procedures specified in Section 44948 or 44948.3 as applicable." (§ 44885.5, subd. (a).)

The District maintains that under section 44885.5 an employee is classified as probationary only if the person satisfies each of the following three criteria: The person must be a district intern, must have completed service in the district as a district intern pursuant to sections 44325 and 44830.3, and must have been reelected for the next succeeding school year. This interpretation, according to the District, comports

with the clear and unambiguous language of the statute and therefore statutory construction is not necessary (*Standon Co. v. Superior Court* (1990) 225 Cal.App.3d 898, 904 [275 Cal.Rptr. 833]).

The trial court did not interpret section 44885.5 in the manner advocated by the District. It pointed out that proper construction of the statute requires the court to consider the language of subdivision (a) in conjunction with that of subdivision (b). Subdivision (b) of section 44885.5 provides: "Every ***1430** certificated employee, who has completed service as a district intern pursuant to subdivision (b) of Section 44325 and pursuant to Section 44830.3 and who is further reelected and employed during the succeeding school year as described in subdivision (a) shall, upon reelection for the next succeeding school year, to a position requiring certification qualifications, be classified as and become a permanent employee of the district...."

The trial court concluded that subdivision (a) of section 44885.5 did not require the district intern to satisfy all three of the criteria set forth, but rather it contemplated two categories of district interns. The statute specifies that a probationary employee is "any person who is employed as a district intern pursuant to Section 44830.3 and any person who has completed service in the district as a district intern pursuant to subdivision (b) of Section 44325 [district intern certificate shall be valid for a period of two years] and Section 44830.3 ...." [FN7] (§ 44885.5, subd. (a).) The language "any person" indicates that those hired as district interns comprise the first category, while individuals who have completed a district internship but are still not permanent constitute the second. Thus, the second clause of subsection (a) protects the probationary status of the second category during the third year of employment when permanent status is unattainable. Indeed, subdivision (b) of this provision substantiates this construction, because it points out that the district intern whose internship is completed after two years will not become classified as permanent until the fourth year.

> FN7 Section 44325, subdivision (b) provides: "Each district intern certificate shall be valid for a period of two years. However, a certificate may be valid for three years if the intern is participating in a program that leads to the attainment of a specialist credential to teach pupils with mild and moderate disabilities, or four years if the intern is participating in a program that leads to the attainment of both a multiple subject or single subject teaching credential and a specialist credential to teach pupils with mild and moderate disabilities. Upon the recommendation of the school district, the commission may grant a one-year extension of the district intern certificate."

The District responds that the statute uses the word "and"; if the Legislature contemplated two categories of district interns it would have used the word "or." It asserts that "[c]ommon sense indicates that the Legislature is well aware of the difference between the word 'and' and the word 'or', since it commonly uses them throughout the Education [Code]. Indeed, common sense indicates that the Legislature specifically chose to use conjunctive language rather than disjunctive language to express its clear intent." (Fn. omitted.)

(5) In considering how to interpret this statute, we follow the wellestablished rules regarding statute construction. " ' " 'A statute must be construed "in the context of the entire statutory [scheme] of which it is a ***1431** part, in order to achieve harmony among [its] parts." [Citation.]' " ' " (*O'Brien v. Dudenhoeffer* (1993) 16 Cal.App.4th 327, 332 [19 Cal.Rptr.2d 826].) However, " ' "[i]t is a prime rule of construction that the legislative intent underlying a statute [or statutes] must be ascertained from its language; if the language is clear, there can be no room for interpretation, and effect must be given to its plain meaning. [Citation.] " ' " (*Ibid.*)

(4b) Here, the District argues that the use of the word "and" in the statute makes it clear that the Legislature was requiring a district intern to satisfy all three of the criteria preceded by the word "and" before attaining probationary status. The District, however, ignores the fact that the statute does not use the phrase "any person" before each alleged "requirement." Rather, the phrase is only used twice, which indicates that the statute is setting forth two categories of people. Indeed, the construction proposed by the District would make the statute grammatically incorrect, since it would violate the rule of parallel construction.

The District also argues that policy supports its

interpretation because it would only create a probationary classification when an intern enters the second or third year of employment. The Education Code specifically acknowledges that teachers may be hired on a temporary basis (see § 44920).

However, as Welch and Petrofsky point out, there is much more compelling evidence that policy supports interpreting the statute as conferring probationary status on all district interns. The Assembly Committee on Ways and Means prepared a "Summary" of Senate Bill No. 813 (1983-1984 Reg. Sess.), which states in pertinent part: "[Teacher] trainees would be probationary employees. The Commission on Teacher Credentialing would grant trainee certificates, individualized plans for professional development would be required, and after 2 years of successful teaching a district governing board could recommend such a teacher for a credential."

In addition, section 44920 specifies that temporary employees are only to be hired if there are long-term vacancies due to a teacher's leave of absence. It provides in relevant part: "The employment of [temporary employees] shall be based upon the need for additional certificated employees during a particular semester or year because a certificated employee has been granted leave for a semester or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board." (§ 44920.)

The District counters that section 44920 is irrelevant because the record is devoid of any facts related to whether the hiring of Welch and Petrofsky ***1432** complied with the mandates of this provision. We conclude, however, that this statute is relevant to the question of whether we should accept the District's argument that all first-year district interns have temporary status. Accepting the District's interpretation of section 44885.5 would not only require us to interpret the statute so that it is grammatically incorrect but also would result in an interpretation that would flout the mandates of section 44920. Accordingly, we reject the District's proposed construction.

We agree with the trial court that the employment contracts drafted by the District providing for termination on 15 days' notice to either party resulted in "an impermissible attempt to abrogate the mandatory duty of the [District] under the Education Code." Accordingly, we hold that Welch and Petrofsky had probationary status and terminating their employment on fewer than 30 days' notice and without any opportunity to appeal violated the District's duty under section 44948.3, subdivision (a).

Disposition

We affirm the judgments. Welch and Petrofsky are awarded costs.

Kline, P. J., and Ruvolo, J., concurred. ***1433**

Cal.App.1.Dist.
Welch v. Oakland Unified School Dist.
91 Cal.App.4th 1421, 111 Cal.Rptr.2d 374, 156 Ed. Law Rep. 277, 01 Cal. Daily Op. Serv. 7752, 2001 Daily Journal D.A.R. 9537

END OF DOCUMENT

Supreme Court of the United States
Wendy WYGANT, et al., Petitioners
v.
JACKSON BOARD OF EDUCATION, etc., et al.

No. 84-1340.
Argued Nov. 6, 1985.
Decided May 19, 1986.
Rehearing Denied June 30, 1986.
See 478 U.S. 1014, 106 S.Ct. 3320.

Nonminority school teachers brought action against school board and its members challenging validity of provision in collective bargaining agreement under which board extended preferential protection against layoffs to some minority employees. The United States District Court for the Eastern District of Michigan, Charles W. Joiner, J., 546 F.Supp. 1195, upheld validity of the preference, and school teachers appealed. The Court of Appeals for the Sixth Circuit, George Clifton Edwards, Jr., Circuit Judge, 746 F.2d 1152, affirmed. Certiorari was granted. The Supreme Court, Justice Powell, for the plurality, held that school board's policy of extending preferential protection against layoffs to some employees because of their race violated the Fourteenth Amendment.

Reversed.

Justice O'Connor filed an opinion concurring in part and concurring in the judgment.

Justice White filed an opinion concurring in the judgment.

Justice Marshall filed a dissenting opinion in which Justices Brennan and Blackmun joined.

Justice Stevens filed a dissenting opinion.

West Headnotes

[1] Constitutional Law 92 3278(1)

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3275 Education
92k3278 Public Elementary and Secondary Education
92k3278(1) k. In General. Most Cited Cases
(Formerly 92k220(1))

Decisions by faculties and administrators of public schools based on race or ethnic origin are reviewable under Fourteenth Amendment. (Per Justice Powell, with the Chief Justice and two Justices concurring and one Justice concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[2] Constitutional Law 92 3078

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes
92k3078 k. Race, National Origin, or Ethnicity. Most Cited Cases
(Formerly 92k215)

There are two prongs to examination of classifications based on race: first, any racial classification must be justified by compelling governmental interest and, second, means chosen by state to effectuate its purpose must be narrowly tailored to achievement of that goal. (Per Justice Powell, with the Chief Justice and two Justices concurring and one Justice concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 3252

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3252 k. Affirmative Action in Gen-

eral. Most Cited Cases
(Formerly 92k215)

Societal discrimination alone is not sufficient to justify racial classification; rather, some showing of prior discrimination by governmental unit involved is required before limited use of racial classifications is allowed in order to remedy discrimination. (Per Justice Powell, with the Chief Justice and two Justices concurring and one Justice concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 3278(6)

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3275 Education
92k3278 Public Elementary and Secondary Education
92k3278(6) k. Employees. Most Cited Cases
(Formerly 92k220(7), 345k147.2(1))

Schools 345 147.10

345 Schools
345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.8 Grounds for Adverse Action
345k147.10 k. Abolition of Position; Reduction in Staff. Most Cited Cases
(Formerly 345k141(1))

School board's policy of extending preferential protection against layoffs to some employees because of their race could not be justified by school board's interest in providing minority role models for its minority students. (Per Justice Powell, with the Chief Justice and two Justices concurring and one Justice concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 3252

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3252 k. Affirmative Action in General. Most Cited Cases
(Formerly 92k219.1)

Public employers must ensure that, before they embark on affirmative action program, they have convincing evidence that remedial action is warranted; that is, they must have sufficient evidence to justify conclusion that there has been prior discrimination. (Per Justice Powell, with the Chief Justice and two Justices concurring and one Justice concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[6] Constitutional Law 92 3278(6)

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)8 Race, National Origin, or Ethnicity
92k3275 Education
92k3278 Public Elementary and Secondary Education
92k3278(6) k. Employees. Most Cited Cases
(Formerly 92k220(7))

Schools 345 63(1)

345 Schools
345II Public Schools
345II(C) Government, Officers, and District Meetings
345k63 District and Other Local Officers
345k63(1) k. Appointment, Qualification, and Tenure. Most Cited Cases

Schools 345 147.10

345 Schools
345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.8 Grounds for Adverse Action
345k147.10 k. Abolition of Position; Reduction in Staff. Most Cited Cases
(Formerly 345k141(1), 345k147.2(1))

School board's policy of extending preferential protection against layoffs to some of its employees because of their race was not permissible method of remedying present effects of past discrimination where the plan was not sufficiently narrowly tailored in that other, less intrusive means of accomplishing similar purposes, such as adoption of hiring goals, were available. (Per Justice Powell, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14.

*****1843 *267** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

The collective-bargaining agreement between respondent Board of Education (Board) and a teachers' union provided that if it became necessary to lay off teachers, those with the most seniority would be retained, except that at no time would there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. After this layoff provision was upheld in litigation arising from the Board's noncompliance with the provision, the Board adhered to it, with the result that, during certain school years, nonminority teachers were laid off, while minority teachers with less seniority were retained. Petitioners, displaced nonminority teachers, brought suit in Federal District Court, alleging violations of the Equal Protection Clause and certain federal and state statutes. Dismissing the suit on ****1844** cross-motions for summary judgment, the District Court upheld the constitutionality of the layoff provision, holding that the racial preferences granted by the Board need not be grounded on a finding of prior discrimination but were permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing "role models" for minority schoolchildren. The Court of Appeals affirmed.

Held: The judgment is reversed.

746 F.2d 1152, (CA6 1984), reversed.

Justice POWELL, joined by THE CHIEF JUSTICE, Justice REHNQUIST, and Justice O'CONNOR, concluded that the layoff provision violates the Equal Protection Clause. Pp. 1847-1848.

(a) In the context of affirmative action, racial classifications must be justified by a compelling state purpose, and the means chosen by the State to effectuate that purpose must be narrowly tailored. Pp. 1848-1849.

(b) Societal discrimination alone is insufficient to justify a racial classification. Rather, there must be convincing evidence of prior discrimination by the governmental unit involved before allowing limited use of racial classifications to remedy such discrimination. The "role model" theory employed by the District Court would allow the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose. Moreover, it does not ***268** bear any relationship to the harm caused by prior discriminatory hiring practices. Societal discrimination, without more, is too amorphous a basis for finding race-conscious state action and for imposing a racially classified remedy. Pp. 1847-1848.

(c) If the purpose of the layoff provision was to remedy prior discrimination as the Board claims, such purpose to be constitutionally valid would require the District Court to make a factual determination that the Board had a strong basis in evidence for its conclusion that remedial action was necessary. No such finding has ever been made. Pp. 1848.

Justice POWELL, joined by THE CHIEF JUSTICE and Justice REHNQUIST, concluded that as a means of accomplishing purposes that otherwise may be legitimate, the layoff provision is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes-such as the adoption of hiring goals-are available. Pp. 1848-1850.

Justice WHITE concluded that respondent Board of Education's layoff policy has the same effect and is equally violative of the Equal Protection Clause as integrating a work force by discharging whites and hiring blacks until the latter comprise a suitable percentage of the work force. P. 1857.

Justice O'CONNOR concluded that the layoff provision is not "narrowly tailored" to achieve its asserted remedial purpose because it acts to maintain levels of minority hiring set by a hiring goal that has no relation to the remedying of employment discrimination. Pp. 1856-1857.

POWELL, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C.J., and REHNQUIST, J., joined, and in all but Part IV of which O'CONNOR, J., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. ---. WHITE, J., filed an opinion concurring in the judgment, *post,* p. ---. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post,* p. ---. STEVENS, J., filed a dissenting opinion, *post,* p. ---.
K. Preston Oade, Jr., argued the cause for petitioners. With him on the briefs were *Constance E. Brooks* and *Thomas Rasmussen.*

Jerome A. Susskind argued the cause and filed a brief for respondents.*

* Briefs of *amici curiae* urging reversal were filed for the United States by *Acting Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Assistant Attorney General Cooper, Samuel A. Alito, Jr., Walter W. Barnett,* and *David K. Flynn;* for the American Federation of Teachers, AFL-CIO, by *Bruce A. Miller* and *Stuart M. Israel;* for the Anti-Defamation League of B'nai B'rith by *Robert A. Helman, Michele Odorizzi, Daniel M. Harris, Justin J. Finger, Meyer Eisenberg,* and *Jeffrey P. Sinensky;* for Local 36, International Association of Firefighters, AFL-CIO, et al. by *George H. Cohen;* for the Mid-America Legal Foundation by *John M. Cannon, Susan W. Wanat,* and *Ann Plunkett Sheldon;* and for the Pacific Legal Foundation by *Ronald A. Zumbrum* and *John H. Findley.*

Briefs of *amici curiae* urging affirmance were filed for the State of Minnesota et al. by *Hubert H. Humphrey III,* Attorney General of Minnesota, *John R. Tunheim,* Assistant Attorney General, and *Peter M. Ackerberg* and *Jean Boler,* Special Assistant Attorneys General, *John K. Van de Kamp,* Attorney General of California, *William J. Guste, Jr.,* Attorney General of Louisiana, *Robert M. Spire,* Attorney General of Nebraska, *Paul Bardacke,* Attorney General of New Mexico, and *Bronson C. La Follette,* Attorney General of Wisconsin; for the Affirmative Action Coordinating Center et al. by *Jeanny Mirer, Jules Lobel, Frank E. Deale,* and *Anne Simon;* for the Congressional Coalition by *Morgan D. Hodgson, Richard Ruda,* and *Linda C. Kauskay;* for the Greater Boston Civil Rights Coalition by *John Reinstein, Marjorie Heins,* and *Mark A. Michelson;* for the Jackson Education Association by *James A. White;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Walter A. Smith, Jr., R. Claire Guthrie, James Robertson, Harold R. Tyler, Jr., Norman Redlich, Thomas D. Barr, William L. Robinson, Richard T. Seymour, Norman J. Chachkin, Robert Allen Sedler,* and *Burt Neuborne;* for the Mexican American Legal Defense and Educational Fund by *Allen M. Katz, Antonia Hernandez,* and *John E. Huerta;* for the Michigan Civil Rights Commission et al. by *Frank J. Kelley,* Attorney General of Michigan, *Louis J. Caruso,* Solicitor General, and *Felix E. League, Howard E. Golberg,* and *Dianne Rubin,* Assistant Attorneys General; for the National Association for the Advancement of Colored People by *Grover G. Hankins;* for the NAACP Legal Defense and Educational Fund, Inc., by *Julius LeVonne Chambers, Ronald L. Ellis,* and *Eric Schnapper;* for the National Education Association et al. by *Robert H. Chanin;* and for the National School Boards Association by *Gwendolyn H. Gregory, August W. Steinhilber,* and *Thomas A. Shannon.*

Briefs of *amici curiae* were filed for the city of Detroit by *Daniel B. Edelman;* for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell,* and *Thomas R. Bagby;* for the Michigan State Police Troopers Association, Inc., by *Donald L. Reisig* and *Lawrence P. Schneider;* and for the National Board, YMCA of the USA, et al. by *Judith Lichtman.*

***269** Justice POWELL announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and Justice REHNQUIST joins, and in all but Part IV of which Justice O'CONNOR joins.

This case presents the question whether a school board, consistent with the Equal ****1845** Protection Clause, may extend ***270** preferential protection against layoffs to some of its employees because of their race or national origin.

I

In 1972 the Jackson Board of Education, because

of racial tension in the community that extended to its schools, considered adding a layoff provision to the Collective Bargaining Agreement (CBA) between the Board and the Jackson Education Association (Union) that would protect employees who were members of certain minority groups against layoffs.[FN1] The Board and the Union eventually approved a new provision, Article XII of the CBA, covering layoffs. It stated:

> FN1. Prior to bargaining on this subject, the Minority Affairs Office of the Jackson Public Schools sent a questionnaire to all teachers, soliciting their views as to a layoff policy. The questionnaire proposed two alternatives: continuation of the existing straight seniority system, or a freeze of minority layoffs to ensure retention of minority teachers in exact proportion to the minority student population. Ninety-six percent of the teachers who responded to the questionnaire expressed a preference for the straight seniority system.

"In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions***271** for which he is certificated maintaining the above minority balance." App. 13.[FN2]

> FN2. Article VII of the CBA defined "minority group personnel" as "those employees who are Black, American Indian, Oriental, or of Spanish descendancy." App. 15.

When layoffs became necessary in 1974, it was evident that adherence to the CBA would result in the layoff of tenured nonminority teachers while minority teachers on probationary status were retained. Rather than complying with Article XII, the Board retained the tenured teachers and laid off probationary minority teachers, thus failing to maintain the percentage of minority personnel that existed at the time of the layoff. The Union, together with two minority teachers who had been laid off, brought suit in federal court, *id.*, at 30 (*Jackson Education Assn. v. Board of Education (Jackson I)* (mem. op.)), claiming that the Board's failure to adhere to the layoff provision violated the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964. They also urged the District Court to take pendent jurisdiction over state-law contract claims. In its answer the Board denied any prior employment discrimination and argued that the layoff provision conflicted with the Michigan Teacher Tenure Act. App. 33. Following trial, the District Court *sua sponte* concluded that it lacked jurisdiction over the case, in part because there was insufficient evidence to support the plaintiffs' claim that the Board had engaged in discriminatory hiring practices prior to 1972, *id.*, at 35-37, and in part because the plaintiffs had not fulfilled the jurisdictional prerequisite to a Title VII claim by filing discrimination charges with the Equal Employment Opportunity Commission. After dismissing the federal claims, the District Court declined to exercise pendent jurisdiction over the state-law contract claims.

Rather than taking an appeal, the plaintiffs instituted a suit in state court, *Jackson Education Assn. v. Board of* ***272** *Education*, No. 77-011484CZ (Jackson Cty.Cir.Ct.1979) (*Jackson II*), raising in essence the same claims that had been raised in *Jackson I.* In entering judgment for the plaintiffs, the state court found that the Board had breached its contract with the plaintiffs, and that Article XII did not violate****1846** the Michigan Teacher Tenure Act. In rejecting the Board's argument that the layoff provision violated the Civil Rights Act of 1964, the state court found that it "ha[d] not been established that the board had discriminated against minorities in its hiring practices. The minority representation on the faculty was the result of societal racial discrimination." App. 43. The state court also found that "[t]here is no history of overt past discrimination by the parties to this contract." *Id.*, at 49. Nevertheless, the court held that Article XII was permissible, despite its discriminatory effect on nonminority teachers, as an attempt to remedy the effects of societal discrimination.

After *Jackson II*, the Board adhered to Article XII. As a result, during the 1976-1977 and 1981-1982 school years, nonminority teachers were laid off, while minority teachers with less seniority were retained. The displaced nonminority teachers, petitioners here, brought suit in Federal District Court, alleg-

ing violations of the Equal Protection Clause, Title VII, 42 U.S.C. § 1983, and other federal and state statutes. On cross-motions for summary judgment, the District Court dismissed all of petitioners' claims. 546 F.Supp. 1195 (E.D.Mich.1982). With respect to the equal protection claim, [FN3] the District Court held that the racial preferences granted by the Board need not be grounded on a finding of prior discrimination. Instead, the court decided that the racial preferences were permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing "role models" for minority schoolchildren, and upheld the constitutionality of the layoff provision.

FN3. Petitioners have sought review in this Court only of their claim based on the Equal Protection Clause.

***273** The Court of Appeals for the Sixth Circuit affirmed, largely adopting the reasoning and language of the District Court. 746 F.2d 1152 (1984). We granted certiorari, 471 U.S. 1014, 105 S.Ct. 2015, 85 L.Ed.2d 298 (1985), to resolve the important issue of the constitutionality of race-based layoffs by public employers. We now reverse.

II

[1] Petitioners' central claim is that they were laid off because of their race in violation of the Equal Protection Clause of the Fourteenth Amendment. Decisions by faculties and administrators of public schools based on race or ethnic origin are reviewable under the Fourteenth Amendment.[FN4] This Court has "consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality,' " *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967), quoting *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943). "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *University of California Regents v. Bakke*, 438 U.S. 265, 291, 98 S.Ct. 2733, 2748, 57 L.Ed.2d 750 (1978) (opinion of POWELL, J., joined by WHITE, J.).

FN4. School district collective-bargaining agreements constitute state action for purposes of the Fourteenth Amendment. *Abood v. Detroit Board of Ed.*, 431 U.S. 209, 218, and n. 12, 97 S.Ct. 1782, 1790, and n. 12, 52 L.Ed.2d 261 (1977).

[2] The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, n. 9, 102 S.Ct. 3331, 3336, n. 9, 73 L.Ed.2d 1090 (1982); *Bakke, supra*, 438 U.S., at 291-299, 98 S.Ct., at 2748-2752; see *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948); see also A. Bickel, The Morality of Consent 133 (1975). In this case, Article XII of the CBA operates against whites and in favor of certain minorities,****1847** and therefore constitutes a classification based on race. "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does ***274** not conflict with constitutional guarantees." *Fullilove v. Klutznick*, 448 U.S. 448, 491, 100 S.Ct. 2758, 2781, 65 L.Ed.2d 902 (1980) (opinion of BURGER, C.J.). There are two prongs to this examination. First, any racial classification "must be justified by a compelling governmental interest." *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984); see *Loving v. Virginia*, *supra*, 388 U.S., at 11, 87 S.Ct., at 1823; cf. *Graham v. Richardson*, 403 U.S. 365, 375, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534 (1971) (alienage). Second, the means chosen by the State to effectuate its purpose must be "narrowly tailored to the achievement of that goal." *Fullilove*, *supra*, 448 U.S., at 480, 100 S.Ct., at 2776. We must decide whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored.

III

A

The Court of Appeals, relying on the reasoning and language of the District Court's opinion, held that the Board's interest in providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination, was sufficiently important to justify the racial classification embodied in the layoff provision. 746 F.2d, at 1156-1157. The court discerned a need for more minority faculty role models by finding that the percentage of minority teachers was less than the percentage of minority students. *Id.*, at 1156.

[3] This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination. This Court's reasoning in *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), illustrates that the relevant analysis in cases involving proof of discrimination by statistical disparity focuses on those disparities that demonstrate such prior governmental discrimination. In *Hazelwood* the Court concluded that, absent employment ***275** discrimination by the school board, " 'nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.' " *Id.*, at 307, 97 S.Ct., at 2741, quoting *Teamsters v. United States*, 431 U.S. 324, 340, n. 20, 97 S.Ct. 1843, 1856, n. 20, 52 L.Ed.2d 396 (1977). See also 746 F.2d, at 1160 (Wellford, J., concurring) ("Had the plaintiffs in this case presented data as to the percentage of qualified minority teachers in the relevant labor market to show that defendant Board's hiring of black teachers over a number of years had equalled that figure, I believe this court may well have been required to reverse..."). Based on that reasoning, the Court in *Hazelwood* held that the proper comparison for determining the existence of actual discrimination by the school board was "between the racial composition of [the school's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market." 433 U.S., at 308, 97 S.Ct., at 2742. *Hazelwood* demonstrates this Court's focus on prior discrimination as the justification for, and the limitation on, a State's adoption of race-based remedies. See also *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

[4] Unlike the analysis in *Hazelwood*, the role model theory employed by the District Court has no logical stopping point. The role model theory allows the Board to engage in discriminatory hiring and layoff ****1848** practices long past the point required by any legitimate remedial purpose. Indeed, by tying the required percentage of minority teachers to the percentage of minority students, it requires just the sort of year-to-year calibration the Court stated was unnecessary in *Swann*, 402 U.S., at 31-32, 91 S.Ct., at 1283-1284:

> "At some point these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*.... Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition ***276** of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."

See also *id.*, at 24, 91 S.Ct., at 1280.

Moreover, because the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students. See *United States v. Hazelwood School District*, 392 F.Supp. 1276, 1286-1287 (ED Mo.1975), rev'd, 534 F.2d 805 (CA8 1976), rev'd and remanded, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977). Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (*Brown I*).

Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the District Court and the resultant holding typify this indefiniteness. There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups. Nevertheless, the District Court combined irrelevant comparisons between these two groups with an indisputable statement that there has been societal discrimination, and upheld state action predicated upon racial classifications. No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

***277** B

[5] Respondents also now argue that their purpose in adopting the layoff provision was to remedy prior discrimination against minorities by the Jackson School District in hiring teachers. Public schools, like other public employers, operate under two interrelated constitutional duties. They are under a clear command from this Court, starting with *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), to eliminate every vestige of racial segregation and discrimination in the schools. Pursuant to that goal, race-conscious remedial action may be necessary. *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586 (1971). On the other hand, public employers, including public schools, also must act in accordance with a "core purpose of the Fourteenth Amendment" which is to "do away with all governmentally imposed discriminations based on race." *Palmore v. Sidoti*, 466 U.S., at 432, 104 S.Ct., at 1881-1882. These related constitutional duties are not always harmonious; reconciling them requires public employers to act with extraordinary care. In particular, a public employer like the Board must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion****1849** that there has been prior discrimination.

Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees. In this case, for example, petitioners contended at trial that the remedial program-Article XII-had the purpose and effect of instituting a racial classification that was not justified by a remedial purpose. 546 F.Supp., at 1199 (ED Mich.1982). In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary. The ultimate burden remains with the employees to demonstrate the unconstitutionality***278** of an affirmative-action program. But unless such a determination is made, an appellate court reviewing a challenge by nonminority employees to remedial action cannot determine whether the race-based action is justified as a remedy for prior discrimination.

Despite the fact that Article XII has spawned years of litigation and three separate lawsuits, no such determination ever has been made. Although its litigation position was different, the Board in *Jackson I* and *Jackson II* denied the existence of prior discriminatory hiring practices. App. 33. This precise issue was litigated in both those suits. Both courts concluded that any statistical disparities were the result of general societal discrimination, not of prior discrimination by the Board. The Board now contends that, given another opportunity, it could establish the existence of prior discrimination. Although this argument seems belated at this point in the proceedings, we need not consider the question since we conclude below that the layoff provision was not a legally appropriate means of achieving even a compelling purpose. FN5

FN5. Justice MARSHALL contends that "the plurality has too quickly assumed the absence of a legitimate factual predicate ... for affirmative action in the Jackson schools," *post*, at 1852. In support of that assertion, he engages in an unprecedented reliance on nonrecord documents that respondent has "lodged" with this Court. This selective citation to factual materials not considered by the District Court or the Court of Appeals below is unusual enough by itself. My disagreement with Justice MARSHALL, however, is more fundamental than any disagreement over the heretofore unquestioned rule that this Court decides cases based on the record before it. Justice MARSHALL does not define what he means by "legitimate factual predicate," nor does he demonstrate the relationship of these nonrecord materials to his undefined predicate. If, for example, his dissent assumes that general societal discrimination is a sufficient factual predicate, then there is no need to refer to respondents' lodgings as to its own employment history. No one disputes that there has been race discrimination in this country. If that fact alone can justify race-conscious action by the State, despite the Equal Protection Clause, then the dissent need not rely on non-record materials to show a "legitimate factual predicate." If, on the other hand, Justice MARSHALL is assuming that the necessary factual predicate is prior discrimination by the Board, there is no escaping the need for a factual determination below-a determination that does not exist.

> The real dispute, then, is not over the state of the record. It is disagreement as to what constitutes a "legitimate factual predicate." If the necessary factual predicate is *prior discrimination*-that is, that race-based state action is taken to remedy prior discrimination by the governmental unit involved-then the very nature of appellate review requires that a factfinder determine whether the employer was justified in instituting a remedial plan. Nor can respondents unilaterally insulate themselves from this key constitutional question by conceding that they have discriminated in the past, now that it is in their interest to make such a concession. Contrary to the dissent's assertion, the requirement of such a determination by the trial court is not some arbitrary barrier set up by today's opinion. Rather, it is a necessary result of the requirement that race-based state action be remedial.
>
> At any rate, much of the material relied on by Justice MARSHALL has been the subject of the previous lawsuit in *Jackson II*, where the court concluded that it "had not been established that the board had discriminated against minorities in its hiring practices." App. 43. Moreover, as noted *supra*, at 1852, in *Jackson I* the Board expressly denied that it had engaged in employment discrimination.

***279** IV

[6] The Court of Appeals examined the means chosen to accomplish the Board's ****1850** race-conscious purposes under a test of "reasonableness." That standard has no support in the decisions of this Court. As demonstrated in Part II above, our decisions always have employed a more stringent standard-however articulated-to test the validity of the means chosen by a State to accomplish its race-conscious purposes. See, *e.g.*, *Palmore, supra*, 466 U.S., at 432, 104 S.Ct., at 1882 ("[T]o pass constitutional muster, [racial classifications] must be 'necessary ... to the accomplishment' of their legitimate purpose") (quoting *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222 (1964)); *Fullilove*, 448 U.S., at 480, 100 S.Ct., at 2775 (opinion of BURGER, C.J.) ("We recognize the need for careful judicial evaluation to assure that any ... program that employs racial or ethnic criteria to accomplish ***280** the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal").[FN6] Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose. *Fullilove*, 448 U.S., at 480, 100 S.Ct., at 2775 (opinion of BURGER, C.J.).[FN7] "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.*, at 537, 100 S.Ct., at 2805 (STEVENS, J., dissenting).

> FN6. The term "narrowly tailored," so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used. Or, as Professor Ely has noted, the classification at issue must "fit" with greater precision than any alternative means. Ely, The Constitutionality of Reverse Racial Discrimination, 41 U.Chi.L.Rev. 723, 727, n. 26 (1974). "[Courts] should give particularly intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense." Greenawalt, Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions, 75 Colum.L.Rev. 559, 578-579 (1975).
>
> FN7. Several commentators have emphasized that, no matter what the weight of the asserted governmental purpose, the *means* chosen to accomplish the purpose should be narrowly tailored. In arguing for a form of intermediate scrutiny, Professor Greenawalt contends that, "while benign racial classifications call for some weighing of the importance of ends they call for even more intense scrutiny of means, especially of the administrability of less onerous alternative classifications." Greenawalt, *supra*, at 565. Professor Ely has suggested that "special scrutiny in the suspect classification context has in fact consisted not in weighing ends but

> rather in insisting that the classification in issue fit a constitutionally permissible state goal with greater precision than any available alternative." Ely, *supra*, at 727, n. 26. Professor Gunther argues that judicial scrutiny of legislative means is more appropriate than judicial weighing of the importance of the legislative purpose. Gunther, The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection, 86 Harv.L.Rev. 1, 20-21 (1972).

We have recognized, however, that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to ***281** eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Id.*, at 484, 100 S.Ct., at 2778, quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 777, 96 S.Ct. 1251, 1270, 47 L.Ed.2d 444 (1976).[FN8] In ****1851** *Fullilove*, the challenged ***282** statute required at least 10 percent of federal public works funds to be used in contracts with minority-owned business enterprises. This requirement was found to be within the remedial powers of Congress in part because the "actual 'burden' shouldered by nonminority firms is relatively light." 448 U.S., at 484, 100 S.Ct., at 2778.[FN9]

> FN8. Of course, when a State implements a race-based plan that requires such a sharing of the burden, it cannot justify the discriminatory effect on some individuals because other individuals had approved the plan. Any "waiver" of the right not to be dealt with by the government on the basis of one's race must be made by those affected. Yet Justice MARSHALL repeatedly contends that the fact that Article XII was approved by a majority vote of the Union somehow validates this plan. He sees this case not in terms of individual constitutional rights, but as an allocation of burdens "between two racial groups." *Post*, at 1864. Thus, Article XII becomes a political compromise that "avoided placing the entire burden of layoffs on either the white teachers as a group or the minority teachers as a group." *Post*, at 1859. But the petitioners before us today are not "the white teachers as a group." They are Wendy Wygant and other individuals who claim that they were fired from their jobs because of their race. That claim cannot be waived by petitioners' more senior colleagues. In view of the way union seniority works, it is not surprising that while a straight freeze on minority layoffs was overwhelmingly rejected, a "compromise" eventually was reached that placed the entire burden of the compromise on the most junior union members. The more senior union members simply had nothing to lose from such a compromise. See *post*, at 1860 ("To petitioners, at the bottom of the seniority scale among white teachers, fell the lot of bearing the white group's proportionate share of layoffs that became necessary in 1982.") The fact that such a painless accommodation was approved by the more senior union members six times since 1972 is irrelevant. The Constitution does not allocate constitutional rights to be distributed like bloc grants within discrete racial groups; and until it does, petitioners' more senior union colleagues cannot vote away petitioners' rights.
>
> Justice MARSHALL also attempts to portray the layoff plan as one that has no real invidious effect, stating that "within the confines of constant minority proportions, it preserves the hierarchy of seniority in the selection of individuals for layoff." *Post*, at 1865. That phrase merely expresses the tautology that layoffs are based on seniority except as to those nonminority teachers who are displaced by minority teachers with less seniority. This is really nothing more than group-based analysis: "[E]ach group would shoulder a portion of [the layoff] burden equal to its portion of the faculty." *Post*, at 1859. The constitutional problem remains: the decision that petitioners would be laid off was based on their race.

> FN9. Similarly, the Court approved the hiring program in *Steelworkers v. Weber*, 443

> U.S. 193, 208, 99 S.Ct. 2721, 2729, 61 L.Ed.2d 480 (1979), in part because the plan did not "unnecessarily trammel the interests of the white employees." Since *Weber* involved a private company, its reasoning concerning the validity of the hiring plan at issue there is not directly relevant to this case, which involves a state-imposed plan. No equal protection claim was presented in *Weber*.

Significantly, none of the cases discussed above involved layoffs.[FN10] Here, by contrast, the means chosen to achieve the Board's asserted purposes is that of laying off nonminority teachers with greater seniority in order to retain minority teachers with less seniority. We have previously expressed concern over the burden that a preferential-layoffs scheme imposes on innocent parties. See *Firefighters v. Stotts*, 467 U.S. 561, 574-576, 578-579, 104 S.Ct. 2576, 2585-2586, 2587-2588, 81 L.Ed.2d 483 (1984); see also *Steelworkers v. Weber*, 443 U.S. 193, 208, 99 S.Ct. 2721, 2730, 61 L.Ed.2d 480 (1979) ("The plan does not require the discharge of white workers and their replacement with new black hirees"). In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial***283** of a future employment opportunity is not as intrusive as loss of an existing job.

> FN10. There are cases involving alteration of strict seniority layoffs, see, *e.g.*, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953); *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521, 69 S.Ct. 1287, 93 L.Ed. 1513 (1949), but they do not involve the critical element here-layoffs based on race. The Constitution does not require layoffs to be based on strict seniority. But it does require the State to meet a heavy burden of justification when it implements a layoff plan based on race.

Many of our cases involve union seniority plans with employees who are typically heavily dependent on wages for their day-to-day living. Even a temporary layoff may have adverse financial as well as psychological effects. A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. "At that point, the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home." Fallon & ****1852** Weiler, Conflicting Models of Racial Justice, 1984 S.Ct. Rev. 1, 58. Layoffs disrupt these settled expectations in a way that general hiring goals do not.

While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities,[FN11] layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored.[FN12] Other, less intrusive means of accomplishing ***284** similar purposes-such as the adoption of hiring goals-are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.[FN13]

> FN11. The "school admission" cases, which involve the same basic concepts as cases involving hiring goals, illustrate this principle. For example, in *DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974), while petitioner's complaint alleged that he had been denied admission to the University of Washington Law School because of his race, he also had been accepted at the Oregon, Idaho, Gonzaga, and Willamette Law Schools. *DeFunis v. Odegaard*, 82 Wash.2d 11, 30, n. 11, 507 P.2d 1169, 1181, n. 11 (1973). The injury to DeFunis was not of the same kind or degree as the injury that he would have suffered had he been removed from law school in his third year. Even this analogy may not rise to the level of harm suffered by a union member who is laid off.

> FN12. We have recognized, however, that in order to provide make-whole relief to the actual, identified victims of individual discrimination, a court may in an appropriate

case award competitive seniority. See *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976).

FN13. The Board's definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent, n. 2, *supra*, further illustrates the undifferentiated nature of the plan. There is no explanation of why the Board chose to favor these particular minorities or how in fact members of some of the categories can be identified. Moreover, respondents have never suggested-much less formally found-that they have engaged in prior, purposeful discrimination against members of each of these minority groups.

V

We accordingly reverse the judgment of the Court of Appeals for the Sixth Circuit.

It is so ordered.

Justice O'CONNOR, concurring in part and concurring in the judgment.

This case requires us to define and apply the standard required by the Equal Protection Clause when a governmental agency agrees to give preferences on the basis of race or national origin in making layoffs of employees. The specific question posed is, as Justice MARSHALL puts it, "whether the Constitution prohibits a union and a local school board from developing a collective-bargaining agreement that apportions layoffs between two racially determined groups as a means of preserving the effects of an affirmative hiring policy." *Post,* at 1860 (dissenting). There is no issue here of the interpretation and application of Title VII of the Civil Rights Act of 1964; accordingly, we have only the constitutional issue to resolve.

The Equal Protection Clause standard applicable to racial classifications that work to the disadvantage of "nonminorities" has been articulated in various ways. See, *e.g., post,* at --- - ---- (MARSHALL, J., dissenting). Justice POWELL***285** now would require that: (1) the racial classification be justified by a " 'compelling governmental interest,' " and (2) the means chosen by the State to effectuate its purpose be "narrowly tailored." *Ante,* at 1867. This standard reflects the belief, apparently held by all Members of this Court, that racial classifications of any sort must be subjected to "strict scrutiny," however defined. See, *e.g., Fullilove v. Klutznick,* 448 U.S. 448, 491, 100 S.Ct. 2758, 2781, 65 L.Ed.2d 902 (1980) (opinion of BURGER, C.J., joined by WHITE, J.) ("Any preference based on racial or ethnic criteria must ****1853** necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees"); *id.,* at 537, 100 S.Ct., at 2805 (STEVENS, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"); *University of California Regents v. Bakke,* 438 U.S. 265, 291, 98 S.Ct. 2733, 2748, 57 L.Ed.2d 750 (1978) (opinion of POWELL, J., joined by WHITE, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination"); *id.,* at 361-362, 98 S.Ct., at 2784 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) ("[O]ur review under the Fourteenth Amendment should be strict-not ' "strict" in theory and fatal in fact,' because it is stigma that causes fatality-but strict and searching nonetheless"). Justices MARSHALL, BRENNAN, and BLACKMUN, however, seem to adhere to the formulation of the "strict" standard that they authored, with Justice WHITE, in *Bakke:* "remedial use of race is permissible if it serves 'important governmental objectives' and is 'substantially related to achievement of those objectives.' " *Post,* at 1861 (MARSHALL, J., dissenting), quoting *Bakke, supra,* at 359, 98 S.Ct., at 2783 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

I subscribe to Justice POWELL's formulation because it mirrors the standard we have consistently applied in examining racial classifications in other contexts. In my view,

> "the analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply ***286** because the objective appears acceptable to individual Members of the Court. While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change." *Mississippi University for Women v. Hogan,* 458 U.S. 718, 724, n. 9, 102 S.Ct. 3331, 3336, n. 9, 73 L.Ed.2d 1090 (1982).

Although Justice POWELL's formulation may be viewed as more stringent than that suggested by Jus-

tices BRENNAN, WHITE, MARSHALL, and BLACKMUN, the disparities between the two tests do not preclude a fair measure of consensus. In particular, as regards certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a "compelling" and an "important" governmental purpose may be a negligible one. The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required. See *infra,* at ----; *ante,* at ----. See also *post,* at ---- (MARSHALL, J., dissenting). Additionally, although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently "compelling," at least in the context of higher education, to support the use of racial considerations in furthering that interest. See, *e.g., Bakke, supra,* 438 U.S., at 311-315, 98 S.Ct., at 2759-2761 (opinion of POWELL, J.). See also *post,* at ---- (MARSHALL, J., dissenting); *post,* at --- - ---- (STEVENS, J., dissenting). And certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently "important" or "compelling" to sustain the use of affirmative action policies.

***287** It appears, then, that the true source of disagreement on the Court lies not so much in defining the state interests which may support affirmative action efforts as ****1854** in defining the degree to which the means employed must "fit" the ends pursued to meet constitutional standards. See, *e.g., ante,* at 1863, nn. 6, 7. Yet even here the Court has forged a degree of unanimity; it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently "narrowly tailored," or "substantially related," to the correction of prior discrimination by the state actor. See *infra,* at ----; *ante,* at ----; *post,* at ---- (MARSHALL, J., dissenting).

In the final analysis, the diverse formulations and the number of separate writings put forth by various Members of the Court in these difficult cases do not necessarily reflect an intractable fragmentation in opinion with respect to certain core principles. Ultimately, the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference.

Respondent School Board argues that the governmental purpose or goal advanced here was the School Board's desire to correct apparent prior employment discrimination against minorities while avoiding further litigation. See, *e.g.,* Brief for Respondents 15-17. See also Defendant's Brief in Support of Motion for Summary Judgment and Motion to Dismiss in No. Civ. 81-8173249 (ED Mich.), p. 16 (hereinafter cited as Defendant's Summary Judgment Brief). The Michigan Civil Rights Commission determined that the evidence before it supported the allegations of discrimination on the part of the Jackson School Board, though that determination was never reduced to formal findings because the School Board, ***288** with the agreement of the Jackson Education Association (Union), voluntarily chose to remedy the perceived violation. Among the measures the School Board and the Union eventually agreed were necessary to remedy the apparent prior discrimination was the layoff provision challenged here; they reasoned that without the layoff provision, the remedial gains made under the ongoing hiring goals contained in the collective bargaining agreement could be eviscerated by layoffs.

The District Court and the Court of Appeals did not focus on the School Board's unquestionably compelling interest in remedying its apparent prior discrimination when evaluating the constitutionality of the challenged layoff provision. Instead, both courts reasoned that the goals of remedying "societal discrimination" and providing "role models" were sufficiently important to withstand equal protection scrutiny. I agree with the plurality that a governmental agency's interest in remedying "societal" discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny. See

ante, at ----. See also *Bakke*, 438 U.S., at 307, 98 S.Ct., at 2757 (opinion of POWELL, J.). I also concur in the plurality's assessment that use by the courts below of a "role model" theory to justify the conclusion that this plan had a legitimate remedial purpose was in error.[FN*] See *ante*, at --- - ----. Thus, in my view, the District Court and the Court of Appeals clearly erred in relying on these purposes and in failing to give greater attention to the School ***289** Board's asserted purpose of rectifying its own apparent discrimination.

> FN* The goal of providing "role models" discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty. Because this latter goal was not urged as such in support of the layoff provision before the District Court and the Court of Appeals, however, I do not believe it necessary to discuss the magnitude of that interest or its applicability in this case. The only governmental interests at issue here are those of remedying "societal" discrimination, providing "role models," and remedying apparent prior employment discrimination by the School Board.

****1855** The error of the District Court and the Court of Appeals can be explained by reference to the fact that the primary issue argued by the parties on the cross motions for summary judgment was whether the School Board, a court, or another competent body had to have made a finding of past discrimination before or at the time of the institution of the plan in order for the plan to be upheld as remedial in purpose. 546 F.Supp. 1195, 1199-1200 (ED Mich.1982). See also Brief in Support of Plaintiff's Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment in No. Civ. 81-8173249 (ED Mich.), pp. 5-13; Defendant's Summary Judgment Brief 11-15. The courts below ruled that a particularized, contemporaneous finding of discrimination was not necessary and upheld the plan as a remedy for "societal" discrimination, apparently on the assumption that in the absence of a specific, contemporaneous finding, any discrimination addressed by an affirmative action plan could only be termed "societal." See, *e.g.*, 546 F.Supp., at 1199. I believe that this assumption is false and therefore agree with the plurality that a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan. See *ante*, at ----.

A violation of federal statutory or constitutional requirements does not arise with the making of a finding; it arises when the wrong is committed. Contemporaneous findings serve solely as a means by which it can be made absolutely certain that the governmental actor truly is attempting to remedy its own unlawful conduct when it adopts an affirmative action plan, rather than attempting to alleviate the wrongs suffered through general societal discrimination. See, *e.g.*, *Fullilove v. Klutznick*, 448 U.S., at 498, 100 S.Ct., at 2784 (POWELL, J., concurring). Such findings, when voluntarily made ***290** by a public employer, obviously are desirable in that they provide evidentiary safeguards of value both to nonminority employees and to the public employer itself, should its affirmative action program be challenged in court. If contemporaneous findings were *required* of public employers in every case as a precondition to the constitutional validity of their affirmative action efforts, however, the relative value of these evidentiary advantages would diminish, for they could be secured only by the sacrifice of other vitally important values.

The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. See, *e.g.*, *Bakke*, *supra*, 438 U.S., at 364, 98 S.Ct., at 2785 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). Cf. *Steelworkers v. Weber*, 443 U.S. 193, 210-211, 99 S.Ct. 2721, 2730-2731, 61 L.Ed.2d 480 (1979) (BLACKMUN, J., concurring). This result would clearly be at odds with this Court's and Congress' consistent emphasis on "the value of voluntary efforts to further the objectives of the law." *Bakke*, *supra*, 438 U.S., at 364, 98 S.Ct., at 2785 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.); see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418, 95 S.Ct. 2362, 2371-2372, 45 L.Ed.2d 280 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147 (1974). The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of

governmental discrimination is of unique importance. See S. Rep. No. 92-415, p. 10 (1971) (accompanying the amendments extending coverage of Title VII to the States) ("Discrimination by government ... serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority****1856** problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government"). ***291** Imposing a contemporaneous findings requirement would produce the anomalous result that what private employers may voluntarily do to correct apparent violations of Title VII, *Steelworkers v. Weber*, *supra*, public employers are constitutionally forbidden to do to correct their statutory and constitutional transgressions.

Such results cannot, in my view, be justified by reference to the incremental value a contemporaneous findings requirement would have as an evidentiary safeguard. As is illustrated by this case, public employers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action *is* taken. Where these employers, who are presumably fully aware both of their duty under federal law to respect the rights of *all* their employees and of their potential liability for failing to do so, act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary, a contemporaneous findings requirement should not be necessary.

This conclusion is consistent with our previous decisions recognizing the States' ability to take voluntary race-conscious action to achieve compliance with the law even in the absence of a specific finding of past discrimination. See, *e.g.*, *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 165-166, 97 S.Ct. 996, 1009-1010, 51 L.Ed.2d 229 (1977) (reapportionment); *McDaniel v. Barresi*, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971) (school desegregation). Indeed, our recognition of the responsible state actor's competency to take these steps is assumed in our recognition of the States' constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination. See, *e.g.*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1275, 28 L.Ed.2d 554 (1971); *Green v. New Kent County School Board*, 391 U.S. 430, 437-438, 88 S.Ct. 1689, 1693-1694, 20 L.Ed.2d 716 (1968).

***292** Of course, as Justice POWELL notes, the public employer must discharge this sensitive duty with great care; in order to provide some measure of protection to the interests of its nonminority employees and the employer itself in the event that its affirmative action plan is challenged, the public employer must have a firm basis for determining that affirmative action is warranted. Public employers are not without reliable benchmarks in making this determination. For example, demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination.

To be sure, such a conclusion is not unassailable. If a voluntary affirmative action plan is subsequently challenged in court by nonminority employees, those employees must be given the opportunity to prove that the plan does not meet the constitutional standard this Court has articulated. However, as the plurality suggests, the institution of such a challenge does not automatically impose upon the public employer the burden of convincing the court of its liability for prior unlawful discrimination; nor does it mean that the court must make an actual finding of prior discrimination based on the employer's proof before the employer's affirmative action plan will be upheld. See *ante*, at ----. In "reverse discrimination" suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated. The findings a court must ****1857** make before upholding an affirmative action plan reflect this allocation of proof and the nature of the challenge asserted. For instance, in the example posed above, the nonminority teachers could easily demonstrate that the purpose and effect of the ***293** plan is to impose a race-based classification. But when the Board introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the Board had a firm basis for concluding that remedial action was appropriate, it is

incumbent upon the nonminority teachers to prove their case; they continue to bear the ultimate burden of persuading the court that the Board's evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored." Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the Board's assertedly remedial action based on the statistical evidence was justified.

In sum, I do not think that the layoff provision was constitutionally infirm simply because the School Board, the Commission, or a court had not made particularized findings of discrimination at the time the provision was agreed upon. But when the plan was challenged, the District Court and the Court of Appeals did not make the proper inquiry into the legitimacy of the Board's asserted remedial purpose; instead, they relied upon governmental purposes that we have deemed insufficient to withstand strict scrutiny, and therefore failed to isolate a sufficiently important governmental purpose that could support the challenged provision.

There is, however, no need to inquire whether the provision actually had a legitimate remedial purpose based on the record, such as it is, because the judgment is vulnerable on yet another ground: the courts below applied a "reasonableness" test in evaluating the relationship between the ends pursued and the means employed to achieve them that is plainly incorrect under any of the standards articulated by this Court. Nor is it necessary, in my view, to resolve the troubling questions whether any layoff provision could survive strict scrutiny or whether this particular layoff provision ***294** could, when considered without reference to the hiring goal it was intended to further, pass the onerous "narrowly tailored" requirement. Petitioners have met their burden of establishing that this layoff provision is not "narrowly tailored" to achieve its asserted remedial purpose by demonstrating that the provision is keyed to a hiring goal that itself has no relation to the remedying of employment discrimination.

Although the constitutionality of the hiring goal as such is not before us, it is impossible to evaluate the necessity of the layoff provision as a remedy for the apparent prior employment discrimination absent reference to that goal. See, *e.g.*, *post*, at 1858 (MARSHALL, J., dissenting). In this case, the hiring goal that the layoff provision was designed to safeguard was tied to the percentage of minority students in the school district, not to the percentage of qualified minority teachers within the relevant labor pool. The disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body is not probative of employment discrimination; it is only when it is established that the availability of minorities in the relevant labor pool substantially exceeded those hired that one may draw an inference of deliberate discrimination in employment. See *Hazelwood School District v. United States*, 433 U.S. 299, 308, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977) (Title VII context). Because the layoff provision here acts to maintain levels of minority hiring that have no relation to remedying employment discrimination, it cannot be adjudged "narrowly tailored" to effectuate its asserted remedial purpose.

****1858** I therefore join in Parts I, II, III and V of the plurality's opinion, and concur in the judgment.

Justice WHITE, concurring in the judgment.

The School Board's policy when layoffs are necessary is to maintain a certain proportion of minority teachers. This policy requires laying off nonminority teachers solely on the basis of their race, including teachers with seniority, and retaining other teachers solely because they are black, even ***295** though some of them are in probationary status. None of the interests asserted by the Board, singly or together, justify this racially discriminatory layoff policy and save it from the strictures of the Equal Protection Clause. Whatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of any racial discrimination, is quite a different matter. I cannot believe that in order to integrate a work force, it would be permissible to discharge whites and hire blacks until the latter comprised a suitable percentage of the work force. None of our cases suggest that this would be permissible under the Equal Protection Clause. Indeed, our cases look quite the other way. The layoff policy in this case-laying off whites who would otherwise be retained in order to keep blacks on the job-has the same effect and is equally violative of the Equal Protection Clause. I agree with the plurality that this official policy is unconstitutional and hence concur in the judgment.

Justice MARSHALL, with whom Justice BRENNAN and Justice BLACKMUN join, dissenting.

When this Court seeks to resolve far-ranging constitutional issues, it must be especially careful to ground its analysis firmly in the facts of the particular controversy before it. Yet in this significant case, we are hindered by a record that is informal and incomplete. Both parties now appear to realize that the record is inadequate to inform the Court's decision. Both have lodged with the Court voluminous "submissions" containing factual material that was not considered by the District Court or the Court of Appeals. Petitioners have submitted 21 separate items, predominantly statistical charts, which they assert are relevant to their claim of discrimination. Respondents have submitted public documents that tend to substantiate the facts alleged in the brief accompanying their motion for summary judgment in the District Court. These include transcripts and exhibits from two prior proceedings, in which certain questions of discrimination***296** in the Jackson schools were litigated, *Jackson Education Assn. v. Board of Education*, No. 4-72340 (ED Mich.1976) (*Jackson I*), and *Jackson Education Assn. v. Board of Education*, No. 77-011484CZ (Jackson Cty. Cir.Ct.1979) (*Jackson II*).

We should not acquiesce in the parties' attempt to try their case before this Court. Yet it would be just as serious a mistake simply to ignore altogether, as the plurality has done, the compelling factual setting in which this case evidently has arisen. No race-conscious provision that purports to serve a remedial purpose can be fairly assessed in a vacuum.

The haste with which the District Court granted summary judgment to respondents, without seeking to develop the factual allegations contained in respondents' brief, prevented the full exploration of the facts that are now critical to resolution of the important issue before us. Respondents' acquiescence in a premature victory in the District Court should not now be used as an instrument of their defeat. Rather, the District Court should have the opportunity to develop a factual record adequate to resolve the serious issue raised by the case. I believe, therefore, that it is improper for this Court to resolve the constitutional issue in its current posture. But, because I feel that the plurality has also erred seriously in its legal analysis of the merits of this case, I write further to ****1859** express my disagreement with the conclusions that it has reached.

I, too, believe that layoffs are unfair. But unfairness ought not be confused with constitutional injury. Paying no heed to the true circumstances of petitioners' plight, the plurality would nullify years of negotiation and compromise designed to solve serious educational problems in the public schools of Jackson, Michigan. Because I believe that a public employer, with the full agreement of its employees, should be permitted to preserve the benefits of a legitimate and constitutional affirmative-action hiring plan even while reducing its work force, I dissent.

***297** I

The record and extrarecord materials that we have before us persuasively suggest that the plurality has too quickly assumed the absence of a legitimate factual predicate, even under the plurality's own view, for affirmative action in the Jackson schools. The first black teacher in the Jackson public schools was hired in 1954.[FN1] In 1969, when minority representation on the faculty had risen only to 3.9%, the Jackson branch of the NAACP filed a complaint with the Michigan Civil Rights Commission, alleging that the Board had engaged in various discriminatory practices, including racial discrimination in the hiring of teachers. Respondents' Lodging No. 6 (complaint). The Commission conducted an investigation and concluded that each of the allegations had merit.[FN2]

FN1. Unless otherwise indicated, the historical facts herein recited have been taken from the defendants' brief in support of its motion for summary judgment before the District Court, Record, Doc. No. 4, pp. 1-6.

FN2. The Commission concluded: "Racial tension continues to be a part of the entire Jackson School System from the elementary level through high school. It would appear, therefore, that each of the allegations as stated in the complaint can be substantiated based upon organizational records, court files, school records, special committee reports and the appraisal conducted by the Superintendent of Schools." Respondents' Lodging No. 1-B, p. 11 (order of adjustment). This conclusion is supported by extrarecord materials suggesting that the shortage of minority teachers was the result

> of past discrimination in teacher hiring. For example, the then-Superintendent of Schools testified that "an administrator ... told me she had tried to get a position in Jackson in the early 1950's and was told that they didn't hire colored people." This was the "type of thing," he stated, that led to adoption of Article XII. Respondents' Lodging No. 3, pp. 22-23.

In settlement of the complaint, the Commission issued an order of adjustment, under which the Jackson Board of Education (Board) agreed to numerous measures designed to improve educational opportunities for black public-school students. Among them was a promise to "[t]ake affirmative steps to recruit, hire and promote minority group teachers ***298** and counselors as positions bec[a]me available...." Respondents' Lodging No. 1-B, p. 3. As a result of the Board's efforts to comply with the order over the next two years, the percentage of minority teachers increased to 8.8%.

In 1971, however, faculty layoffs became necessary. The contract in effect at that time, between the Board and the Jackson Education Association (Union), provided that layoffs would be made in reverse order of seniority. Because of the recent vintage of the school system's efforts to hire minorities, the seniority scheme led to the layoff of a substantial number of minority teachers, "literally wip[ing] out all the gain" made toward achieving racial balance. Respondents' Lodging No. 3, p. 24 (deposition of Superintendent of Schools). Once again, minority teachers on the faculty were a rarity.

By early 1972, when racial tensions in the schools had escalated to violent levels, school officials determined that the best course was full integration of the school system, including integration of the faculty. But they recognized that, without some modification of the seniority layoff system, genuine faculty integration could not take place. See App. 41; Respondents' Lodging No. 3, p. 69 (deposition of superintendent****1860** of Schools); Respondents' Lodging No. 2, pp. 16-20 (testimony of Union Executive Director, *Jackson I*). The Minority Affairs Office of the Jackson Public Schools submitted a questionnaire to all teachers, asking them to consider the possibility of abandoning the "last hired, first fired" approach to layoffs in favor of an absolute freeze on layoffs of minority teachers. The teachers overwhelmingly voted in favor of retaining the straight seniority system. Negotiations ensued between the two camps-on the one hand, the Board, which favored a freeze of minority layoffs and, on the other, the Union, urging straight seniority-and the negotiators ultimately reached accord. One Union leader characterized the development of the layoff compromise as the most ***299** difficult balancing of equities that he had ever encountered. Record, Doc. No. 4, p. 5.

The compromise avoided placing the entire burden of layoffs on either the white teachers as a group or the minority teachers as a group. Instead, each group would shoulder a portion of that burden equal to its portion of the faculty. Thus, the overall percentage of minorities on the faculty would remain constant. Within each group, seniority would govern which individuals would be laid off. This compromise was the provision at issue here, subsequently known as Article XII:

> "In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.... Each teacher so affected will be called back in reverse order for positions for which he is certified maintaining the above minority balance." App. 13.

The Board and the Union leadership agreed to the adoption of Article XII. The compromise was then presented to the teachers, who ratified it by majority vote. Each of the six times that the contract has been renegotiated, Article XII has been presented for reconsideration to the members of the Union, at least 80% of whom are white, and each time it has been ratified.

To petitioners, at the bottom of the seniority scale among white teachers, fell the lot of bearing the white group's proportionate share of layoffs that became necessary in 1982. Claiming a right not to lose their jobs ahead of minority teachers with less seniority, petitioners brought this challenge to Article XII under the Equal Protection Clause of the Fourteenth Amendment.

***300** II

From the outset, it is useful to bear in mind what this case is not. There has been no court order to achieve racial balance, which might require us to reflect upon the existence of judicial power to impose obligations on parties not proved to have committed a wrong. See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971). There is also no occasion here to resolve whether a white worker may be required to give up his or her job in order to be replaced by a black worker. See *Steelworkers v. Weber*, 443 U.S. 193, 208, 99 S.Ct. 2721, 2729, 61 L.Ed.2d 480 (1979). Nor are we asked to order parties to suffer the consequences of an agreement that they had no role in adopting. See *Firefighters v. Stotts*, 467 U.S. 561, 575, 104 S.Ct. 2576, 2586, 81 L.Ed.2d 483 (1984). Moreover, this is not a case in which a party to a collective-bargaining agreement has attempted unilaterally to achieve racial balance by refusing to comply with a contractual, seniority-based layoff provision. Cf. *Teamsters v. United States*, 431 U.S. 324, 350, 352, 97 S.Ct. 1843, 1862, 1863, 52 L.Ed.2d 396 (1977).

The sole question posed by this case is whether the Constitution prohibits a union and a local school board from developing a ****1861** collective-bargaining agreement that apportions layoffs between two racially determined groups as a means of preserving the effects of an affirmative hiring policy, the constitutionality of which is unchallenged.[FN3]

FN3. Justice O'CONNOR rests her disposition of this case on the propriety of the hiring plan, even though petitioners have not challenged it. She appears to rely on language in the preamble to the collective-bargaining agreement, which suggests that the "goal of such [affirmative-action] policy shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools." Article VII.D.1, App. to Pet. for Cert. 1a. Believing that the school system's hiring "goal" ought instead to be the percentage of qualified minorities in the labor pool, Justice O'CONNOR concludes that the challenged layoff provision itself is overly broad. *Ante*, at ----. Among the materials considered by the District Court and Court of Appeals, however, there is no evidence to show the actual proportion of minority teachers in the Jackson schools, either in relation to the qualified minority labor force or in relation to the number of minority students. If the distinction between the two goals is to be considered critical to the constitutionality of the affirmative-action plan, it is incumbent on petitioners-plaintiffs below-to demonstrate that, at the time they were laid off, the proportion of minority teachers had equaled or exceeded the appropriate percentage of the minority labor force, and that continued adherence to affirmative-action goals, therefore, unjustifiably caused their injuries. This petitioners have failed to do. Outside of the First Amendment context, I know of no justification for invalidating a provision because it might, in a hypothetical case, apply improperly to other potential plaintiffs. Petitioners have attempted to fill the gap in their case by supplying statistical charts to this Court. See, *e.g.*, Petitioners' Lodging, pp. 56-62. Clearly, however, we are not equipped for such fact-finding, and if the hortatory ceiling of the affirmative-action plan is indeed to be considered a significant aspect of the case, then that would be an appropriate subject of inquiry on remand.

***301** III

Agreement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us. In *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), four Members of the Court concluded that, while racial distinctions are irrelevant to nearly all legitimate state objectives and are properly subjected to the most rigorous judicial scrutiny in most instances, they are highly relevant to the one legitimate state objective of eliminating the pernicious vestiges of past discrimination; when that is the goal, a less exacting standard of review is appropriate. We explained at length our view that, because no fundamental right was involved and because whites have none of the immutable characteristics of a suspect class, the so-called "strict scrutiny" applied to cases involving either fundamental rights or suspect classifications was not applicable. *Id.*, at 357, 98 S.Ct., at 2782 (opinion of BRENNAN, WHITE, MARSHALL,

and BLACKMUN, JJ.). Nevertheless, we eschewed the least rigorous, "rational basis" standard of review, recognizing that any racial classification is subject to misuse. We determined that remedial use of race is permissible if it serves "important governmental***302** objectives" and is "substantially related to achievement of those objectives." *Id.*, at 359, 98 S.Ct., at 2783; see also *id.*, at 387, 98 S.Ct., at 2797 (opinion of MARSHALL, J.); *id.*, at 402, 98 S.Ct., at 2802 (opinion of BLACKMUN, J.). This standard is genuinely a "strict and searching" judicial inquiry, but is "not ' "strict" in theory and fatal in fact.' " *Id.*, at 362, 98 S.Ct. at 2784 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (quoting Gunther, The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L.Rev. 1, 8 (1972)). The only other Justice to reach the constitutional issue in *Bakke* suggested that, remedial purpose or no, any racial distinctions "call for the most exacting judicial examination." *Id.*, at 291, 98 S.Ct., at 2748 (opinion of POWELL, J.).

In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Court again disagreed as to the proper standard of review. Three Justices, of ****1862** whom I was one, concluded that a statute reserving 10% of federal funds for minority contractors served important governmental objectives and was substantially related to achievement of those objectives, surviving attack under our *Bakke* test. 448 U.S., at 519, 100 S.Ct., at 2748 (MARSHALL, J., joined by BRENNAN and BLACKMUN, JJ., concurring in judgment). Three other Justices expressly declined to adopt any standard of review, deciding that the provision survived judicial scrutiny under either of the formulae articulated in *Bakke*. 448 U.S., at 492, 100 S.Ct., at 2781 (opinion of BURGER, C.J., joined by WHITE and POWELL, JJ.).

Despite the Court's inability to agree on a route, we have reached a common destination in sustaining affirmative action against constitutional attack. In *Bakke*, we determined that a state institution may take race into account as a factor in its decisions, 438 U.S., at 326, 98 S.Ct., at 2766, and in *Fullilove*, the Court upheld a congressional preference for minority contractors because the measure was legitimately designed to ameliorate the present effects of past discrimination, 448 U.S., at 520, 100 S.Ct., at 2796.

***303** In this case, it should not matter which test the Court applies. What is most important, under any approach to the constitutional analysis, is that a reviewing court genuinely consider the circumstances of the provision at issue. The history and application of Article XII, assuming verification upon a proper record, demonstrate that this provision would pass constitutional muster, no matter which standard the Court should adopt.

IV

The principal state purpose supporting Article XII is the need to preserve the levels of faculty integration achieved through the affirmative hiring policy adopted in the early 1970's. Brief for Respondents 41-43. Justification for the hiring policy itself is found in the turbulent history of the effort to integrate the Jackson public schools-not even mentioned in the plurality opinion-which attests to the bona fides of the Board's current employment practices.

The record and lodgings indicate that the Commission, endowed by the State Constitution with the power to investigate complaints of discrimination and the duty to secure the equal protection of the laws, Mich.Const., Art. V, § 29, prompted and oversaw the remedial steps now under attack.[FN4] When the Board agreed to take specified remedial action, including the hiring and promotion of minority teachers, the Commission did not pursue its investigation of the apparent violations to the point of rendering formal findings of discrimination.

> FN4. The Commission currently describes its participation in the Jackson matter as follows: "[T]he Commission investigated the allegations and sought *to remedy the apparent violations* by negotiating an order of adjustment with the Jackson Board.... [T]he out-of-line seniority layoff provisions in the Jackson Board of Education's employment contracts with its teachers since 1972 are consistent with overall desegregation efforts undertaken *in compliance with* the Commission's order of adjustment." Brief for Michigan Civil Rights Commission, Michigan Dept. of Civil Rights as *Amicus Curiae* 14 (emphasis added).

***304** Instead of subjecting an already volatile school system to the further disruption of formal ac-

cusations and trials, it appears that the Board set about achieving the goals articulated in the settlement. According to the then-Superintendent of Schools, the Board was aware, at every step of the way, that "[t]he NAACP had its court suit ready if either the Board postponed the [integration] operation or abandoned the attempts. They were willing to-they were ready to go into Federal court and get a court order, as happened in Kalamazoo." Respondents' Lodging No. 3, p. 44. Rather than provoke the looming lawsuit, the Board and the Union worked with the committees to reach a solution to the racial problems plaguing the school system. In 1972, the Board explained to ****1863** parents why it had adopted a voluntary integration plan:

> "Waiting for what appears the inevitable only flames passions and contributes to the difficulties of an orderly transition from a segregated to a desegregated school system. Firmly established legal precedents mandate a change. Many citizens know this to be true.
>
> "Waiting for a court order emphasizes to many that we are quite willing to disobey the law until the court orders us not to disobey the law.... Further, court orders cost money for both the school system and the litigants." Respondents' Lodging No. 1, pp. 1-2 (Exhibit No. 8, *Jackson I*).

An explicit Board admission or judicial determination of culpability, which petitioners and even the Solicitor General urge us to hold was required before the Board could undertake a race-conscious remedial plan, see Brief for Petitioners 27-29; Brief for United States as *Amicus Curiae* 29, would only have exposed the Board in this case to further litigation and liability, including individual liability under 42 U.S.C. § 1983, for past acts. It would have contributed nothing to the advancement of the community's urgent objective of integrating its schools.

***305** The real irony of the argument urging mandatory, formal findings of discrimination lies in its complete disregard for a longstanding goal of civil rights reform, that of integrating schools without taking every school system to court. Our school desegregation cases imposed an affirmative duty on local school boards to see that "racial discrimination would be eliminated root and branch." *Green v. New-Kent County School Board*, 391 U.S. 430, 437-438, 88 S.Ct. 1689, 1693-1694, 20 L.Ed.2d 716 (1968); see *Brown v. Board of Education*, 349 U.S. 294, 299, 75 S.Ct. 753, 755, 99 L.Ed. 1083 (1955). Petitioners would now have us inform the Board, having belatedly taken this Court's admonitions to heart, that it should have delayed further, disputing its obligations and forcing the aggrieved parties to seek judicial relief. This result would be wholly inconsistent with the national policies against overloading judicial dockets, maintaining groundless defenses, and impeding good-faith settlement of legal disputes. Only last Term, writing for the Court, THE CHIEF JUSTICE reaffirmed that civil rights litigation is no exception to the general policy in favor of settlements: "Indeed, Congress made clear its concern that civil rights plaintiffs not be penalized for 'helping to lessen docket congestion' by settling their cases out of court.... In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants." *Marek v. Chesny*, 473 U.S. 1, 10, 105 S.Ct. 3012, 3017, 87 L.Ed.2d 1 (1985). It would defy equity to penalize those who achieve harmony from discord, as it would defy wisdom to impose on society the needless cost of superfluous litigation. The Court is correct to recognize, as it does at least implicitly today, that formal findings of past discrimination are not a necessary predicate to the adoption of affirmative-action policies, and that the scope of such policies need not be limited to remedying specific instances of identifiable discrimination. See *ante*, at 1844 (opinion of POWELL, J.); *ante*, at 1852 (opinion of O'CONNOR, J.).

Moreover, under the apparent circumstances of this case, we need not rely on any general awareness of "societal discrimination" to conclude that the Board's purpose is of sufficient***306** importance to justify its limited remedial efforts. There are allegations that the imperative to integrate the public schools was urgent. Racially motivated violence had erupted at the schools, interfering with all educational objectives. We are told that, having found apparent violations of the law and a substantial underrepresentation of minority teachers, the state agency responsible for ensuring equality of treatment for all citizens of Michigan had instituted a settlement that required the Board to adopt affirmative hiring practices in lieu of further enforcement****1864** proceedings. That agency, participating as *amicus curiae* through the Attorney General of Michigan, still stands fully behind the solution that the Board and the Union adopted in Article XII, viewing it as a measure necessary to attainment of stability and educational quality in the

public schools. See n. 4, *supra*. Surely, if properly presented to the District Court, this would supply the "[e]videntiary support for the conclusion that remedial action is warranted" that the plurality purports to seek, *ante*, at 1848. Since the District Court did not permit submission of this evidentiary support, I am at a loss as to why JUSTICE POWELL so glibly rejects the obvious solution of remanding for the factfinding he appears to recognize is necessary. See *ante*, at 1848 - 1849, n. 5.

Were I satisfied with the record before us, I would hold that the state purpose of preserving the integrity of a valid hiring policy-which in turn sought to achieve diversity and stability for the benefit of *all* students-was sufficient, in this case, to satisfy the demands of the Constitution.

V

The second part of any constitutional assessment of the disputed plan requires us to examine the means chosen to achieve the state purpose. Again, the history of Article XII, insofar as we can determine it, is the best source of assistance.

***307** A

Testimony of both Union and school officials illustrates that the Board's obligation to integrate its faculty could not have been fulfilled meaningfully as long as layoffs continued to eliminate the last hired. See App. 41; Respondents' Lodging No. 3, p. 69 (deposition of Superintendent of Schools); Respondents' Lodging No. 2, pp. 16-20 (testimony of Union Executive Director, *Jackson I*). In addition, qualified minority teachers from other States were reluctant to uproot their lives and move to Michigan without any promise of protection from imminent layoff. The testimony suggests that the lack of some layoff protection would have crippled the efforts to recruit minority applicants. *Id.*, at 20, 55, 56. Adjustment of the layoff hierarchy under these circumstances was a necessary corollary of an affirmative hiring policy.

B

Under Justice POWELL's approach, the community of Jackson, having painfully watched the hard-won benefits of its integration efforts vanish as a result of massive layoffs, would be informed today, simply, that preferential layoff protection is never permissible because hiring policies serve the same purpose at a lesser cost. See *ante*, at 1851 - 1852. As a matter of logic as well as fact, a hiring policy achieves no purpose at all if it is eviscerated by layoffs. JUSTICE POWELL's position is untenable.

Justice POWELL has concluded, by focusing exclusively on the undisputed hardship of losing a job, that the Equal Protection Clause always bars race-conscious layoff plans. This analysis overlooks, however, the important fact that Article XII does not cause the loss of jobs; someone will lose a job under any layoff plan and, whoever it is, that person will not deserve it. Any *per se* prohibition against layoff protection, therefore, must rest upon a premise that the tradition of basing layoff decisions on seniority is so fundamental that its ***308** modification can never be permitted. Our cases belie that premise.

The general practice of basing employment decisions on relative seniority may be upset for the sake of other public policies. For example, a court may displace innocent workers by granting retroactive seniority to victims of employment discrimination. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 775, 96 S.Ct. 1251, 1269, 47 L.Ed.2d 444 (1976). Further, this Court has long held that "employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." ****1865** *Id.*, at 778, 96 S.Ct., at 1271. And we have recognized that collective-bargaining agreements may go further than statutes in enhancing the seniority of certain employees for the purpose of fostering legitimate interests. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 339-340, 73 S.Ct. 681, 686-687, 97 L.Ed. 1048 (1953). Accordingly, we have upheld one collectively bargained provision that bestowed enhanced seniority on those who had served in the military before employment, *id.*, at 340, 73 S.Ct., at 687, and another that gave preferred seniority status to union chairmen, to the detriment of veterans. *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521, 529, 69 S.Ct. 1287, 1291, 93 L.Ed. 1513 (1949).

In *Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), we specifically addressed a departure from the seniority principle designed to alleviate racial disparity. In *Weber*, a private employer and a union negotiated a collective agreement that reserved for black employees one half of all openings in a plant training program, replacing the prior system of awarding all seats on the basis of se-

niority. This plan tampered with the expectations attendant to seniority, and redistributed opportunities to achieve an important qualification toward advancement in the company. We upheld the challenged plan under the Civil Rights Act of 1964 because it was designed to "eliminate traditional patterns of racial segregation" in the industry and did not "unnecessarily trammel the interests of the white employees." *Id.*, at 201, 208, 99 S.Ct., at 2726, 2730. We required no judicial finding or employer admission of past discrimination***309** to justify that interference with the seniority hierarchy for the sake of the legitimate purposes at stake.

These cases establish that protection from layoff is not altogether unavailable as a tool for achieving legitimate societal goals. It remains to be determined whether the particular form of layoff protection embodied in Article XII falls among the permissible means for preserving minority proportions on the teaching staff.

C

Article XII is a narrow provision because it allocates the impact of an unavoidable burden proportionately between two racial groups. It places no absolute burden or benefit on one race, and, within the confines of constant minority proportions, it preserves the hierarchy of seniority in the selection of individuals for layoff. Race is a factor, along with seniority, in determining which individuals the school system will lose; it is not alone dispositive of any individual's fate. Cf. *Bakke*, 438 U.S., at 318, 98 S.Ct., at 2762 (opinion of POWELL, J.). Moreover, Article XII does not use layoff protection as a tool for *increasing* minority representation; achievement of that goal is entrusted to the less severe hiring policies. [FN5] And Article XII is narrow in the temporal sense as well. The very bilateral process that gave rise to Article XII when its adoption was necessary will also occasion its demise when remedial measures are no longer required. Finally, Article XII modifies contractual expectations that do not themselves carry any connotation of merit or achievement; it does not interfere with the "cherished American ethic" of "[f]airness in individual competition," *Bakke*, *supra*, at 319, n. 53, 98 S.Ct., at 2763, n. 53, depriving individualsof ***310** an opportunity that they could be said to deserve. In all of these important ways, Article XII metes out the hardship of layoffs in a manner that achieves its purpose with the smallest possible deviation from established norms.

FN5. Justice WHITE assumes that respondents' plan is equivalent to one that deliberately seeks to change the racial composition of a staff by firing and hiring members of predetermined races. *Ante*, at 1857. That assumption utterly ignores the fact that the Jackson plan involves only the means for selecting the employees who will be chosen for layoffs already necessitated by external economic conditions. This plan does not seek to supplant whites with blacks, nor does it contribute in any way to the number of job losses.

****1866** The Board's goal of preserving minority proportions could have been achieved, perhaps, in a different way. For example, if layoffs had been determined by lottery, the ultimate effect would have been retention of current racial percentages. A random system, however, would place every teacher in equal jeopardy, working a much greater upheaval of the seniority hierarchy than that occasioned by Article XII; it is not at all a less restrictive means of achieving the Board's goal. Another possible approach would have been a freeze on layoffs of minority teachers. This measure, too, would have been substantially more burdensome than Article XII, not only by necessitating the layoff of a greater number of white teachers, but also by erecting an absolute distinction between the races, one to be benefited and one to be burdened, in a way that Article XII avoids. Indeed, neither petitioners nor any Justice of this Court has suggested an alternative to Article XII that would have attained the stated goal in any narrower or more equitable a fashion. Nor can I conceive of one.

VI

It is no accident that this least burdensome of all conceivable options is the very provision that the parties adopted. For Article XII was forged in the crucible of clashing interests. All of the economic powers of the predominantly white teachers' union were brought to bear against those of the elected Board, and the process yielded consensus.

The concerns that have prompted some Members of this Court to call for narrowly tailored, perhaps court-ordered, means of achieving racial balance spring from a legitimate fear that racial distinctions will again be used as a means to persecute individuals,

while couched in benign phraseology. That fear has given rise to mistrust of those who profess to ***311** take remedial action, and concern that any such action "work the least harm possible to other innocent persons competing for the benefit." *Bakke, supra,* at 308, 98 S.Ct., at 2757 (opinion of POWELL, J.). One Justice has warned that "if innocent employees are to be made to make any sacrifices ..., they must be represented and have had full participation rights in the negotiation process," *Firefighters v. Stotts,* 467 U.S., at 588, n. 3, 104 S.Ct., at 2593, n. 3 (O'CONNOR, J., concurring), and another has called for a "principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification...." *Bakke, supra,* 438 U.S., at 294-295, n. 34, 98 S.Ct., at 2750, n. 34 (opinion of POWELL, J.). This case answers that call.

The collective-bargaining process is a legitimate and powerful vehicle for the resolution of thorny problems, and we have favored "minimal supervision by courts and other governmental agencies over the substantive terms of collective-bargaining agreements." *American Tobacco Co. v. Patterson,* 456 U.S. 63, 76-77, 102 S.Ct. 1534, 1541, 71 L.Ed.2d 748 (1982). We have also noted that "[s]ignificant freedom must be afforded employers and unions to create differing seniority systems," *California Brewers Assn. v. Bryant,* 444 U.S. 598, 608, 100 S.Ct. 814, 820, 63 L.Ed.2d 55 (1980).[FN6] The perceived dangers of affirmative action misused, therefore, are naturally averted by the bilateral process of negotiation, agreement, and ratification. The best evidence that Article XII is a narrow means to serve important interests is that representatives of all affected persons, starting from diametrically opposed perspectives, have agreed to it-not once, but six times since 1972.

FN6. This deference is warranted only if the union represents the interests of the workers fairly; a union's breach of that duty in the form of racial discrimination gives rise to an action by the worker against the union. See *Steele v. Louisville & Nashville R. Co.,* 323 U.S. 192, 207, 65 S.Ct. 226, 234, 89 L.Ed. 173 (1944).

VII

The narrow question presented by this case, if indeed we proceed to the merits, ****1867** offers no occasion for the Court to issue broad proclamations of public policy concerning ***312** the controversial issue of affirmative action. Rather, this case calls for calm, dispassionate reflection upon exactly what has been done, to whom, and why. If one honestly confronts each of those questions against the factual background suggested by the materials submitted to us, I believe the conclusion is inescapable that Article XII meets, and indeed surpasses, any standard for ensuring that race-conscious programs are necessary to achieve remedial purposes. When an elected school board and a teachers' union collectively bargain a layoff provision designed to preserve the effects of a valid minority recruitment plan by apportioning layoffs between two racial groups, as a result of a settlement achieved under the auspices of a supervisory state agency charged with protecting the civil rights of all citizens, that provision should not be upset by this Court on constitutional grounds.

The alleged facts that I have set forth above evince, at the very least, a wealth of plausible evidence supporting the Board's position that Article XII was a legitimate and necessary response both to racial discrimination and to educational imperatives. To attempt to resolve the constitutional issue either with no historical context whatever, as the plurality has done, or on the basis of a record devoid of established facts, is to do a grave injustice not only to the Board and teachers of Jackson and to the State of Michigan, but also to individuals and governments committed to the goal of eliminating all traces of segregation throughout the country. Most of all, it does an injustice to the aspirations embodied in the Fourteenth Amendment itself. I would vacate the judgment of the Court of Appeals and remand with instructions that the case be remanded to the District Court for further proceedings consistent with the views I have expressed.[FN7]

FN7. I do not envy the District Court its task of sorting out what this Court has and has not held today. It is clear, at any rate, that from among the many views expressed today, two noteworthy results emerge: a majority of the Court has explicitly rejected the argument that an affirmative-action plan must be preceded by a formal finding that the entity seeking to institute the plan has committed discriminatory acts in the past; and the Court has left open whether layoffs may be used as an instrument of remedial action.

***313** Justice STEVENS, dissenting.

In my opinion, it is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future. Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future. If so, I believe we should consider whether that public interest, and the manner in which it is pursued, justifies any adverse effects on the disadvantaged group.[FN1]

FN1. "In every equal protection case, we have to ask certain basic questions.

> What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?" *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 453, 105 S.Ct. 3249, 3261, 87 L.Ed.2d 313 (1985) (STEVENS, J., concurring).

I

The Equal Protection Clause absolutely prohibits the use of race in many governmental contexts. To cite only a few: the government may not use race to decide who may serve on juries,[FN2] who may use ****1868** public services,[FN3] who may marry,[FN4] and who may be fit parents. [FN5] The use of race in these situations is "utterly irrational" because it is completely unrelated ***314** to any valid public purpose; [FN6] moreover, it is particularly pernicious because it constitutes a badge of oppression that is unfaithful to the central promise of the Fourteenth Amendment.

FN2. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1985); *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979); *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880).

FN3. *Turner v. City of Memphis*, 369 U.S. 350, 82 S.Ct. 805, 7 L.Ed.2d 762 (1962) *(per curiam); Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

FN4. *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

FN5. *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984).

FN6. *Cleburne*, 473 U.S., at 452, 105 S.Ct., at 3261 (STEVENS, J., concurring in judgment) ("It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color"). See also *Palmore v. Sidoti*, 466 U.S., at 432, 104 S.Ct., at 1882 ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category").

Nevertheless, in our present society, race is not always irrelevant to sound governmental decisionmaking.[FN7] To take the most obvious example, in law enforcement, if an undercover agent is needed to infiltrate a group suspected of ongoing criminal behavior-and if the members of the group are all of the same race-it would seem perfectly rational to employ an agent of that race rather than a member of a different racial class. Similarly, in a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers.

FN7. As Justice MARSHALL explains, although the Court's path in *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), and *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), is tortuous, the path at least reveals that race consciousness does not automatically violate the Equal Protection Clause. In those opinions, only two Justices of the Court suggested that race-conscious governmental efforts were

inherently unconstitutional. See *id.*, at 522, 100 S.Ct., at 2797 (STEWART, J., dissenting, joined by REHNQUIST, J.). Cf. *id.*, at 548, 100 S.Ct., at 2810 (STEVENS, J., dissenting) ("Unlike Mr. Justice STEWART and Mr. Justice REHNQUIST, ... I am not convinced that the Clause contains an absolute prohibition against any statutory classification based on race"). Notably, in this Court, petitioners have presented solely a constitutional theory, and have not pursued any statutory claims. Cf. *Bakke*, 438 U.S. at 408, 98 S.Ct., at 2808 (STEVENS, J., concurring in judgment in part and dissenting in part) (suggesting that constitutional issue need not be reached because statutory issue was dispositive).

***315** In the context of public education,[FN8] it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous "melting pot" do not ****1869** identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.

FN8. The Court has frequently emphasized the role of public schools in our national life. See *Board of Education v. Pico*, 457 U.S. 853, 864, 102 S.Ct. 2799, 2806, 73 L.Ed.2d 435 (1982) (plurality opinion) ("[P]ublic schools are vitally important ... as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system' "); *Ambach v. Norwick*, 441 U.S. 68, 76, 99 S.Ct. 1589, 1594, 60 L.Ed.2d 49 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions"); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 30, 93 S.Ct. 1278, 1295, 36 L.Ed.2d 16 (1973) (" '[T]he grave significance of education both to the individual and to our society' cannot be doubted"); *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954) ("[E]ducation ... is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment").

In this case, the collective-bargaining agreement between the Union and the Board of Education succinctly stated a valid public purpose-"recognition of the desirability of multi-ethnic representation on the teaching faculty," and thus "a policy of actively seeking minority group personnel." App. to Pet. for Cert. 22a. Nothing in the record-not a shred of evidence-contradicts the view that the Board's attempt to employ, and to retain, more minority teachers in the Jackson public school system served this completely sound educational purpose. Thus, there was a rational and unquestionablylegitimate ***316** basis for the Board's decision to enter into the collective-bargaining agreement that petitioners have challenged, even though the agreement required special efforts to recruit and retain minority teachers.

II

It is argued, nonetheless, that the purpose should be deemed invalid because, even if the Board of Education's judgment in this case furthered a laudable goal, some other boards might claim that their experience demonstrates that segregated classes, or segregated faculties, lead to better academic achievement. There is, however, a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason.

The exclusionary decision rests on the false premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. As noted, that premise is "utterly irrational," *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 452, 105 S.Ct. 3249, 3261, 87 L.Ed.2d 313 (1985), and repugnant to the principles of a free and democratic society. Nevertheless, the fact that persons of different races

do, indeed, have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it. The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not. Thus, consideration of whether the consciousness of race is exclusionary or inclusionary plainly distinguishes the Board's valid purpose in this case from ***317** a race-conscious decision that would reinforce assumptions of inequality.[FN9]

FN9. Cf. *Palmore v. Sidoti*, 466 U.S., at 434, 104 S.Ct., at 1882 ("The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody"); *Buchanan v. Warley*, 245 U.S. 60, 81, 38 S.Ct. 16, 20, 62 L.Ed. 149 (1917) (rejecting legitimacy of argument that the "proposed segregation will promote the public peace by preventing race conflicts").

III

Even if there is a valid purpose to the race consciousness, however, the question that remains is whether that public purpose transcends the harm to the white teachers who are disadvantaged by the special preference the Board has given to its most recently hired minority teachers. In my view, there are two important inquiries in assessing the harm to the disadvantaged teacher. The first is an assessment of the procedures that were used to adopt, and implement, the race-conscious action.[FN10] ****1870** The second is an evaluation of the nature of the harm itself.

FN10. Cf. *Fullilove*, 448 U.S., at 548-549, 100 S.Ct., at 2810-2811 (STEVENS, J., dissenting) (A race-based classification "does impose a special obligation to scrutinize any governmental decisionmaking process that draws nationwide distinctions between citizens on the basis of their race and incidentally also discriminates against noncitizens in the preferred racial classes. For just as procedural safeguards are necessary to guarantee impartial decisionmaking in the judicial process, so can they play a vital part in preserving the impartial character of the legislative process"). That observation is, of course, equally applicable to a context in which the governmental decision is reached through a nonlegislative process. Significantly, a reason given for what this Court frequently calls "strict scrutiny" of certain classifications is the notion that the disadvantaged class is one that has been unable to enjoy full procedural participation. See *United States v. Carolene Products, Co.*, 304 U.S. 144, 152-153, n. 4, 58 S.Ct. 778, 783-784, n. 4, 82 L.Ed. 1234 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"); J. Ely, Democracy and Distrust 75-77 (1980).

In this case, there can be no question about either the fairness of the procedures used to adopt the race-conscious provision,***318** or the propriety of its breadth. As Justice MARSHALL has demonstrated, the procedures for adopting this provision were scrupulously fair. The Union that represents petitioners negotiated the provision and agreed to it; the agreement was put to a vote of the membership, and overwhelmingly approved. Again, not a shred of evidence in the record suggests *any* procedural unfairness in the adoption of the agreement. Similarly, the provision is specifically designed to achieve its objective-retaining the minority teachers that have been specially recruited to give the Jackson schools, after a period of racial unrest, an integrated faculty.[FN11] Thus, in striking contrast to the procedural inadequacy and unjustified breadth of the race-based classification in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980),[FN12] the race-conscious layoff policy here was adopted with full participation of the disadvantaged individuals and with a narrowly circumscribed berth for the policy's operation.

FN11. The layoff provision states:

"In the event that it becomes necessary to

> reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff." App. to Pet. for Cert. 23a.
>
> The layoff provision follows the agreement's statement of the goal of an increased minority presence on the faculty and of the commitment to active minority recruiting and hiring efforts. *Id.*, at 22a-23a.

FN12. See 448 U.S., at 532, 100 S.Ct., at 2802 (STEVENS, J., dissenting).

Finally, we must consider the harm to petitioners. Every layoff, like every refusal to employ a qualified applicant, is a grave loss to the affected individual. However, the undisputed facts in this case demonstrate that this serious consequence to petitioners is not based on any lack of respect for their race, or on blind habit and stereotype.[FN13] Rather, petitioners have been laid off for a combination of ***319** two reasons: the economic conditions that have led Jackson to lay off some teachers, and the special contractual protections intended to preserve the newly integrated character of the faculty in the Jackson schools. Thus, the same harm might occur if a number of gifted young teachers had been given special contractual protection because their specialties were in short supply and if the Jackson Board of Education faced a fiscal need for layoffs. A Board decision to grant immediate tenure to a group of experts in computer technology, an athletic coach, and a language teacher, for example, might reduce the pool of teachers eligible for layoffs during a depression and therefore have precisely the same impact as the racial preference at issue here. In either case, the harm would ****1871** be generated by the combination of economic conditions and the special contractual protection given a different group of teachers-a protection that, as discussed above, was justified by a valid and extremely strong public interest.[FN14]

FN13. Cf. *Mathews v. Lucas*, 427 U.S. 495, 520-521, 96 S.Ct. 2755, 2769, 49 L.Ed.2d 651 (1976) (STEVENS, J., dissenting).

FN14. The fact that the issue arises in a layoff context, rather than a hiring context, has no bearing on the equal protection question. For if the Board's interest in employing more minority teachers is sufficient to justify providing them with an extra incentive to accept jobs in Jackson, Michigan, it is also sufficient to justify their retention when the number of available jobs is reduced. Justice POWELL's suggestion, *ante*, at 1850 - 1852, that there is a distinction of constitutional significance under the Equal Protection Clause between a racial preference at the time of hiring and an identical preference at the time of discharge is thus wholly unpersuasive. He seems to assume that a teacher who has been working for a few years suffers a greater harm when he is laid off than the harm suffered by an unemployed teacher who is refused a job for which he is qualified. In either event, the adverse decision forecloses "only one of several opportunities" that may be available, *ante*, at 1851, to the disappointed teacher. Moreover, the distinction is artificial, for the layoff provision at issue in this case was included as part of the terms of the *hiring* of minority and other teachers under the collective-bargaining agreement.

IV

We should not lightly approve the government's use of a race-based distinction. History teaches the obvious dangers ***320** of such classifications.[FN15] Our ultimate goal must, of course, be "to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race." [FN16] In this case, however, I am persuaded that the decision to include more minority teachers in the Jackson, Michigan, school system served a valid public purpose, that it was adopted with fair procedures and given a narrow breadth, that it transcends the harm to petitioners, and that it is a step toward that ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race. I would therefore affirm the judgment of the Court of Appeals.

FN15. See, *e.g.*, *Fullilove*, 448 U.S., at 534, n. 5, 100 S.Ct., at 2804, n. 5 (STEVENS, J., dissenting).

FN16. *Id.*, at 547, 100 S.Ct., at 2810.

U.S.,1986.
Wygant v. Jackson Bd. of Educ.
476 U.S. 267, 106 S.Ct. 1842, 40 Fair Empl.Prac.Cas. (BNA) 1321, 40 Empl. Prac. Dec. P 36,106, 90 L.Ed.2d 260, 54 USLW 4479, 32 Ed. Law Rep. 20

END OF DOCUMENT