ITEM 3

TEST CLAIM
REVISED FINAL STAFF ANALYSIS
AND
PROPOSED STATEMENT OF DECISION

Former California Code of Regulations, Title 2, Sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127

Register 2008, No. 43

Post Election Manual Tally (PEMT)

10-TC-08

County of Santa Barbara, Claimant

TABLE OF CONTENTS

Exhibit A

1. TEST CLAIM TITLE

Post Election Manual Tally Requirements in Close Contest

2. CLAIMANT INFORMATION

County of Santa Barbara
Name of Local Agency or School District

Renee Bischof
Claimant Contact

Elections Division Manager
Title

4440 Calle Real - A
Street Address

Santa Barbara, CA 93110
City, State, Zip

805-696-8957
Telephone Number

805-568-2209
Fax Number

rbischo@co.santa-barbara.ca.us
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

Claimant designates the following person to act as its sole representative in this test claim. All correspondence and communications regarding this claim shall be forwarded to this representative. Any change in representation must be authorized by the claimant in writing, and sent to the Commission on State Mandates.

Renee Bischof
Claimant Representative Name

Elections Division Manager
Title

Santa Barbara County Clerk-Recorder-Assessor
Organization

4440 Calle Real - A
Street Address

Santa Barbara, CA 93110
City, State, Zip

805-696-8957
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E-Mail Address

For CSM Use Only

Filing Date: RECEIVED MAR 2 8 2011 COMMISSION ON STATE MANDATES

Test Claim #: 10-TC-08

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

Please identify all code sections, statutes, bill numbers, regulations, and/or executive orders that impose the alleged mandate (e.g., Penal Code Section 2045, Statutes 2004, Chapter 54 [AB 290]). When alleging regulations or executive orders, please include the effective date of each one.

Effective October 20, 2008 pursuant to Government Code sections 11346.1 and 11349.6 the Office of Administrative Law for the State of California approved emergency regulations numbered 2008-2009-002E to adopt the following sections to Division 7 of Title 2 of the California Code of Regulations:

Chapter 3. Post Election Manual Tallies
§ 20120, §20121, §20122, §20123, §20124, §20125, § 20126, §20127.

☑ *Copies of all statutes and executive orders cited are attached.*

Sections 5, 6, and 7 are attached as follows:

5. Written Narrative: pages 1 to 11.
6. Declarations: pages 1 to 1.
7. Documentation: pages 1 to 17.

SECTION 5: WRITTEN NARRATIVE

OVERVIEW

In October of 2008, emergency regulations were adopted by the Office of Administrative Law for the State of California under OAL File No. 2008-1009-02E calling for the manual tally of ten percent (10%) of precincts in contests where the margin of victory is less than half of one percent (0.5%) as of the semi-official canvass of election results.

On October 21, 2008 the Secretary of State issued CCROV 08304 noticing the elections officials in the State of California of this emergency regulatory action that was filed with the Secretary of State and effective October 20, 2008. The emergency regulatory action led to the elections officials in the State of California being required to provide a "higher level of service" than the manual tally of precincts required by California Elections Code section 15360.

Elections Code section 15360 currently reads:

> 15360. (a) During the official canvass of every election in which a voting system is used, the official conducting the election shall conduct a public manual tally of the ballots tabulated by those devices, including vote by mail voters' ballots, cast in 1 percent of the precincts chosen at random by the elections official. If 1 percent of the precincts is less than one whole precinct, the tally shall be conducted in one precinct chosen at random by the elections official. In addition to the 1 percent manual tally, the elections official shall, for each race not included in the initial group of precincts, count one additional precinct. The manual tally shall apply only to the race not previously counted. Additional precincts for the manual tally may be selected at the discretion of the elections official.
>
> (b) If vote by mail ballots are cast on a direct recording electronic voting system at the office of an elections official or at a satellite location of the office of an elections official pursuant to Section 3018, the official conducting the election shall either include those ballots in the manual tally conducted pursuant to subdivision (a) or conduct a public manual tally of those ballots cast on no fewer than 1 percent of all the direct recording electronic voting machines used in that election chosen at random by the elections official.
>
> (c) The elections official shall use either a random number generator or other method specified in regulations that shall be adopted by the Secretary of State to randomly choose the initial precincts or direct recording electronic voting machines subject to the public manual tally.
>
> (d) The manual tally shall be a public process, with the official conducting the election providing at least a five-day public notice of the time and place of the manual

[1]

tally and of the time and place of the selection of the precincts to be tallied prior to conducting the tally and selection.

(e) The official conducting the election shall include a report on the results of the 1 percent manual tally in the certification of the official canvass of the vote. This report shall identify any discrepancies between the machine count and the manual tally and a description of how each of these discrepancies was resolved. In resolving any discrepancy involving a vote recorded by means of a punchcard voting system or by electronic or electromechanical vote tabulating devices, the voter verified paper audit trail shall govern if there is a discrepancy between it and the electronic record.

The emergency regulations added sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127 of Chapter 3 to Division 7 of Title 2 of the California Code of Regulations.

At the time of adoption of the emergency regulations, the applicable code sections read as follows:

§ 20120. Purpose and Applicability.

(a) The purpose of this chapter is to establish standards and procedures for conducting increased manual tallies in contests in which the margin of victory is very narrow.

(b) This chapter applies to the Secretary of State and all elections officials within the State of California for all elections in this state conducted in whole or in part on a voting system, the approval of which is conditioned by the Secretary of State on performance of increased manual tallies in contests with narrow margins of victory.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20121. Increased manual tally in contests with narrow margins of victory.

(a) After each election, the elections official shall determine the margin of victory in each contest based upon the semifinal official canvass results, as defined in Elections Code section 353.5.

(1) For single-winner elections, the margin of victory is the difference between the percentage of votes won by the candidate with the number of votes needed to win the seat and the percentage of votes won by the candidate with the next lowest number of votes.

(2) For multi-winner elections, the margin of victory is the difference between the percentage of votes won by the candidate with the lowest number of votes needed to win a seat and the percentage of votes won by the candidate with the next lowest

number of votes. For example, for a contest with three open seats, the margin of victory would be the difference between the percentage of the votes won by the third and fourth place candidates.

(3) For ballot measure contests, including recall contests, the margin of victory is the difference between the percentages of votes for and against the ballot measure.

(b) For any contest in which the margin of victory is less than one half of one percent (0.5%), the elections official shall conduct a manual tally, employing the methods set forth in Elections Code section 15360, of ten percent (10%) of randomly selected precincts. The ten percent (10%) manual tally shall apply only to votes cast in the contest or contests with a margin of victory less than one half of one percent (0.5%), not to other contests on the same ballot in which the margin of victory equals or exceeds on half of one percent (0.5%).

(c) Precincts manually tallied under Elections Code section 15360 may be included as part of the ten percent (10%) manual tally.

(d) In any contest in which a ten percent (10%) manual tally would otherwise be required pursuant to subdivision (b), an elections official may instead conduct a one hundred percent (100%) manual tally.

(e) The elections official shall begin the manual tally as soon as practicable after the random selection of precincts for the manual tally.

(f) The manual tally shall be conducted in public view by hand without the use of electronic scanning equipment.

(g) Individuals performing the manual tally shall not at any time during the manual tally process be informed of the corresponding machine tally results.

(h) A poll worker participating in the manual tally shall not be assigned to tally the results from a precinct in which that individual served as a poll worker on Election Day.

(i) The elections official shall take appropriate measures to ensure that direct recording electronic (DRE) ballots that were cancelled before being cast are not inadvertently tallied as valid ballots in the manual tally process.

(j) The elections official shall take appropriate measures to ensure that damaged or defective ballots are not inadvertently tallied as valid ballots in the manual tally process.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.

[3]

Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20122. Contests voted upon in more than one jurisdiction.

(a) In any contest voted upon in more than one jurisdiction, the elections official in each jurisdiction in which votes were cast in the contest shall determine whether a ten percent (10%) manual tally is required by section 20121, subdivision (b), by calculating the overall margin of victory in all jurisdictions in which votes were cast in the contest. The examples in subdivisions (a)(1) and (a)(2) below of contests voted upon in two counties illustrate the application of the general rule stated in this subdivision (a).

(1) If the margin of victory in a contest voted upon in counties A and B is less than one half of one percent (0.5%) within county A but the overall margin of victory in counties A and B combined is more than one half of one percent (0.5%), then a ten percent (10%) manual tally is not required in either county.

(2) If the margin of victory in a contest voted upon in counties A and B is more than one half of one percent (0.5%) within county A but the overall margin of victory in counties A and B combined is less than one half of one percent (0.5%), then County A shall conduct a manual tally of randomly selected ten percent (10%) of the County A precincts in which voters cast ballots for that contest and County B shall conduct a manual tally of randomly selected ten percent (10%) of the County B precincts in which voters cast ballots for that contest.

(b) For a legislative or statewide contest, the elections official shall determine whether a ten percent (10%) manual tally is required based upon the semifinal official canvass results and margin of victory for the entire district for a legislative contest or the entire state for a state contest posted on the canvass website of the Secretary of State.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20123. Determination, counting and disclosure of variances.

(a) A "variance' is any difference between the machine tally and the manual tally for a contest. For purposes of determining whether additional precincts must be manually tallied under section 20124, variances found in the manual tally sample for a given contest are presumed to exist in at least the same proportion in the remaining ballots cast in the contest. The examples in subdivisions (a)(1) through (a)(3) illustrate how the number of variances in a contest should be calculated.

(1) If the manual tally establishes that the machine tally erroneously attributed a vote for Candidate A to Candidate B, two variances result because the vote totals for Candidate A and for Candidate B are each changed by one vote in the manual tally.

(2) If the manual tally establishes that the machine tally erroneously attributed a vote for Measure 1 as a vote against Measure 1, two variances result because the vote totals for Measure 1 and against Measure 1 are each changed by one vote in the manual tally.

(3) If the manual tally determines that a vote was cast in a contest on a ballot that the machine tally interpreted as an undervote in the contest, one variance results because the machine tally undervote becomes a vote for a candidate or a vote for or against a measure in the manual tally.

(b) An elections official must document and disclose to the public any variances between the semifinal official canvass results and the manual tally results.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20124. Manual tally escalation requirements for variances.

(a) The elections official shall calculate the variance percentage for any contest with one or more variances by dividing the total number of variances found in the manual tally sample for the contest by the total number of votes cast for that contest in the manual tally sample. For single-winner contests, only variances that narrow the margin between the winner and any of the losers shall be included in the total number of variances. For multi-winner contests, only variances that narrow the margin of victory between any of the winners and any of the losers shall be included in the total number of variances. If the variance percentage represents at least one-tenth (10%) of the margin of victory for that contest based on the semifinal official canvass results, then additional precincts must be manually tallied for that contest as provided in subdivision (b).

(b) Additional precincts shall be tallied in randomly selected blocks of five percent (5%) until the total number of variances presumed to exist – re-calculated using the method above – is smaller than ten percent (10%) of the margin of victory for that contest, based on the semifinal official canvass results, or until all ballots have been manually tallied, whichever occurs first.

(c) If any variance is found between manually tallied voter verifiable paper audit trail (VVPAT) records and corresponding electronic vote results that cannot be accounted for by some obvious mechanical problem, then the VVPAT records, memory cards and devices, and direct recording electronic (DRE) voting machines must be preserved and the Secretary of State must be notified in order to allow for an

investigation to determine the cause of the problem. The Secretary of State shall conduct the investigation in such a manner as to minimize adverse impact on the conclusion of the canvass and certification of the election, as well as preparation for any upcoming elections.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20125. Records To Be Maintained During And After The Manual Tally Process.

(a) The elections official shall keep a log to record the manual tally process, including the results of each round of manual tallying for each precinct included in the sample, how variances were resolved, and details of any actions taken that are contrary to this chapter. The elections official shall make the log available to the public.

(b) The elections official shall track, record in the log and report to the public by precinct the number of undervotes and overvotes discovered in the manual tally of a contest.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20126. Public Right To Observe.

(a) The elections official shall make any semifinal official canvass precinct tally results available to the public before the manual tally of the results from those precincts begins.

(b) The elections official shall comply with the notice requirements established in Elections Code section 15360 when conducting any post-election manual tallying required by this chapter. This notice requirement may be satisfied by providing a single notice containing the times and places of:

(1) the initial selection of precincts for the one percent (1%) manual tally and any ten percent (10%) manual tally required;
(2) the beginning of the manual tally process; and
(3) any additional random selection of precincts which may become necessary to comply with the escalation requirements.

(c) The elections official shall permit the public to observe all parts of the manual tally process, including the random selection of precincts, in a manner that allows them to verify the tally. The elections official shall not permit members of the public to touch ballots, voter verifiable paper audit trails or other official materials used in the manual tally process or to interfere in any way with the process.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20127. Completion Within Official Canvass Period.

For any contest in which an increased manual tally is required by this chapter, the elections official shall complete all tasks and make all reports required by this chapter within the canvass period established by Elections Code sections 10262 and 15372.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

(A) NEW ACTIVITIES

The addition of sections § 20121 - Increased manual tally in contests with narrow margins of victory, § 20122 - Contests voted upon in more than one jurisdiction, and § 20124 - Manual tally escalation requirements for variances had the greatest impact on elections officials.

Determining the margin of victory.

With the addition of § 20121 the election official was required to determine the margin of victory in each contest based on the results as reported in the semifinal official canvass of results and the type of contest; single-winner, multi-winner, or ballot measure contests. As defined in Elections Code 353.5 the "semifinal official canvass" is the public process of collecting, processing, and tallying ballots and, for state or statewide elections, reporting results to the Secretary of State on election night.

Contest voted upon in multiple jurisdictions.

Prior to the adoption of § 20122, elections officials in other jurisdictions acted independently from one another in the conduct of the manual tally provisions set for in Elections Code Section 15360. With the addition of § 20122, for contests voted in more than one jurisdiction, the overall margin of victory in all jurisdictions in which votes were cast for that contest needed be determined. If the combined margin of victory was more than one half of one percent, a ten percent manual tally was not required. If the combined margin of victory

was less than one half of one percent, a ten percent manual tally was required to be completed. This was true for legislative or statewide contests.

Escalation Requirement:

With the addition of § 20124 when variances occurred between the semifinal results and the manual tally results the elections official was required to do the following:

1. Calculate the variance for each contest.
2. Determine if additional precincts were required to be tallied, which occurred if the variance percentage represented at least 10% of the margin of victory for that contest.
3. Tally randomly selected precincts in 5% increments until the total number of variances recalculated was smaller than 10% of the margin of victory for that contest or until all ballots have been tallied, whichever came first.
4. Notify the Secretary of State's office if any variances exist between manually tallied voter verifiable paper audit trail records and electronic vote results that could not be accounted for by an obvious mechanical problem. In this instance all VVPAT records, memory cards/devices, and direct recording electronic voting machines were required to be preserved for investigation by the Secretary of State.

As an alternative to the 10% manual tally with escalation requirements, the elections official had the option to conduct a 100% manual tally of the ballots in a given contest meeting the Post Election Manual Tally requirement.

The tracking and reporting of undervotes and overvotes was also required for the Post Election Manual Tally by § 20123.

Pages 11-13 of Section 7. Documentation includes a list of tasks associated with meeting the new activities imposed by the emergency regulations.

(B) MODIFIED ACTIVITIES

Elections Code section 15360 requires a public manual tally of both poll and vote by mail ballots tabulated on voting devices in one percent (1%) of the precincts to be chosen at random. Additional precincts are selected if necessary to ensure all contests are tallied.

With the adoption of the Post Election Manual Tally emergency regulations, the potential existed for any elections official in the State of California to be required to manual tally a contest or contests encompassing their entire county, drastically increasing the number of precincts to be tallied. Furthermore, should the number of variances in the initial 10% of precincts for the contest(s) dictate that additional precincts be tallied; this escalation requirements could lead to the manual tally of 100% of votes cast in that contest(s) including a county or statewide contest.

The County of Santa Barbara had three contests that met the requirements of the Post Election Manual Tally. The largest contest tallied was the 19th State Senate District

encompassing 253 of the 318 precincts in the county. With potentially being required to hand tally 253 precincts by the end of the canvass period, the time frame identified by section 20127, the County of Santa Barbara determined that we did not have the space or staff to complete the Post Election Manual Tally concurrently with other required canvass tasks. In order to comply with these regulations the County completed the following actions:

1. Identified a location to rent for conducting the manual tally;
2. Coordinated with the Sheriff for the security of ballots at an offsite location;
3. Recruited additional staff from our poll worker list and temporary agencies to work on manual tally boards;
4. Organized manual tally boards to ensure that poll workers were not on boards tallying ballots for precincts they worked on Election Day;
5. Created and boxed up all tally sheets and supplies for transport to offsite tally location;
6. Rented a Box Truck to transport ballots to/from offsite manual tally location; and
7. Ensured secure transport of ballots & tally sheets to/from offsite manual tally location.

In order to include precincts tallied as part of the 1% manual tally as part of the 10% Post Election Manual Tally, we were required to also track overvotes and undervotes in those precincts to fulfill the requirements of section 20123 that were not required by Elections Code § 15360.

Section 20126 (b) states the elections official shall comply with the notice requirement outlined in Elections Code § 15360. The escalation of manual tallied precincts required by section 20124 is not applicable to section15360. Therefore when an elections official determined they must escalate the number of precincts tallied, a supplementary notice of the time and place for the additional random selection of precincts was required to comply with section 20126 (b)(3).

Pages 13-17 of Section 7. Documentation includes a list of tasks associated with meeting the modified existing activities imposed by the emergency regulations.

(C) ACTUAL COSTS

The cost incurred by the County of Santa Barbara, totaling $250,126.09, represents the lowest possible expenditure in order to completely comply with the requirements set forth in the Post Election Manual Tally Requirements in Close Contest Emergency Regulations. The County did not incur the costs until after November 4, 2008.

(D) ANNUAL COST ESTIMATES

There are no ongoing costs associated with these emergency regulations adopted in October of 2008 which have since expired. Currently there are no regulations in place related to the Post Election Manual Tally Requirements in Close Contests.

E) STATEWIDE COST ESTIMATES

The statewide cost estimate for Post Election Manual Tallies conducted for the November Presidential General Election in 2008 was $ 817,479.96. This figure is based on information gathered in a survey conducted by the California Association of County Elections Officials (CACEO). As all counties have not responded to the survey, we do not have the actual cost. Page 10 in Section 7. Documentation outlines the costs per county.

(F) FUNDING SOURCES

The County of Santa Barbara is unaware of any funding sources for the new activities.

(G) PRIOR MANDATE DETERMINATIONS

There were no other prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the Post Election Manual Tally Requirements in Close Contests.

(H) LEGISLATIVELY DETERMINED MANDATE

On October 22, 2009 the California State Association of Counties (CSAC) submitted a letter of intent to the Commission on State Mandates in accordance with Government Code section 17573 to develop a Legislatively Determined Mandate for the Post Election Manual Tally emergency regulations. On November 12, 2009, the Commission on State Mandates notified CSAC and the Department of Finance of their receipt of the letter of intent and advising that the statute of limitation for the filing of a test claim shall be tolled as of October 22, 2009 per Government Code section 17573 (b). The Legislatively Determined Mandate is referred to as *Post Election Manual Tally*, 09-LDM-01.

These two letters are shown on pages 8 and 9 of Section 7. Documentation.

ELIGIBILITY FOR REIMBURSEMENT

The adoption of the emergency regulations adding Chapter 3. Post Election Manual Tallies which encompassed sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127 to Division 7 of Title 2 of the California Code of Regulations, for which this test claim is filed, imposed a mandate on the elections officials in the State of California calling for a higher level of service than that which was imposed by California Elections Code Section 15360.

In *County of Los Angeles v. State of California* (1987) 43 Cal.3d, 46 the court defined "program" as one that carries out the "governmental function of providing service to the public, or laws which, to implement state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."

Section 20120 established that Chapter 3. Post Election Manual Tallies called for increased manual tallies in contests in which the margin of victory was very narrow and applied to the Secretary of State and all elections officials within the State of California for all elections in this state. Both the Secretary of State and election officials in the state are considered a local agency as defined in Government Code section 17518 and therefore, the regulations were unique to local government.

The adoption of these emergency regulations by a State Agency, The Office of Administrative Law, and the calling for the adoption of these regulations by the Secretary of State of California, clearly establishes these regulations as state policy.

The County of Santa Barbara asserts that costs incurred in conjunction with these regulations for which this test claim is filed are "costs mandated by the state" under Article XIIIB, section 6 of the California Constitution and Government Code section 17514, which reads as follows:

17514. "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.

CONCLUSION

The executive order adopting Chapter 3. Post Election Manual Tallies including sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127 to Division 7 of Title 2 of the California Code of Regulations imposed a higher level of service and cost to the County of Santa Barbara and meets the requirements established by the California Constitution and Government Code as a reimbursable state-mandated program.

Declaration of Renee Bischof

I, Renee Bischof, state as follows:

1. I have been the Elections Division Manager for the County of Santa Barbara County Clerk-Recorder-Assessor's Office since 2006. I have personal knowledge of the facts stated herein and if called upon to testify, I could do so competently.

2. In satisfying the statutes which are the subject of this test claim, the County of Santa Barbara performed the new activities as identified on pages 7 and 8 of section 5. Written Narrative and the tasks identified on pages 11-13 of section 7. Documentation.

3. Costs incurred by the County of Santa Barbara in satisfying this mandate including staff time, and time and materials totals $250,126.09. As this mandate has expired there are no ongoing costs.

4. The County of Santa Barbara incurred said costs from November 10, 2008 through November 26, 2008.

5. There are no funding sources available to offset the cost incurred in the implementation of the Post Election Manual Tally Requirements in Close Contests Emergency Regulations.

6. Section 6, subsection (D) is not applicable.

I declare under penalty of perjury that the foregoing is true and correct as based upon my personal knowledge, information or belief, and that this declaration is executed this 25 day of March, 2011, at Santa Barbara, California.

Renee Bischof
Elections Division Manager
County of Santa Barbara

State of California
Office of Administrative Law

In re:	**NOTICE OF APPROVAL OF EMERGENCY REGULATORY ACTION**
Secretary of State	
Regulatory Action:	**Government Code Section 11349.6**
Title 2, California Code of Regulations	
Adopt sections: 20120, 20121, 20122, 20123, 20124, 20125, 20126, 20127	**OAL File No. 2008-1009-02 E**
Amend sections:	
Repeal sections:	

This emergency rulemaking adopts the already promulgated post election manual tally requirements in close contests, pursuant to *County of San Diego v. Debra Bowen* (2008) 166 Cal.App.4th 501. It requires that in election contests where the margin of victory is lessthan half of one percent (0.5%) a manual tally of ten percent of the precincts of the contested race be conducted in addition to that already required by Elections Code section 15360.

OAL approves this emergency regulatory action pursuant to sections 11346.1 and 11349.6 of the Government Code.

This emergency regulatory action is effective on 10/20/2008 and will expire on 4/21/2009. The Certificate of Compliance for this action is due no later than 4/20/2009.

Date: 10/20/2008

Holly Geneva Stout
Staff Counsel

For: LINDA C. BROWN
Deputy Director

Original: Debra Bowen
Copy: Pam Giarrizzo

EMERGENCY

STATE OF CALIFORNIA—OFFICE OF ADMINISTRATIVE LAW
NOTICE PUBLICATION/REGULATIONS SUBMISSION (See Instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-08)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-		2008-1009-02E

For use by Office of Administrative Law (OAL) only

2008 OCT -9 PM 1:17
OFFICE OF ADMINISTRATIVE LAW

NOTICE | REGULATIONS

2008 OCT 20 PM 4:27

AGENCY WITH RULEMAKING AUTHORITY: Secretary of State

AGENCY FILE NUMBER (If any):

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S): Post Election Manual Tally Requirements in Close Contests

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S): None

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	
	ADOPT: 20120, 20121, 20122, 20123, 20124, 20125, 20126, 20127
	AMEND:
TITLE(S): Title 2	REPEAL:

3. TYPE OF FILING

- ☐ Regular Rulemaking (Gov. Code §11346)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☒ Emergency (Gov. Code, §11346.1(b))
- ☐ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☐ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ File & Print
- ☐ Other (Specify)
- ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)
n.a.

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- ☐ Effective 30th day after filing with Secretary of State
- ☒ Effective on filing with Secretary of State
- ☐ §100 Changes Without Regulatory Effect
- ☐ Effective other (Specify)

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- ☐ Department of Finance (Form STD. 399) (SAM §6660)
- ☐ Fair Political Practices Commission
- ☐ State Fire Marshal
- ☐ Other (Specify)

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Pam Giarrizzo, Chief Counsel	(916) 653-7244		PGiarrizzo@sos.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE		DATE
Pam Giarrizzo	[2]	10/9/08

TYPED NAME AND TITLE OF SIGNATORY: Pam Giarrizzo, Chief Counsel

TEXT OF PROPOSED EMERGENCY REGULATIONS

Add Sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127 of Chapter 3 to Division 7 of Title 2 of the California Code of Regulations.

Chapter 3. Post Election Manual Tallies.

§ 20120. Purpose and Applicability.

(a) The purpose of this chapter is to establish standards and procedures for conducting increased manual tallies in contests in which the margin of victory is very narrow.

(b) This chapter applies to the Secretary of State and all elections officials within the State of California for all elections in this state conducted in whole or in part on a voting system, the approval of which is conditioned by the Secretary of State on performance of increased manual tallies in contests with narrow margins of victory.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20121. Increased manual tally in contests with narrow margins of victory.

(a) After each election, the elections official shall determine the margin of victory in each contest based upon the semifinal official canvass results, as defined in Elections Code section 353.5.

(1) For single-winner elections, the margin of victory is the difference between the percentage of votes won by the candidate with the number of votes needed to win the seat and the percentage of votes won by the candidate with the next lowest number of votes.

(2) For multi-winner elections, the margin of victory is the difference between the percentage of votes won by the candidate with the lowest number of votes needed to win a seat and the percentage of votes won by the candidate with the next lowest number of votes. For example, for a contest with three open seats, the margin of victory would be the difference between the percentage of the votes won by the third and fourth place candidates.

(3) For ballot measure contests, including recall contests, the margin of victory is the difference between the percentages of votes for and against the ballot measure.

(b) For any contest in which the margin of victory is less than one half of one percent (0.5%), the elections official shall conduct a manual tally, employing the methods set forth in Elections Code section 15360, of ten percent (10%) of randomly selected precincts. The ten percent (10%) manual tally shall apply only to votes cast in the contest

or contests with a margin of victory less than one half of one percent (0.5%), not to other contests on the same ballot in which the margin of victory equals or exceeds one half of one percent (0.5%).

(c) Precincts manually tallied under Elections Code section 15360 may be included as part of the ten percent (10%) manual tally.

(d) In any contest in which a ten percent (10)%) manual tally would otherwise be required pursuant to subdivision (b), an elections official may instead conduct a one hundred percent (100%) manual tally of the ballots.

(e) The elections official shall begin the manual tally as soon as practicable after the random selection of precincts for the manual tally.

(f) The manual tally shall be conducted in public view by hand without the use of electronic scanning equipment.

(g) Individuals performing the manual tally shall not at any time during the manual tally process be informed of the corresponding machine tally results.

(h) A poll worker participating in the manual tally shall not be assigned to tally the results from a precinct in which that individual served as a poll worker on Election Day.

(i) The elections official shall take appropriate measures to ensure that direct recording electronic (DRE) ballots that were cancelled before being cast are not inadvertently tallied as valid ballots in the manual tally process.

(j) The elections official shall take appropriate measures to ensure that damaged or defective ballots are not inadvertently tallied as valid ballots in the manual tally process.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20122. Contests voted upon in more than one jurisdiction.

(a) In any contest voted upon in more than one jurisdiction, the elections official in each jurisdiction in which votes were cast in the contest shall determine whether a ten percent (10%) manual tally is required by section 20121, subdivision (b) by calculating the overall margin of victory in all jurisdictions in which votes were cast in the contest. The examples in subdivisions (a)(1) and (a)(2) below of contests voted upon in two counties illustrate the application of the general rule stated in this subdivision (a).

(1) If the margin of victory in a contest voted upon in counties A and B is less than one half of one percent (0.5%) within county A but the overall margin of victory in

counties A and B combined is more than one half of one percent (0.5%), then a ten percent (10%) manual tally is not required in either county.

(2) If the margin of victory in a contest voted upon in counties A and B is more than one half of one percent (0.5%) within county A but the overall margin of victory in counties A and B combined is less than one half of one percent (0.5%), then County A shall conduct a manual tally of a randomly selected ten percent (10%) of the County A precincts in which voters cast ballots for that contest and County B shall conduct a manual tally of a randomly selected ten percent (10%) of the County B precincts in which voters cast ballots for that contest.

(b) For a legislative or statewide contest, the elections official shall determine whether a ten percent (10%) manual tally is required based upon the semifinal official canvass results and margin of victory for the entire district for a legislative contest or the entire state for a state contest posted on the canvass website of the Secretary of State.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20123. Determination, counting and disclosure of variances.

(a) A "variance" is any difference between the machine tally and the manual tally for a contest. For purposes of determining whether additional precincts must be manually tallied under section 20124, variances found in the manual tally sample for a given contest are presumed to exist in at least the same proportion in the remaining ballots cast in the contest. The examples in subdivisions (a)(1) through (a)(3) illustrate how the number of variances in a contest should be calculated.

(1) If the manual tally establishes that the machine tally erroneously attributed a vote for Candidate A to Candidate B, two variances result because the vote totals for Candidate A and for Candidate B are each changed by one vote in the manual tally.

(2) If the manual tally establishes that the machine tally erroneously attributed a vote for Measure 1 as a vote against Measure 1, two variances result because the vote totals for Measure 1 and against Measure 1 are each changed by one vote in the manual tally.

(3) If the manual tally determines that a vote was cast in a contest on a ballot that the machine tally interpreted as an undervote in the contest, one variance results because the machine tally undervote becomes a vote for a candidate or a vote for or against a measure in the manual tally.

(b) An elections official must document and disclose to the public any variances between the semifinal official canvass results and the manual tally results.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20124. Manual tally escalation requirements for variances.

(a) The elections official shall calculate the variance percentage for any contest with one or more variances by dividing the total number of variances found in the manual tally sample for the contest by the total number of votes cast for that contest in the manual tally sample. For single-winner contests, only variances that narrow the margin between the winner and any of the losers shall be included in the total number of variances. For multi-winner contests, only variances that narrow the margin of victory between any of the winners and any of the losers shall be included in the total number of variances. If the variance percentage represents at least one-tenth (10%) of the margin of victory for that contest based on the semifinal official canvass results, then additional precincts must be manually tallied for that contest as provided in subdivision (b).

(b) Additional precincts shall be tallied in randomly selected blocks of five percent (5%) until the total number of variances presumed to exist – re-calculated using the method above – is smaller than ten percent (10%) of the overall margin of victory in that contest, based on the semifinal official canvass results, or until all ballots have been manually tallied, whichever occurs first.

(c) If any variance is found between manually tallied voter verifiable paper audit trail (VVPAT) records and corresponding electronic vote results that cannot be accounted for by some obvious mechanical problem, then the VVPAT records, memory cards and devices, and direct recording electronic (DRE) voting machines must be preserved and the Secretary of State must be notified in order to allow for an investigation to determine the cause of the problem. The Secretary of State shall conduct the investigation in such a manner as to minimize adverse impact on the conclusion of the canvass and certification of the election, as well as preparation for any upcoming elections.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20125. Records To Be Maintained During And After The Manual Tally Process.

(a) The elections official shall keep a log to record the manual tally process, including the results of each round of manual tallying for each precinct included in the sample, how variances were resolved, and details of any actions taken that are contrary to this chapter. The elections official shall make the log available to the public.

(b) The elections official shall track, record in the log and report to the public by precinct the number of undervotes and overvotes discovered in the manual tally of a contest.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20126. Public Right To Observe.

(a) The elections official shall make any semifinal official canvass precinct tally results available to the public before the manual tally of the results from those precincts begins.

(b) The elections official shall comply with the notice requirements established in Elections Code §15360 when conducting any post-election manual tallying required by this chapter. This notice requirement may be satisfied by providing a single notice containing the times and places of:

(1) the initial selection of precincts for the one percent (1%) manual tally and any ten percent (10%) manual tally required;
(2) the beginning of the manual tally process; and
(3) any additional random selection of precincts which may become necessary to comply with escalation requirements.

(c) The elections official shall permit the public to observe all parts of the manual tally process, including the random selection of precincts, in a manner that allows them to verify the tally. The elections official shall not permit members of the public to touch ballots, voter verifiable paper audit trails or other official materials used in the manual tally process or to interfere in any way with the process.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20127. Completion Within Official Canvass Period.

For any contest in which an increased manual tally is required by this chapter, the elections official shall complete all tasks and make all reports required by this chapter within the canvass period established by Elections Code sections 10262 and 15372.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

October 22, 2009

Paula Higashi
Executive Director
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA 95814

1100 K Street
Suite 101
Sacramento
California
95814

Telephone
916.327.7500
Facsimile
916.441.5507

RE: Legislatively-Determined Mandate
Post Election Manual Tally (PEMT)

Dear Executive Director Higashi:

It is the intent of the California State Association of Counties (CSAC) to work with the Department of Finance in following the process set forth in Government Code section 17573 to develop a Legislatively Determined Mandate (LDM) for the Post Election Manual Tally emergency regulations issued on March 24, 2009, referred to by the Secretary of State as CCROV #009048.

By copy of this letter to Carla Castañeda, Department of Finance, we are providing notice of our intent. CSAC requests that the statute of limitation for the filing of a test claim be tolled as of the date of this notice pursuant to Government Code section 17573, subdivision (b).

While the joint request is pending, the DOF or CSAC shall notify the CSM of actions taken as set forth below, in accordance with Government Code section 17573, subdivision (g):

- Provide the CSM with a copy of any communications re development of a joint request, and a copy of a joint request when it is submitted to the Legislature.
- Notify the CSM of the date of (A) the Legislature's action on a joint request in the Budget Act, or (B) the Department of Finance's decision not to submit a joint request.

The principal contact person for the RRM shall be Carla Castañeda, Department of Finance, (916) 327-0103, extension 3090 or Jean Kinney Hurst, CSAC, (916) 327-7500, extension 515.

Sincerely,

Jean Kinney Hurst
Legislative Representative

cc: Carla Castañeda, Department of Finance

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

November 12, 2009

Ms. Jean Kinney Hurst
California State Association
of Counties (CSAC)
1100 K Street, Suite 101
Sacramento, CA 95814-3941

Ms. Carla Castaneda
Department of Finance (A-15)
915 L Street, 12th Floor
Sacramento, CA 95814

RE: **Legislatively Determined Mandate**
Post Election Manual Tally, 09-LDM-01

Dear Ms. Hurst and Ms. Castaneda:

On November 2, 2009, the Commission on State Mandates (Commission) received a letter of intent from the California State Association of Counties (CSAC) to work with the Department of Finance to develop a Legislatively Determined Mandate (LDM) for the *Post Election Manual Tally* program.

Pursuant to Government Code section 17573, subdivision (b), the statute of limitation for the filing of a test claim shall be tolled as of October 22, 2009.

Please contact Heidi Palchik at (916) 323-8218 if you have any questions.

Sincerely,

NANCY PATTON
Assistant Executive Director

Post Election Manual Tally Cost by County from CACEO Survey
Presidential General Election, November 4, 2008

County	Total Costs
Amador	0.00
Alameda	24,885.45
Butte	1,126.81
Calaveras	0.00
Colusa	1,000.00
Contra Costa	11,037.54
Del Norte	0.00
El Dorado	33,184.87
Fresno	9,114.09
Inyo	320.00
Kern	2,534.00
Kings	0.00
Lassen	0.00
Los Angeles	43,919.00
Madera	1,900.00
Merced	0.00
Modoc	0.00
Monterey	3,790.66
Napa	711.74
Nevada	965.00
Orange	57,825.04
Placer	9,840.74
Plumas	1,077.12
Riverside	20,502.00
Sacramento	8,604.85
San Bernardino	52,000.00
San Diego	6,446.37
San Francisco	68,669.70
San Joaquin	0.00
San Luis Obispo	0.00
Santa Barbara	250,126.09
Santa Clara	94,727.00
Santa Cruz	6,307.37
Shasta	3,674.30
Sierra	0.00
Siskiyou	2,600.00
Solano	200.00
Sonoma	25,057.69
Sutter	0.00
Tulare	1,250.00
Ventura	74,082.53
Total costs	817,479.96

Post Election Manual Tally (PEMT) New and Existing Activities

COUNTY: SANTA BARBARA

(A) New Activities

1. Conducted meetings internally, with other counties and with the Secretary of State to clarify the requirements outlined in the Emergency Regulations.
   Labor - staff time including but not limited to reviewing Emergency Regulations and existing mandates required per Election Code §15360 in conducting manual tallies; involvement in meetings and determining course of action based on meeting outcome.
   Materials – includes but not limited to printed material for distribution and discussion during meetings.

2. Conducted meetings with Election Division staff to determine activities to be completed in preparation for the Manual Tally.
   Labor - staff time including but not limited to discussing necessary activities, identifying staff responsible for each activity, and setting priorities and deadlines.
   Materials – includes but not limited to printed material for distribution and discussion during meetings.

3. Identify which local contests are required to be tallied.
   Labor - staff time including but not limited to determining the margin of victory for each contest; and for the contest required to be tallied printing reports listing the precincts in that contest.
   Materials – includes but not limited to the Election Night Results Summary, district to precinct reports and other printed materials in preparation for the random selection of precincts.

4. Coordinate with Sheriff for security of ballots at offsite location.
   Labor - staff time including but not limited to determining where to store ballots while conducting the manual tally and contacting the Sheriff to arrange for access to secure location.

5. Identify location for conducting manual tally and complete contract for location.
   Labor - staff time including but not limited to locating potential sites, meeting with the location representative to determine functionality of space and availability, and completing any necessary paperwork for use of space.

6. Recruit staff from poll worker list and temporary agencies.
   Labor - staff time including but not limited to identifying potential poll workers to work, contacting the poll workers, contacting temporary agencies to fill remaining staff positions required to conduct the tally.

7. Organize manual tally boards; ensure that poll workers do not tally ballots for precincts they worked on Election Day.
   Labor - staff time including but not limited to compiling a list of all persons assigned to work the manual tally; identifying the source of their employment, either a poll worker and their precinct assignment or a temporary agency, and creating boards from the list with one experienced manual tally staff per board.
   Services – includes that of temporary agencies to assist in placing persons to work on the manual tally.

8. Prepare Poll and Vote by Mail ballot boxes for transport.
   Labor - staff time including but not limited to identifying all ballots required for the manual tally. Sealing boxes with tamper evident tape.

9. Prepare spreadsheet to track results of manual tally.
   Labor - staff time including but not limited to importing data from the semi-official election night results by precinct for each contest; proofing for accuracy and setting up formulas to calculate variances.

10. Box up all tally sheets and supplies for transport to offsite tally location.
    Labor - staff time including but not limited to packing the tally sheets and supplies required to conduct the manual tally.
    Materials – includes but not limited to tally sheets, red pens, reports, rulers

11. Ensure secure transport of ballots to/from offsite manual tally location
    Labor - staff time including but not limited to making sure boxes of ballots are sealed, loading the ballots on a truck and securing the ballots at the offsite location in dual custody.
    Materials – includes but not limited to tamper evident tape, boxes and labels to identify what ballots are stored in the boxes.
    Services – renting a truck to transport ballots from manual tally location to secure offsite location.

12. Setup tables with board numbers and supplies
    Labor - staff time including but not limited to setting up tables and chairs, labeling them with a tally board number, taking down the tables and chairs in the evening when an event was being held at the offsite location that evening.

13. Call roll and assign staff to their tally board/table
    Labor - staff time including but not limited to calling the names of the board members, checking them in as present, assigning them to their tally board table, reallocating staff to fill boards where there are vacancies.

14. Update spreadsheet with Vote by Mail ballot manual tally results
    Labor - staff time including but not limited to gathering tally sheets when tally is completed from each board and entering the number of votes cast for each candidate along with the overvotes and undervotes based on the tally.
    Materials – includes but not limited to the completed tally sheets and reports from tabulation to verify the totals.

15. Check totals to determine if variance exists and if escalation of precincts tallied is required.
    Labor - staff time including but not limited to reviewing the manual tally spreadsheet to determine if there is a need to escalate based on whether or not there truly is any variance, what those variances are and determining how to resolve the variances.
    Materials – includes but not limited to tally sheets, ballots, tabulation reports to verify totals.

16. Randomly select precincts in 5% increments for contests requiring escalation.
    Labor - staff time including but not limited to identifying the precincts in the contest requiring escalation, placing those precinct ranges in a random integer generator program, listing precinct selections in order.
    Materials – includes but not limited to precinct reports by contest.

17. Prepare report of cost for Post Election Manual Tally
    Labor - staff time including but not limited to tracking the cost of the Post Election Manual Tally and preparing a report of costs.

(B) Existing Activities

1. Prepare notice of date and time of random selection of manual tally precincts for publication/posting.
    Labor - staff time including but not limited to identifying the date and time of the random selection of precincts, preparing the notice of these dates and times, updating the website with the notice and posting the notice in all three of our offices, and coordinating with the local papers the publication of the notice.
    Materials – includes but not limited to paper on which the notice is printed.
    Services – publishing notice in the local newspapers.

2. Generate random precinct numbers for tally
   Labor - staff time including but not limited to printing reports which show the precincts per contest, selecting the method by which to randomly select the precincts, entering the number ranges to choose from, randomly selecting the precincts, and listing the precincts in the order in which they were drawn.
   Materials – includes but not limited to precinct reports by contest, computer with random integer generator program (or internet capability), and media (paper and pen) or computer used to document the selection of precincts.

3. Generate machine count reports for precincts selected
   Labor - staff time including but not limited to loading the semi official results from election night on the tabulation server; exporting polling place results by precinct for the contest and precincts in question.

4. Generate central count deck reports for precincts selected
   Labor - staff time including but not limited to loading the semi official results from election night on the tabulation server; printing central count reports by precinct showing the decks that have Vote By Mail or Mail Ballots for that precinct.

5. Identify staffing needs for supervision and manual tally boards (4 member board*)
   Labor - staff time including but not limited to estimating the number of hours it would take to complete the manual tally process, determining the number of hours available to complete the tally, determining the number of boards necessary to complete the tally in the timeline required and how many supervisors would be needed based on one per four boards.

   * Tally Board consists of one caller, one observer, and two markers.

6. Prepare notice of dates, times and locations of manual tally for publication/posting
   Labor - staff time including but not limited to identifying the dates and times of the manual tally, preparing the notice of these dates and times, updating the website with the notice and posting the notice in all three of our offices, and at the location where the tally was conducted, and coordinating with the local papers the publication of the notice.
   Materials – includes but not limited to paper on which the notice is printed.
   Services – publishing notice in the local newspapers.

7. Escort public observers
   Labor - staff time including but not limited to the preparation of observer instructions, logging in observers, providing the instructions to the observers, escorting the observers through each process while explaining what is being observed and answering questions.
   Materials – includes but not limited to paper on which the instructions are printed. Services

8. Locate and pull counted poll ballots for selected precincts
   Labor -staff time including but not limited to finding out what Vote Center (polling place) the precincts were located at, finding the boxes for that Vote Center, finding the write-in ballot envelopes for the Vote Center/precincts, and making sure that all containers are sealed for transport.
   Materials – seals for boxes and envelopes to be transported

9. Prepare supply list and order supplies for manual tally process
   Labor -staff time including but not limited to finding the boxes that contained the poll ballots for those precincts, finding the write-in ballot envelopes for the precincts, and making sure that the containers were sealed for transport.
   Materials – seals for boxes and envelopes to be transported

10. Prepare tally sheets for each contest/precinct selected for both poll and Vote By Mail ballots
    Labor -staff time including but not limited to generating a list of each candidate per contest to be tallied, identifying which precincts are part of the One Percent Manual Tally per Elections Code 15360 and Post Election Manual Tally, and adding the rows for tracking overvotes and undervotes for those in both, prepare master sheets for each contest, and print out sets of tally sheets for each precinct for both Vote By Mail and polling place ballots.
    Materials – Ledger size paper, paper clips, staples, toner cartridges

11. Prepare Pull List to track precincts and contests tallied
    Labor - staff time including but not limited to preparing logs to track which tables/boards are assigned which precincts, whether they are Vote By Mail (Central Count) or Polling Place Precincts, which contests have been tallied, which tallies need to be reviewed or are complete, whether they are part of the One Percent Manual Tally, Post Election Manual Tally or both.
    Materials – paper, clipboard, pens

12. Train boards on manual tally process
    Labor - staff time including but not limited to preparing instructions, informing the boards on every step of the process including separating the precinct ballots, calling and marking the tally sheets, what to do if a mark is questionable, and how to complete the tally sheets at the end of counting.

13. Provide tally boards working on Vote By Mail ballots with deck report for central count and tally sheets for a selected precinct
    Labor - staff time including but not limited to generating the deck reports from central count for selected precincts, pulling the deck report for the precinct the tally board is working on along with the corresponding tally sheets, logging the precinct and board assignments on the Pull List.

14. Locate central count deck in box of Vote By Mail ballots, one at a time
    Labor - staff time including but not limited to referring to the deck reports from central count to determine which deck you need, referring to a box log to determine which box the deck was stored in, finding that box and pulling the deck.

15. Sort vote by mail ballots by precinct
    Labor - staff time including but not limited to looking at each ballot in the deck to identify the precinct number and pulling out the one for the precinct you are tallying.
    Materials – Sort Qwik fingertip moistener

16. Conduct Manual Tally on Vote By Mail ballots.
    Labor - staff time including but not limited to looking at each ballot for that precinct to find the contest to tally, calling the vote for the contest being tallied, two markers marking the tally sheets while the observer watches what is being called and marked; this is done for each deck. Tallying each deck individually, so we can verify the counts at the deck level in case the tally is off. This makes it easier to identify variances and resolve the issue.
    Materials –red pens, colored pencils (not erasable), post-its, rulers

17. Supervisor compares manual tally with machine count for Vote By Mail ballots by precinct.
    Labor - staff time including but not limited to comparing the boards tally sheets with the deck and statement of votes cast to see if the totals match without providing the board with the numbers.
    Materials – Statement of Votes Cast Reports by precinct, and by deck, when needed to resolve any variances.

18. Provide tally board with polling place ballots and tally sheets for a selected precinct
    Labor - staff time including but not limited to locating the Vote Center (polling place) containing the precinct you are looking for, located the boxes for that Vote Center, pulling the write-in and uncounted ballot envelopes for that Vote Center/precinct and providing them along with the tally sheets for the selected precinct to a tally board, and logging out the precinct/Vote Center ballots on the Pull List.

19. Sort polling place ballots by precinct
    Labor - staff time including but not limited to looking at each ballot in the boxes for the Vote Center and pulling out any ballots for the precinct being tallied.
    Materials – Sort Qwik finger moistener

20. Conduct Polling Place ballot Manual Tally
    Labor - staff time including but not limited to looking at each ballot, calling the vote for the contest being tallied, two markers marking the tally sheets while the observer watches what is being called and marked, this is done for each precinct selected.
    Materials – Tally Sheets, red pens, colored pencils (not erasable), post-its, rulers

21. Supervisor compares manual tally with machine count for polling place ballots by precinct.
    Labor - staff time including but not limited to looking at the boards tally sheets against the statement of votes cast to see if the totals match without providing the board with the numbers.

22. Investigate any variances
    Labor - staff time including but not limited to reviewing the marks on the ballots to determine which votes may or may not have been read by the voting system, sorting out undervotes and overvotes and making sure those counts match, reviewing the uncounted ballots to see if they were truly uncounted or erroneously pulled by the pollworkers.

23. Reconcile and resolve variances if necessary
    Labor - staff time including but not limited to documenting any variances once identified and resolving them by deleting and rerunning the precinct effected. Once resolved, update the tracking spreadsheet with a description of how the variance was resolved.

24. Prepare tally reports for Secretary of State
    Labor - staff time including but not limited to preparing the Secretary of State reports on the Manual Tally and sending them to the Secretary of State.

8. CLAIM CERTIFICATION

*Read, sign, and date this section and insert at the end of the test claim submission.**

This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim submission is true and complete to the best of my own knowledge or information or belief.

Renee Bischof
Print or Type Name of Authorized Local Agency or School District Official

Elections Division Manager
Print or Type Title

Renee Bischof
Signature of Authorized Local Agency or School District Official

March 25, 2011
Date

** If the declarant for this Claim Certification is different from the Claimant contact identified in section 2 of the test claim form, please provide the declarant's address, telephone number, fax number, and e-mail address below.*

Received
June 13, 2011
Commission on
State Mandates

DEPARTMENT OF FINANCE

EDMUND G. BROWN JR. ▪ GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

Exhibit B

June 13, 2011

Mr. Drew Bohan
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Test Claim 10-TC-08 "Post Election Manual Tally—County of Santa Barbara."

Dear Mr. Bohan:

The Department of Finance (Finance) has reviewed the test claim on the Post Election Manual Tally submitted by the County of Santa Barbara (claimant). The claimant alleges the emergency regulations approved by the Office of Administrative Law (OAL File No. 2008-1009-02 E) on October 20, 2008 is a reimbursable state mandate because its requirements exceed that of current law and, therefore, impose a new program or higher level of service on local elections officials.

The emergency regulations require an elections official, in election contests where the margin of victory is less than half of one percent (0.5%), to conduct a manual tally of ten percent of randomly-selected precincts of the contested race. However, we request that the Commission on State Mandates (CSM) staff consider whether the regulations merely adopt the already-promulgated post election manual tally requirements in close contests pursuant to *County of San Diego v. Debra Bowen* (2008) 166 Cal.App.4th 501.

Should the CSM staff find that to be the case, the emergency regulations would then not impose a reimbursable state mandate on local elections officials within the meaning of Article XIII B, section 6 of the California Constitution because the requirements of the emergency regulations would already be required by the above court case. As such, the claim would then be denied pursuant to the court decision exception in Government Code section 17556, subdivision (b) which states that the Commission shall not find costs mandated by the state if, "The statute or executive order affirmed for the state a mandate that has been declared existing law or regulation by action of the courts."

Pursuant to section 1181.2, subdivision (c)(1)(E) of the California Code of Regulations, "documents e-filed with the Commission need not be otherwise served on persons that have provided an e-mail address for the mailing list."

Received
June 13, 2011
Commission on
State Mandates

If you have any questions regarding this letter, please contact Jeff Carosone, Principal Program Budget Analyst at (916) 445-8913.

Sincerely,

for NONA MARTINEZ
Assistant Program Budget Manager

Enclosure

Received
June 13, 2011
Commission on
State Mandates

Enclosure A

DECLARATION OF JEFF CAROSONE
DEPARTMENT OF FINANCE
CLAIM NO. CSM-10-TC-08

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.

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.

6-13-11
at Sacramento, CA

Jeff Carosone
Jeff Carosone

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On June 14, 2011, I served the:

Department of Finance Comments
Post Election Manual Tally Requirements in Close Contest, 10-TC-08
Office of Administrative Law File No. 2008-2009-002E, effective October 20, 2008;
California Code of Regulations, Title 2, Division 7, Chapter 3, Post Election Manual Tallies
Sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127
County of Santa Barbara, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

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 June 14, 2011, at Sacramento, California.

Heidi J. Palchik

Commission on State Mandates

Original List Date: 4/13/2011
Last Updated: 4/13/2011
List Print Date: 06/14/2011
Claim Number: 10-TC-08
Issue: Post Election Manual Tally

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.)

Ms. Marianne O'Malley Legislative Analyst's Office (B-29) 925 L Street, Suite 1000 Sacramento, CA 95814	Tel: Email Fax:	(916) 319-8315 marianne.O'malley@lao.ca.gov (916) 324-4281
Ms. Annette Chinn Cost Recovery Systems, Inc. 705-2 East Bidwell Street, #294 Folsom, CA 95630	Tel: Email Fax:	(916) 939-7901 achinncrs@aol.com (916) 939-7801
Ms. Anita Worlow AK & Company 3531 Kersey Lane Sacramento, CA 95864	Tel: Email Fax:	(916) 972-1666 akcompany@um.att.com
Mr. David Wellhouse David Wellhouse & Associates, Inc. 9175 Kiefer Blvd, Suite 121 Sacramento, CA 95826	Tel: Email Fax:	(916) 368-9244 dwa-david@surewest.net (916) 368-5723
Ms. Hasmik Yaghobyan County of Los Angeles Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: Email Fax:	(213) 893-0792 hyaghobyan@auditor.lacounty.gov (213) 617-8106
Mr. Allan Burdick CSAC-SB 90 Service 2001 P Street, Suite 200 Sacramento, CA 95811	Tel: Email Fax:	(916) 443-9136 allan_burdick@mgtamer.com (916) 443-1766
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Mr. Andy Nichols Nichols Consulting 1857 44th Street Sacramento, CA 95819	Tel: Email Fax:	(916)455-3939 andy@nichols-consulting.com (916)739-8712
Ms. Harmeet Barkschat Mandate Resource Services, LLC 5325 Elkhorn Blvd. #307 Sacramento, CA 95842	Tel: Email Fax:	(916)727-1350 harmeet@calsdrc.com (916)727-1734
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Mr. Jeff Carosone Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Tel: Email Fax:	(916)445-8913 jeff.carosone@dof.ca.gov
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Ms. Socorro Aquino State Controller's Office Division of Audits 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: Email Fax:	(916) 322-7522 SAquino@sco.ca.gov
Ms. Renee Bischof County of Santa Barbara 4440 Calle Real - A Santa Barbara, CA 93110	Tel: Email Fax:	(805) 696-8957 rbischo@co.santa-barbara.ca.us (805) 568-2209
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Ms. Juliana F. Gmur MAXIMUS 2380 Houston Ave Clovis, CA 93611	Tel: Email Fax:	(916) 471-5513 julianagmur@msn.com (916) 366-4838
Mr. Wayne Shimabukuro County of San Bernardino Auditor/Controller-Recorder-Treasurer-Tax Collector 222 West Hospitality Lane, 4th Floor San Bernardino, California 92415-0018	Tel: Email Fax:	(909) 386-8850 wayne.shimabukuro@atc.sbcounty.gov (909) 386-8830
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Ms. Evelyn Tseng City of Newport Beach 3300 Newport Blvd. P. O. Box 1768 Newport Beach, CA 92659-1768	Tel: Email Fax:	(949) 644-3127 etseng@newportbeachca.gov (949) 644-3339
Mr. Jim Spano State Controller's Office (B-08) Division of Audits 3301 C Street, Suite 700	Tel: Email Fax:	(916) 323-5849 jspano@sco.ca.gov (916) 327-0832

Sacramento, CA 95816

REGISTRAR OF VOTERS
4440-A Calle Real
Santa Barbara, CA 93110

Mailing Address:
PO Box 61510
Santa Barbara, CA 93160-1510

Lompoc Branch Office
401 E. Cypress Ave., Room 102
Lompoc, CA 93436

Santa Maria Branch Office
511 E. Lakeside Parkway, Suite 134
Santa Maria, CA 93455

JOSEPH E. HOLLAND
COUNTY CLERK, RECORDER AND ASSESSOR

Exhibit C

July 12, 2011

Mr. Drew Bohan
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Test Claim 10-TC-08 "Post Election Manual Tally-County of Santa Barbara."

Dear Mr. Bohan:

This letter is the County of Santa Barbara's (Claimant's) rebuttal to the Department of Finance letter submitted to the Commission on June 13, 2011.

In its letter, the Department of Finance requested that the Commission on State Mandates (CSM) staff consider whether the regulations "adopt the already-promulgated post election manual tally requirements in close contests pursuant to *County of San Diego v. Debra Bowen* (2008) 166 Cal. App.4th 501", stating that "Should the CSM staff find that to be the case, the emergency regulations would then not impose a reimbursable state mandate on local elections officials within the meaning of Article XIII B, section 6 of the California Constitution because the requirements of the emergency regulations would already be required by the above court case."

In the case cited, the Court of Appeal found that the Post Election Manual Tally (PEMT) requirements fell within the definition of a regulation under California law, and as such were subject to the Administrative Procedures Act (APA). As the Secretary failed to follow the proper procedures of the APA in instituting the requirements, the Court of Appeal found the PEMT requirements void. *County of San Diego*, at 505 and 520.

The findings being such, it is the Claimant's understanding that the PEMT requirements outlined in the emergency regulations for which this test claim was filed, were not required by the court or declared existing law by the court, and therefore are not exempt as a reimbursable mandate under Government Code Section 17566, subdivision (b).

If you have any questions regarding this letter, please contact Renee Bischof, Claimant Representative for the County of Santa Barbara at (805) 696-8953.

Sincerely,

Renee Bischof

Renee Bischof
Elections Division Manager, County of Santa Barbara

Attachments

Attachment A

DECLARATION OF RENEE BISCHOF
COUNTY OF SANTA BARBARA
CLAIM NO. CSM-10-TC-08

I, the undersigned, declare as follows:

I am currently employed with the County of Santa Barbara, am listed as the claimant contact and representative for this test claim and am authorized to make this declaration on behalf of the claimant, the County of Santa Barbara.

I certify under penalty of perjury that the rebuttal is true and complete to the best of my personal knowledge, information or belief.

This declaration is executed on this 12th day of July, 2011, at Santa Barbara, California.

Renee Bischof

Renee Bischof
Elections Division Manager
County of Santa Barbara
4440-A Calle Real
Santa Barbara, CA 93110
(805) 696-8957

Attachment B

DECLARATION OF SERVICE BY EMAIL
REBUTTAL BY COUNTY OF SANTA BARBARA TO DEPARTMENT OF FINANCE
LETTER DATED JUNE 13, 2011
CLAIM NO. CSM-10-TC-08

I, the undersigned, declare as follows:

I am currently employed with the County of Santa Barbara, am listed as the claimant contact and representative for this test claim and am authorized to make this declaration on behalf of the claimant, the County of Santa Barbara.

On July 12, 2011, I served the:

Rebuttal by the County of Santa Barbara to the Department of Finance's letter to the Commission on State Mandates dated June 13, 2011 on the Post Election Manual Tally, 10-TC-08

by e-filing the documents to the Commission. Pursuant to section 1181.2, subdivision (c)(1)(E) of the California Code of Regulations "documents e-filed with the Commission need not be otherwise served on persons that have provided an e-mail address for the mailing list."

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

This declaration is executed on this 12th day of July, 2011, at Santa Barbara, California.

Renee Bischof

Renee Bischof
Elections Division Manager
County of Santa Barbara
4440-A Calle Real
Santa Barbara, CA 93110
(805) 696-8957

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On July 13, 2011, I served the:

Claimant Rebuttal Comments
Post Election Manual Tally Requirements in Close Contest, 10-TC-08
Office of Administrative Law File No. 2008-2009-002E, effective October 20, 2008;
California Code of Regulations, Title 2, Division 7, Chapter 3, Post Election Manual Tallies
Sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127
County of Santa Barbara, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

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 July 13, 2011, at Sacramento, California.

Heidi J. Palchik

Commission on State Mandates

Original List Date: 4/13/2011
Last Updated: 7/13/2011
List Print Date: 07/13/2011
Claim Number: 10-TC-08
Issue: Post Election Manual Tally

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.)

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Mr. David Wellhouse David Wellhouse & Associates, Inc. 9175 Kiefer Blvd, Suite 121 Sacramento, CA 95826	Tel: Email Fax:	(916) 368-9244 dwa-david@surewest.net (916) 368-5723
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Ms. Susan Geanacou Department of Finance (A-15) 915 L Street, Suite 1280 Sacramento, CA 95814	Tel: Email Fax:	(916) 445-3274 susan.geanacou@dof.ca.gov (916) 449-5252
Ms. Socorro Aquino State Controller's Office Division of Audits 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: Email Fax:	(916) 322-7522 SAquino@sco.ca.gov
Ms. Renee Bischof County of Santa Barbara 4440 Calle Real - A Santa Barbara, CA 93110	Tel: Email Fax:	(805) 696-8957 rbischo@co.santa-barbara.ca.us (805) 568-2209
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Mr. Wayne Shimabukuro County of San Bernardino Auditor/Controller-Recorder-Treasurer-Tax Collector 222 West Hospitality Lane, 4th Floor San Bernardino, California 92415-0018	Tel: Email Fax:	(909) 386-8850 wayne.shimabukuro@atc.sbcounty.gov (909) 386-8830
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Ms. Evelyn Tseng City of Newport Beach 3300 Newport Blvd. P. O. Box 1768 Newport Beach, CA 92659-1768	Tel: Email Fax:	(949) 644-3127 etseng@newportbeachca.gov (949) 644-3339
Mr. Jim Spano State Controller's Office (B-08) Division of Audits 3301 C Street, Suite 700	Tel: Email Fax:	(916) 323-5849 jspano@sco.ca.gov (916) 327-0832

Sacramento, CA 95816

STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

November 18, 2013

Ms. Renee Bischof
Elections Division Manager
County of Santa Barbara
4440 Calle Real - A
Santa Barbara, CA 93110

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: **Draft Staff Analysis, Schedule for Comments, and Notice of Hearing**
Post Election Manual Tally (PEMT), 10-TC-08
Former California Code of Regulations, Title 2, Sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127;
Register 2008, No.43
County of Santa Barbara, Claimant

Dear Ms. Bischof:

The draft staff analysis for the above-named matter is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by **December 9, 2013.** You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Please see http://www.csm.ca.gov/dropbox.shtml on the Commission's website for instructions on electronic filing. (Cal. Code Regs., tit. 2, § 1181.2.)

If you would like to request an extension of time to file comments, please refer to section 1183.01(c)(1) of the Commission's regulations.

Hearing

This matter is set for hearing on **Friday, January 24, 2014**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. The final staff analysis will be issued on or about January 10, 2014. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01(c)(2) of the Commission's regulations.

Please contact Eric Feller at (916) 323-3562 if you have any questions.

Sincerely,

Heather Halsey
Executive Director

j:\mandates\2010\tc\10-tc-08 post election manual tally (pemt)\correspondence\tc dsatrans.docx

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

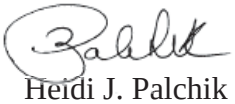
I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On November 18, 2013, I served the:

> **Draft Staff Analysis, Schedule for Comments, and Notice of Hearing**
> *Post Election Manual Tally (PEMT),* 10-TC-08
> Office of Administrative Law File No. 2008-2009-002E, effective October 20, 2008; California Code of Regulations, Title 2, Division 7, Chapter 3, Post Election Manual Tallies Sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127
> County of Santa Barbara, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

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 November 18, 2013 at Sacramento, California.



Heidi J. Palchik
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

Commission on State Mandates

Original List Date: 4/13/2011
Last Updated: 11/15/2013
List Print Date: 11/15/2013
Claim Number: 10-TC-08
Issue: Post Election Manual Tally

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

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Ms. Annette Chinn Cost Recovery Systems, Inc. 705-2 East Bidwell Street, #294 Folsom, CA 95630	Tel: Email Fax:	(916) 939-7901 achinncrs@aol.com (916) 939-7801
Mr. Allan Burdick 7525 Myrtle Vista Avenue Sacramento, CA 95831	Tel: Email Fax:	(916) 203-3608 allanburdick@gmail.com
Mr. Matthew Schuneman MAXIMUS 900 Skokie Boulevard, Suite 265 Northbrook, IL 60062	Tel: Email Fax:	(847) 513-5504 matthewschuneman@maximus.com (703) 251-8240
Mr. J. Bradley Burgess MGT of America 895 La Sierra Drive Sacramento, CA 95864	Tel: Email Fax:	(916)595-2646 Bburgess@mgtamer.com
Mr. Andy Nichols Nichols Consulting 1857 44th Street Sacramento, CA 95819	Tel: Email Fax:	(916) 455-3939 andy@nichols-consulting.com (916) 739-8712
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Hearing Date: January 24, 2014
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ITEM _

TEST CLAIM
DRAFT STAFF ANALYSIS

AND

PROPOSED STATEMENT OF DECISION

Former California Code of Regulations, Title 2, Sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127[1]

Register 2008, No. 43

Post Election Manual Tally (PEMT)

10-TC-08

County of Santa Barbara, Claimant

Attached is the draft proposed statement of decision for this matter. This draft proposed statement of decision also functions as the draft staff analysis, as required by section 1183.07 of the Commission on State Mandates' (Commission) regulations.

EXECUTIVE SUMMARY

The test claim seeks reimbursement for counties to comply with procedures to conduct specified new post election manual tallies (PEMT) of votes, for those races with very narrow margins of victory where the election was conducted in whole or in part on a mechanical, electromechanical, or electronic voting system. The emergency regulations, which are the subject of this claim, were effective from October 2008 until April 2009, coinciding with the November 2008 Presidential General Election.

Background

A. Preexisting Law Required Election Canvassing and, for Counties With Voting Systems, a One-Percent Manual Tally.

In California, elections are administered at the county level and either the county clerk or registrar of voters is required to perform the duties imposed by the Elections Code.[2] For every election, the county elections official is required by the Elections Code to conduct a semifinal official canvass and an official canvass of ballots by processing, tabulating, and compiling

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[1] The regulations were adopted as emergency regulations by Register 2008, No. 43, operative October 20, 2008. They were repealed by operation of Government Code section 11346.1 (g) (Register 2009, No. 31).

[2] Government Code section 26802 states: "Except as provided by law, the county clerk shall register as voters any electors who apply for registration and shall perform any other duties required of him or her by the Elections Code. In those counties in which a registrar of voters office has been established, the registrar of voters shall discharge all duties vested by law in the county clerk that relate to and are a part of election procedure."

election results. When performing these duties, counties are authorized to use any kind of voting system, any combination of voting systems, or any combination of voting system and paper ballots, provided that the use of the voting system or systems has been approved by the Secretary of State (SOS) or specifically authorized by law. "Voting system" means "any mechanical, electromechanical, or electronic system and its software, or any combination of these used to cast or tabulate votes, or both." [3] The authority to use voting systems is provided in Elections Code section 19210, enacted in 1994 and derived from a 1976 statute, which states the following:

> The governing board may adopt for use at elections any kind of voting system, any combination of voting systems, any combination of voting system and paper ballots, provided that the use of the voting system or systems involved has been approved by the Secretary of State or specifically authorized by law. The voting system or systems may be used at any or all elections held in any county, city, or any of their political subdivisions for voting, registering, and counting votes cast. When more than one voting system is used to count ballots, the names of the candidates shall, insofar as possible, be placed upon the primary voting system. When more than one voting system or combination of voting system and paper ballots is used to count ballots, a single ballot measure or the candidates for a single office may not be split between voting systems or between a voting system and paper ballots.

Voting systems must be approved by the SOS through a process that includes examination by expert electronic technicians, a written report that is sent to county boards of supervisors, and a public hearing. The systems must also be inspected for accuracy and periodically reviewed to determine if they are defective, obsolete, or otherwise unacceptable.

Counties may also count and process ballots by hand and not use a voting system. The Elections Code establishes procedures for counting ballots by hand for the semifinal official canvass and official canvass.

If a county uses a mechanical, electromechanical, or electronic voting system during the official canvass, Elections Code section 15360 requires the official conducting the election to conduct a *manual* tally of the ballots tabulated by those devices cast in one percent of the precincts chosen at random by the elections official to verify the accuracy of the automated count.[4] The manual tally is a public process, with the election official providing at least a five-day public notice of the time and place of the manual tally and of the time and place of the selection of the precincts, batches, or direct recording electronic voting machines subject to the public manual tally.

B. The Secretary of State's Review of Voting Systems Led to the Adoption of PEMT Requirements that Were Later Invalidated in Court Because They Were Not Adopted in Accordance With the Administrative Procedures Act.

In 2007, the SOS conducted a "top-to-bottom review" of several voting machines certified for use in California. The purpose of the review was to determine whether currently certified voting systems provide acceptable levels of security, accessibility, ballot secrecy, accuracy and usability

[3] Elections Code section 362, as added by Statutes 1994, chapter 920.

[4] Elections Code section 336.5.

under federal and state standards. At the conclusion of the review, the SOS decertified and conditionally recertified three voting systems. The SOS simultaneously issued a conditional re-approval of each of the voting systems that set forth approximately 40 preconditions to their use. One of the conditions required counties that chose to use voting systems that were subject to the "top-to-bottom-review" to follow "post-election manual count auditing requirements" in addition to the one-percent manual tally required by existing law. In October 2007, the conditional re-approvals were amended, with the post election manual count condition revised to state that "Elections officials must comply with requirements as set forth by the Secretary of State in the document entitled 'Post-Election Manual Tally Requirements' and any successor document." In addition, the SOS issued a stand-alone document entitled "Post-Election Manual Tally Requirements." The PEMT requirements were implemented for the June 2008 Statewide Direct Primary Election in seven counties where a margin of victory that was less than .5% required manual tallies of those counties in 10% of the precincts.

The County of San Diego challenged the PEMT requirements in court, and on August 31, 2008, the Fourth District Court of Appeal held that the SOS had authority to institute PEMT requirements under its general authority provided in the Elections Code, but should have done so by adopting regulations using the procedures in the Administrative Procedures Act. The court held that the PEMT requirements adopted in 2007 were therefore void.

C. <u>The Test Claim Regulations Were Adopted to Increase the Accuracy of, and Public Confidence in, California Elections.</u>

The SOS adopted the test claim regulations as emergency regulations effective October 20, 2008 so that the PEMT requirements would apply to the November 2008 Presidential General Election. The regulations expired in 2009, and new PEMT requirements have not been established by statute or by regulation.

The test claim regulations establish specified new standards and procedures to conduct post election manual tallies, for those races with very narrow margins of victory where the election was conducted in whole or in part on a mechanical, electromechanical, or electronic voting system. The test claim regulations impose the following requirements on county election officials in counties that use a mechanical, electromechanical, or electronic voting system:

- Determine the margin of victory in each contest based upon the semifinal official canvass results, and for any contest in which the margin of victory is less than one half of one percent (0.5%), require elections officials to conduct a manual tally of 10% of randomly selected precincts, as specified.
- In any contest voted upon in more than one jurisdiction, or for a legislative or statewide contest, in each jurisdiction in which votes were cast in the contest, determine whether a ten percent (10%) manual tally is required, as specified.
- Document and disclose to the public any variances[5] between the semifinal official canvass results and the manual tally results.

[5] A "variance" is any difference between the machine tally and the manual tally for a contest. For purposes of determining whether additional precincts must be manually tallied under section 20124, variances found in the manual tally sample for a given contest are presumed to exist in at

- Calculate the variance percentage for any contest with one or more variances, as specified. If any variance is found between manually tallied voter verifiable paper audit trail (VVPAT) records and corresponding electronic vote results that cannot be accounted for by some obvious mechanical problem, preserve the VVPAT records, memory cards and devices, and direct recording electronic (DRE) voting machines and notify the Secretary of State in order to allow for an investigation to determine the cause of the problem.
- Keep a log to record the manual tally process, including the results of each round of manual tallying for each precinct included in the sample, how variances were resolved, and details of any actions taken, and make the log available to the public.
- Track, record in the log, and report to the public by precinct the number of undervotes and overvotes discovered in the manual tally of a contest.
- Make any semifinal official canvass precinct tally results available to the public before the manual tally of the results from those precincts begins, and comply with the notice requirements established in Elections Code section 15360 when conducting any post-election manual tallying required.
- Permit the public to observe all parts of the manual tally process, including the random selection of precincts, in a manner that allows them to verify the tally.
- Prohibit members of the public from touching ballots, voter verifiable paper audit trails or other official materials used in the manual tally process or to interfere in any way with the process.
- Complete all tasks and make all reports required by the regulations within the canvass period established by Elections Code sections 10262 and 15372.

Procedural History

On October 22, 2009, the California State Association of Counties (CSAC) notified Commission staff of its intent to develop a legislatively determined mandate (LDM) for the test claim regulations. On November 12, 2009, Commission staff notified CSAC and the Department of Finance (Finance) that the statute of limitations for filing a test claim would be tolled as of October 22, 2009 pursuant to Government Code section 17573(b). On March 11, 2011, Commission staff was notified that the parties were no longer negotiating an LDM. On March 28, 2011 the County of Santa Barbara filed the test claim with the Commission. On May 11, 2011, Finance requested an extension of time to comment on test claim. On June 13, 2011, Finance submitted comments on the test claim. On July 12, 2011, the claimant submitted rebuttal comments. On November 5, 2013, a notice of dismissal of test claim was issued on the ground that the notice to develop an LDM was filed more than 12 months after the regulations became effective and, thus, after the statute of limitations expired. On November 6, 2013, the notice of dismissal was rescinded on the assertion that the notice to develop an LDM was filed before the expiration of the statute of limitations, when calculated

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least the same proportion in the remaining ballots cast in the contest. (Former Cal. Code Regs., tit. 2, § 20123.)

based on the date the claimant first incurred costs, rather than 12 months after the effective date of the regulations. Notice was also provided that the test claim was set for hearing on January 24, 2014. On November 18, 2013, a draft staff analysis and proposed statement of decision was issued for comment.

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 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.[6]

Claims

The following chart provides a brief summary of the claims and issues raised and staff's recommendation.

Subject	Description	Staff Recommendation
CCR, title 2, former sections 20120 – 20127, as adopted by Register 2008, No. 43.	The regulations require elections officials to determine the margin of victory in each contest based upon the semifinal official canvass results, and for any contest in which the margin of victory is less than one half of one percent (0.5%), require elections officials to conduct a manual tally of 10% of randomly selected precincts. They also require elections officials to document and disclose to the public any variances between the semifinal official canvass results and the manual tally results, and impose related record keeping and public notice requirements.	***Deny.*** The regulations do not impose a state-mandated program on county elections officials because the regulations only apply to counties that have decided to adopt mechanical, electromechanical, or electronic voting systems for casting ballots or tabulating votes and use the voting system in an election. Counties are not legally required to adopt voting systems, and there is no evidence in the record that counties are practically compelled to adopt voting systems.

[6] *City of San Jose v. State of California (1996)* 45 Cal.App.4th 1802.

Analysis

A. The Commission Has Jurisdiction to Hear and Determine This Claim.

The PEMT regulations were adopted and became operative on October 20, 2008. The claimant incurred actual costs as a result of the regulations one month later beginning November 10, 2008. The test claim was filed on March 28, 2011. Although the test claim was filed nearly two and a half years after the effective date of the regulations and the date actual costs were incurred, the Commission has jurisdiction to hear and determine this test claim.

Government Code section 17551(c) states that a test claim shall be filed not later than 12 months following the effective date of a statute or executive order, which in this case, would be October 20, 2009. Government Code section 17551(c) also allows test claims to be filed within 12 months of incurring increased costs as a result of a statute or executive order if that date occurs later than a year after the effective date of the statute or executive order. Under the section 1183(c) of the Commission's regulations, "within 12 months of incurring increased costs" means that the test claim can be filed by "June 30 of the fiscal year *following* the fiscal year in which increased costs were first incurred by the test claimant," thus increasing the time to file a test claim by another fiscal year. In this case, the deadline using the second provision would be June 30, 2010.

The parties to this claim, however, attempted to negotiate an LDM pursuant to Government Code sections 17573 and 17574 for the reimbursement of costs for the PEMT regulations. Under Government Code section 17573(b), the statute of limitations in section 17551 for filing a test claim is tolled during those negotiations *from* the date a local agency contacts Finance or responds to a Finance request to initiate a joint request for a LDM - *to* the date that the Budget Act for the subsequent fiscal year is adopted if a joint request is submitted to the Legislature, *or to* the date on which one of the parties notifies the other of its decision to not submit a joint request to the Legislature for an LDM.

The courts have explained that when the Legislature "tolls" the statute of limitations, it means that the clock has stopped and will start when the tolling period has ended. Whatever period of time that remained when the clock is stopped is available when the clock is restarted to file the claim.

In order for the Commission to have jurisdiction to hear and determine a test claim when negotiations for a joint request for an LDM are underway and ultimately fail, parties are required to either (1) file a test claim within the statute of limitations provided in section 17551(c), continue negotiations with the state, and request that the Commission stay its proceedings on the test claim pursuant to section 17573(h); or (2) file the notice required under section 17573(b) with the Commission before the statute of limitations on the test claim statute or executive order expires showing that negotiations for an LDM have started. Pursuant to section 17573(b), the parties are required to provide written notification to the Commission of the date local agencies initiate or respond to a request to initiate a joint LDM, and in this case, notice was provided that the LDM process started on October 22, 2009 – two days *after* the statute of limitations would have expired if the statute of limitations is based on 12 months following the effective date of the regulations pled in the claim (which would be October 20, 2009). Under the first provision of section 17551(c), then, the Commission would not have jurisdiction of this test claim.

The claimant alleges, however, that it first incurred costs on November 10, 2008, and requests that the statute of limitations be determined based on the second provision in Government Code section 17551(c), allowing test claims to be filed within 12 months of incurring increased costs, which extends the statute of limitations from October 20, 2009, to June 30, 2010. Since the notice of intent to develop an LDM was filed on October 22, 2009, *before* the June 30, 2010 deadline for filing the test claim, the notice would be considered timely and the statute of limitations properly tolled until March 11, 2011, when the parties decided to not submit a joint request for an LDM to the Legislature and the tolling period ended. Under the law, whatever period of time that remained when the clock was stopped was available when the clock was restarted after the tolling period ended. The test claim here was filed on March 28, 2011, just two weeks after the tolling period ended.

Because the Legislature has provided two alternative statutes of limitation to be used by a claimant, without any express limitation as to which option a claimant may use, staff finds that the test claim was timely filed and the Commission has jurisdiction to hear and determine the claim.

B. The Test Claim Regulations Do Not Impose a State-Mandated Program on Counties within the Meaning of Article XIII B, Section 6 of the California Constitution.

The test claim regulations establish standards and procedures for post election *manual* tallies (PEMT) of votes, in addition to those already required by law, for those races with very narrow margins of victory, and where the election was conducted in whole or in part on a mechanical, electromechanical, or electronic voting system.

Although the regulations require new activities to be performed related to the manual tally of votes, those activities are triggered and apply *only* to those counties that have made the local decision to adopt a "voting system" and use the voting system in an election. Counties are not required by state law to use mechanical, electromechanical, or electronic voting systems during the elections process. The Elections Code authorizes counties to choose whether to count ballots manually, or automatically using voting systems, or to use both methods as long as the precinct results are determined in accordance with the law. Elections Code sections 15270, et seq. and 15290, et seq., establish procedures for counting ballots by hand for the semifinal official canvass and official canvass. Thus, counties are not legally compelled by state law to comply with the regulations. Moreover, claimant does not argue, nor is there any evidence in the record to support a finding, that counties are practically compelled to comply with the regulations. There are no penalties in the law if a county chooses to manually count ballots and tabulate votes, rather than use a voting system. Although, as a practical matter, many counties may depend on voting systems to save time and money, there is no concrete evidence in the record showing that certain and severe penalties or other draconian consequences will occur from a local decision to manually tabulate votes.

Therefore, counties are not legally or practically compelled by state law to comply with the regulations and, thus, the regulations do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Conclusion

Staff finds that California Code of Regulations, title 2, sections 20120, 20121, 20122, 20123, 20124, 20125, 20126, and 20127 (Register 2008, No. 43) do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Staff Recommendation

Staff recommends that the Commission adopt this analysis to deny the test claim.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: California Code of Regulations, Title 2, Sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127[7] Register 2008, No. 43 Filed on March 28, 2011 By County of Santa Barbara, Claimant.	Case No.: 10-TC-08 *Post Election Manual Tally (PEMT)* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted January 24, 2014*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on January 24, 2014. [Witness list will be included in the final statement of decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission [adopted/modified] the proposed statement of decision to [approve/deny] the test claim at the hearing by a vote of [vote count will be included in the final statement of decision].

Summary of the Findings

The test claim regulations establish specified new standards and procedures for post election *manual* tallies (PEMT) of votes, for those races with very narrow margins of victory where the election was conducted in whole or in part on a mechanical, electromechanical, or electronic voting system. The regulations were adopted based on findings by the Secretary of State's Office (SOS) that voting systems in widespread use throughout California are vulnerable to error and tampering. Thus, the regulations are intended to ensure the accuracy and integrity of election results in close contests, and to ensure public confidence in those results.[8]

[7] The regulations were adopted as emergency regulations by Register 2008, No. 43, operative October 20, 2008. They were repealed by operation of Government Code section 11346.1 (g) (Register 2009, No. 31).

[8] SOS, Finding of Emergency and Informative Digest for the emergency PEMT regulations (Cal. Code Regs., tit. 2, §§ 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127), October 9, 2008.

Although the regulations require new activities to be performed related to the manual tally of votes, those activities are triggered and apply *only* to those counties that have made the local decision to adopt a "voting system" and use the voting system in an election. Counties are not required by state law to use mechanical, electromechanical, or electronic voting systems during the elections process. The Elections Code authorizes counties to choose whether to count ballots manually, or automatically using voting systems, or to use both methods as long as the precinct results are determined in accordance with the law. Elections Code sections 15270, et seq. and 15290, et seq., establish procedures for counting ballots by hand for the semifinal official canvass and official canvass. Thus, counties are not legally compelled by state law to comply with the regulations. Moreover, there is no evidence that counties are practically compelled to comply with the regulations. There are no penalties in the law if a county chooses to manually count ballots and tabulate votes, rather than use a voting system. Although, as a practical matter, many counties may depend on voting systems to save time and money, claimant has not alleged, nor is there is any evidence in the record to support a finding, that certain and severe penalties or other draconian consequences will occur from a local decision to manually tabulate votes.

Therefore, counties are not legally or practically compelled by state law to comply with the regulations and, thus, the regulations do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. Accordingly, the Commission denies this test claim.

COMMISSION FINDINGS

I. Chronology

10/22/09	California State Association of Counties (CSAC) notified Commission staff of its intent to develop a legislatively determined mandate (LDM) for the test claim regulations.
11/12/09	Commission staff notified CSAC and the Department of Finance (Finance) that the statute of limitations for filing a test claim would be tolled as of October 22, 2009 pursuant to Government Code section 17573(b).
03/28/11	Commission staff notified that the parties were no longer negotiating an LDM.
03/28/11	Claimant, County of Santa Barbara, filed test claim *Post Election Manual Tally*, 10-TC-08 with the Commission.
05/11/11	Finance requested an extension of time to comment on test claim.
06/13/11	Finance submitted comments on the test claim.
07/12/11	Claimant submitted rebuttal comments.
11/05/13	Notice of dismissal of test claim issued based on the ground that the notice to develop an LDM was filed more than 12 months after the regulations became effective and, thus, after the statute of limitations expired.

11/06/13	Notice of dismissal rescinded because the notice to develop an LDM was filed before the expiration of the statute of limitations based on when the claimant first incurred costs.

II. Introduction

The test claim seeks reimbursement for specified new standards and procedures to conduct post election manual tallies (PEMT), for those races with very narrow margins of victory, and where the election was conducted in whole or in part on a mechanical, electromechanical, or electronic voting system. The emergency regulations were effective from October 2008 until April 2009, coinciding with the November 2008 Presidential General Election.

A. Preexisting Law Required Election Canvassing and, for Counties With a Voting System, a One-Percent Manual Tally.

The PEMT regulations are best explained in context of the prior law applicable to counting or "canvassing" ballots, voting systems, and manual tally requirements.

1. Election Canvassing

In California, elections are administered at the county level and either the county clerk or registrar of voters is required to perform the duties imposed by the Elections Code.[9] The Elections Code requires county elections officials in every election to conduct a semifinal official canvass and an official canvass of ballots by processing, tabulating, and compiling election results. The semifinal official canvass[10] begins immediately upon the close of the polls and continues until all precincts are accounted for.[11] County elections officials are required to tabulate all vote-by-mail ballots and precinct ballots, compile the results, and then transmit the semifinal official results for candidates for office and ballot measures to the SOS in the manner and according to the schedule prescribed by the SOS. Although most of the activities required to complete the semifinal official canvass occur once the polls are closed on election day, counties may begin processing vote-by-mail ballots seven business days before the election. County elections officials verify the signatures on the return envelopes for the vote-by-mail ballots, remove the voted ballots, and process them through their vote tallying system. The results from these ballots, however, are not tabulated until after the close of polls on election day. Vote-by-mail ballots that are not counted by election day and those ballots received on

[9] Government Code section 26802 states the following: "Except as provided by law, the county clerk shall register as voters any electors who apply for registration and shall perform any other duties required of him or her by the Elections Code. In those counties in which a registrar of voters office has been established, the registrar of voters shall discharge all duties vested by law in the county clerk that relate to and are a part of election procedure."

[10] Elections Code section 353.5 defines the "semifinal official canvass" as "the public process of collecting, processing, and tallying ballots and, for state or statewide elections, reporting results to the Secretary of State on election night. The semifinal official canvass may include some or all of the vote by mail and provisional vote totals."

[11] Elections Code sections 15150, *et seq*.

election day, either through the mail or at the precincts, are tabulated during the official canvass of the vote.[12]

The official canvass begins no later than the Thursday following the election, is open to the public, and continues daily until completed.[13] County elections officials must complete the official canvass no later than the 28th day after the election and submit a certified statement of the results of the election to the SOS by the 31st day.[14] The activities undertaken during the official canvass include, but are not limited to, the following listed in Elections Code section 15302:

- Processing and counting any valid vote-by-mail and provisional ballots not included in the semifinal official canvass. Provisional ballots are cast by voters whose names do not appear on the precinct roster.
- Inspecting all materials and supplies returned by poll workers.
- Reconciling the number of signatures on the roster with the number of ballots recorded on the ballot statement.
- Reconciling the number of ballots counted, spoiled, canceled, or invalidated due to identifying marks or overvotes with the number of votes counted, including vote-by-mail and provisional ballots.
- Counting any valid write-in votes.
- Reproducing any damaged ballots, if necessary.
- Hand counting the ballots cast in one (1) percent of the precincts, chosen at random by the elections official.
- Reporting final results to the Secretary of State, as required.[15]

Elections officials are required to adopt semifinal official and official canvass procedures to conform to the applicable voting systems procedures that have been approved by the SOS. The procedures must be available for public inspection no later than 29 days before each election.[16]

2. Voting Systems and the One-Percent Manual Tally

Counties are authorized to use any kind of voting system, any combination of voting systems, or any combination of voting system and paper ballots, provided that the use of the voting system or systems has been approved by the SOS or specifically authorized by law. "Voting system" means "any mechanical, electromechanical, or electronic system and its software, or any

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[12] California Secretary of State, "The Official Canvass of the Vote" <http://www.sos.ca.gov/elections/official-canvass.htm> as of September 1, 2013.

[13] Elections Code section 15301.

[14] Elections Code sections 15372 and 15375.

[15] See California Secretary of State, "The Official Canvass of the Vote" <http://www.sos.ca.gov/elections/official-canvass.htm> as of September 1, 2013.

[16] Elections Code section 15003.

combination of these used to cast or tabulate votes, or both." [17] The authority to use voting systems is provided in Elections Code section 19210, enacted in 1994 and derived from a 1976 statute, which states the following:

> The governing board may adopt for use at elections any kind of voting system, any combination of voting systems, any combination of voting system and paper ballots, provided that the use of the voting system or systems involved has been approved by the Secretary of State or specifically authorized by law. The voting system or systems may be used at any or all elections held in any county, city, or any of their political subdivisions for voting, registering, and counting votes cast. When more than one voting system is used to count ballots, the names of the candidates shall, insofar as possible, be placed upon the primary voting system. When more than one voting system or combination of voting system and paper ballots is used to count ballots, a single ballot measure or the candidates for a single office may not be split between voting systems or between a voting system and paper ballots.

Voting systems must be approved by the SOS through a process that includes examination by expert electronic technicians, a written report that is sent to county boards of supervisors, and a public hearing.[18] The systems must also be inspected for accuracy and periodically reviewed to determine if they are defective, obsolete, or otherwise unacceptable. The SOS has the right to withdraw approval previously granted of any voting system if it is defective or unacceptable after review.[19]

Counties may also count ballots by hand and not use a voting system. Elections Code sections 15270, et seq. and 15290, et seq., establish procedures for counting ballots by hand for the semifinal official canvass and official canvass.

If a county uses a voting system during the official canvass, Elections Code section 15360 requires the official conducting the election to conduct a *manual* tally of the ballots tabulated by those devices cast in one percent of the precincts chosen at random by the elections official to verify the accuracy of the automated count.[20] Elections Code section 15360(a) states:

> In every election in which a voting system is used, the election official shall conduct a public manual tally of the ballots tabulated by those devices cast in 1 percent of the precincts chosen at random by the elections official. If 1 percent of the precincts is less than one whole precinct, the tally shall be conducted in one precinct chosen at random by the elections official. In addition, the elections official shall, for each race not included in the initial group of precincts, count one additional precinct. The manual tally shall apply only to the race not previously counted. Additional precincts for the manual tally may be selected at the discretion of the elections official.

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[17] Elections Code section 362, as added by Statutes 1994, chapter 920.

[18] Elections Code sections 19204, 19206, 19207, 19208 and 19209.

[19] Elections Code sections 19220-19222.

[20] Elections Code section 336.5.

The manual tally is a public process, with the election official providing at least a five-day public notice of the time and place of the manual tally and of the time and place of the selection of the precincts, batches, or direct recording electronic voting machines subject to the public manual tally prior to conducting the selection and tally.[21]

B. The Secretary of State's Review of Voting Systems Led to the Adoption of PEMT Requirements that Were Later Invalidated in Court Because They Were Not Adopted in Accordance With the Administrative Procedures Act.

In 2007, the SOS, pursuant to the authority in Elections Code section 19222, conducted a "top-to-bottom review" of several voting machines certified for use in California. The purpose of the review was "to determine whether currently certified voting systems provide acceptable levels of security, accessibility, ballot secrecy, accuracy and usability under federal and state standards." At the conclusion of the review, the SOS decertified and conditionally recertified three voting systems. The SOS also decertified a fourth voting system that was not able to be tested during the review, but was later conditionally recertified.[22] The SOS simultaneously issued a conditional re-approval of each of the voting systems that set forth approximately 40 preconditions to their use. One of the conditions required counties that chose to use the machines subject to the "top-to-bottom-review" to follow "post-election manual count auditing requirements" in addition to the one-percent manual tally required by existing law. In October 2007, the conditional re-approvals were amended, with the post election manual count condition revised to state that "Elections officials must comply with requirements as set forth by the Secretary of State in the document entitled 'Post-Election Manual Tally Requirements' and any successor document." In addition, the SOS issued a stand-alone document entitled "Post-Election Manual Tally Requirements."[23] The PEMT requirements were implemented for the June 2008 Statewide Direct Primary Election in seven counties where a margin of victory that was less than .5% required manual tallies of those counties in 10% of the precincts. The other counties had no margin of victory below the .5% threshold.[24]

The County of San Diego challenged the PEMT requirements in court, and on August 31, 2008, the Fourth District Court of Appeal held that the SOS had authority to institute PEMT requirements under its general authority provided in the Elections Code, but should have done so by adopting regulations using the procedures in the Administrative Procedures Act.[25] The court held that the PEMT requirements adopted in 2007 were therefore void.[26]

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[21] Elections Code section 15360 (d).

[22] Senate Committee on Elections, Reapportionment, and Constitutional Amendments, Analysis of AB 2023 (2009-2010 Reg. Sess.) amended April 27, 2010, pages 3-4.

[23] SOS, Informative Digest, for the emergency PEMT regulations (former Cal. Code Regs., tit. 2, §§ 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127), October 9, 2008.

[24] Letter from Lowell Finley, Deputy Secretary of State, to the Office of Administrative Law Research Attorney, regarding the proposed emergency regulations, October 17, 2008.

[25] *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501.

[26] *Id.* at page 520.

C. The Test Claim Regulations Were Adopted to Increase the Accuracy of, and Public Confidence in, California Elections.

Effective October 20, 2008, the SOS adopted the emergency regulations at issue in this test claim (title 2, §§ 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127) so that the PEMT requirements would apply to the November 2008 Presidential General Election. The emergency regulations expired in 2009,[27] and new PEMT requirements have not been established by statute or by regulation.[28]

The purpose of the regulations was to increase the accuracy, as well as public confidence in the accuracy, of California elections. According to the SOS, electronic voting systems pose a risk of being tampered with, and are prone to errors and inaccuracies.[29] PEMT tallies were cited as a particularly effective risk mitigation procedure to ensure the trustworthiness and accuracy of election results. The SOS also stated that the existing one-percent manual tally was not adequate in contests with a very narrow margin of victory.[30]

The regulations establish standards and procedures for conducting increased manual tallies in contests in which the margin of victory is very narrow.[31] Section 20120(b) states that the regulations apply to the SOS and all elections officials in California "for all elections in this state conducted in whole or in part on a voting system, the approval of which is conditioned by the Secretary of State on performance of increased manual tallies in contests with narrow margins of victory."

III. Positions of the Parties

A. Claimant's Position

The claimant, County of Santa Barbara, alleges that the test claim regulations impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution. According to the claimant, "the additions of § 20121 – Increased manual tally in contests with narrow margins of victory, and § 20124 – Manual tally escalation requirements for variances had the greatest impact on elections officials."[32] Claimant states that it had three

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[27] The emergency regulations were readopted and renumbered operative April 13, 2009, but were repealed operative July 13, 2009 (Register 2009, No. 16, repealed by operation of Government Code section 11346.1(g), Register 2009, No. 31, July 13, 2009) because no Certificate of Compliance was filed.

[28] In 2010, the Legislature enacted Statutes 2010, chapter 122 (AB 2023), sponsored by the SOS, that authorized the SOS to conduct a pilot project in five or more counties to evaluate post canvass risk-limiting audits of election results

[29] SOS, Finding of Emergency and Informative Digest for the emergency PEMT regulations (Cal. Code Regs., tit. 2, §§ 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127), October 9, 2008.

[30] Letter from Lowell Finley, Deputy Secretary of State, to the Office of Administrative Law Research Attorney, regarding the proposed emergency regulations, October 17, 2008.

[31] California Code of Regulations, title 2, section 20123.

[32] County of Santa Barbara, Test Claim 10-TC-08, *Post Election Manual Tally (PEMT)* page 7.

contests in which the PEMT regulations applied. Claimant requests reimbursement for the following new activities performed between November 10, 2008 and November 26, 2008:[33]

1. Conducted internal meetings with other counties and with the Secretary of State to clarify the requirements outlined in the emergency regulations.
2. Conducted meetings with Elections Division staff to determine activities to be completed in preparation for the manual tally.
3. Identified which local contests are required to be tallied.
4. Coordinated with Sheriff for security of ballots at offsite location.
5. Identified location for conducting manual tally and complete contract for location.
6. Recruited staff from poll worker list and temporary agencies.
7. Organized manual tally boards; ensured poll workers do not tally ballots for precincts they worked on Election Day.
8. Prepared Poll and Vote by Mail boxes for transport.
9. Prepared spreadsheet to track results of manual tally.
10. Boxed up tally sheets and supplies for transport to offsite tally location.
11. Ensured secure transport of ballots to/from offsite manual tally location.
12. Setup tables with board numbers and supplies.
13. Called roll and assign staff to their tally board/table.
14. Updated spreadsheet with Vote by Mail ballot manual tally results.
15. Checked totals to determine if variance exists and if escalation of precincts tallied is required.
16. Randomly selected precincts in 5% increments for contests requiring escalation.
17. Prepared report of cost for Post Election Manual Tally.

Claimant also lists the following modified activities to complete the PEMT within the canvass period:

1. Prepared notice of date and time of random selection of manual tally precincts for publication/posting.
2. Generated random precinct numbers for tally.
3. Generated machine count reports for precincts selected.
4. Generated central count deck reports for the precincts selected.
5. Identified staffing needs for supervision and manual tally boards.
6. Prepared notice of dates, times and locations of manual tally for publication/posting.

[33] County of Santa Barbara, Test Claim 10-TC-08, Declaration of Renee Bischoff, Elections Division Manager for the County of Santa Barbara (Exhibit A.)

7. Escorted public observers.
8. Located and pull counted poll ballots for selected precincts.
9. Prepared supply list and order supplies for manual tally process.
10. Prepared tally sheets for each contest/precinct selected for both poll and Vote by Mail ballots.
11. Prepared pull list to track precincts and contests tallied.
12. Trained boards on manual tally process.
13. Provided tally boards working on Vote by Mail ballots with deck report for central count and tally sheets for a selected precinct.
14. Located central count deck in box of Vote by Mail ballots, one at a time.
15. Sorted vote by mail ballots by precinct.
16. Conducted manual tally on Vote by Mail ballots.
17. Supervisor compared manual tally with machine count for Vote by Mail ballots by precinct.
18. Provided tally board with polling place ballots and tally sheets for a selected precinct.
19. Sorted polling place ballots by precinct.
20. Conducted polling place ballot manual tally.
21. Supervisor compared manual tally with machine count for polling place ballots by precinct.
22. Investigated any variances.
23. Reconciled and resolved variances if necessary.
24. Prepared tally reports for Secretary of State.

Claimant states that it incurred costs of $250,126.09, which "represents the lowest possible expenditure in order to completely comply with the requirements set forth in the Post Election Manual Tally Requirements in Close Contest Emergency Regulations."[34]

In rebuttal comments submitted in July 2011, claimant responded to Finance's position that the PEMT regulations may be required pursuant to *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501. Claimant contends that the court found the PEMT requirements promulgated by the SOS to be void because the Administrative Procedure Act procedures were not followed. Thus, the PEMT requirements outlined in the emergency regulations were not required or declared existing law by the court, and Government Code section 17556(b) does not preclude reimbursement for this test claim.

B. Department of Finance's Position

In comments submitted in June 2011, Finance requests that the Commission:

[34] *Id.* at page 9.

> … consider whether the regulations merely adopt the already-promulgated post election manual tally requirements in close contests pursuant to *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501.
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> Should the CSM … find that to be the case, the emergency regulations would then not impose a reimbursable state mandate on local elections officials within the meaning of article XIII B, section 6 of the California Constitution because the requirements of the emergency regulations would already be required by the above court case. As such, the claim would then be denied pursuant to the court decision exception in Government Code section 17556, subdivision (b) …

IV. 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."[35] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[36]

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.[37]
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.[38]
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.[39]

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[35] *County of San Diego v. State of California* (1997)15 Cal.4th 68, 81.

[36] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[37] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, 874.

[38] *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.

[39] *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.

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. [40]

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.[41] The determination of whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[42] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[43]

A. The Commission Has Jurisdiction to Hear and Determine This Test Claim.

The PEMT regulations were adopted and became operative on October 20, 2008.[44] The claimant incurred actual costs as a result of the regulations one month later, beginning November 10, 2008.[45] The test claim was filed on March 28, 2011. Although the test claim was filed nearly two and a half years after the effective date of the regulations and the date actual costs were incurred, the Commission has jurisdiction to hear and determine this test claim.

Government Code section 17551(c) states that a test claim shall be filed not later than 12 months following the effective date of a statute or executive order, which in this case, would be October 20, 2009. Government Code section 17551(c) also allows test claims to be filed within 12 months of incurring increased costs as a result of a statute or executive order if that date occurs later than a year after the effective date of the statute or executive order. Under the section 1183(c) of the Commission's regulations, "within 12 months of incurring increased costs" means that the test claim can be filed by "June 30 of the fiscal year *following* the fiscal year in which increased costs were first incurred by the test claimant," thus increasing the time to file a test claim by another fiscal year. In this case, the deadline using the second provision would be June 30, 2010.

The parties to this claim, however, attempted to negotiate an LDM pursuant to Government Code sections 17573 and 17574 for the reimbursement of costs for the PEMT regulations. Under Government Code section 17573(b), the statute of limitations in section 17551 for filing a test claim is tolled during those negotiations *from* the date a local agency contacts the Department of

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[40] *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.

[41] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

[42] *County of San Diego, supra,* 15 Cal.4th 68, 109.

[43] *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.

[44] Register 2008, No. 43, operative October 20, 2008.

[45] County of Santa Barbara, Test Claim 10-TC-08, Declaration of Renee Bischoff, Elections Division Manager for the County of Santa Barbara (Exhibit A.)

Finance or responds to a Finance request to initiate a joint request for a LDM - *to* the date that the Budget Act for the subsequent fiscal year is adopted if a joint request is submitted to the Legislature, *or to* the date on which one of the parties notifies the other of its decision to not submit a joint request to the Legislature for an LDM. Section 17573(b) states the following:

> The statute of limitations specified in Section 17551 shall be tolled from the date a local agency, school district, or statewide association contacts the Department of Finance or responds to a Department of Finance request to initiate a joint request for a legislatively determined mandate pursuant to subdivision (a), to (1) the date that the Budget Act for the subsequent fiscal year is adopted if a joint request is submitted pursuant to subdivision (a), or (2) the date on which the Department of Finance, or a local agency, school district, or statewide association notifies the other party of its decision not to submit a joint request. A local agency, school district, or statewide association, or the Department of Finance shall provide written notification to the commission of each of these dates.

The courts have explained that when the Legislature "tolls" the statute of limitations, it means that the clock has stopped and will start when the tolling period has ended. Whatever period of time that remained when the clock is stopped is available when the clock is restarted to file the claim.

> Under California law, tolling generally refers to a suspension of a statute of limitations. (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 674, 108 Cal.Rptr.3d 171, 229 P.3d 83 citing *Woods v. Young* (1991) 53 Cal.3d 315, 326, fn. 1, 279 Cal.Rptr. 613, 807 P.2d 455 ["'Tolling may be analogized to a clock that is stopped and then restarted. Whatever period of time that remained when the clock is stopped is available when the clock is restarted, that is, when the tolling period has ended.' "]; *Cuadra v. Millan* (1998) 17 Cal.4th 855, 72 Cal.Rptr.2d 687, 952 P.2d 704,overruled on a different point in *Samuels v. Mix* (1999) 22 Cal.4th 1, 16, fn. 4, 91 Cal.Rptr.2d 273, 989 P.2d 701, citing 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 407, p. 513 [" 'The statute [of limitations] may be tolled (i.e., *its operation suspended*) by various circumstances, events or acts.' "].) Federal decisional authority is in accord. (*Chardon v. Soto* (1983) 462 U.S. 650, 652, fn. 1, 103 S.Ct. 2611, 77 L.Ed.2d 74; *Board of Regents v. Tomanio* (1980) 446 U.S. 478, 486, 100 S.Ct. 1790, 64 L.Ed.2d 440.)[46]

Thus, in order for the Commission to have jurisdiction to hear and determine a test claim when negotiations for a joint request for an LDM are underway and ultimately fail, parties are required to either (1) file a test claim within the statute of limitations provided in section 17551(c), continue negotiations with the state, and request that the Commission stay its proceedings on the test claim pursuant to section 17573(h); or (2) file the notice required under section 17573(b) with the Commission before the statute of limitations on the test claim statute or executive order expires showing that negotiations for an LDM have started. Pursuant to section 17573(b), the parties are required to provide written notification to the Commission of the date local agencies

[46] *Don Johnson Productions, Inc. v. Rysher Entertainment* (2012) 209 Cal.App.4th 919, 929.

initiate or respond to a request to initiate a joint LDM, and in this case, notice was provided that the LDM process started on October 22, 2009 – two days *after* the statute of limitations would have expired if the statute of limitations is based on 12 months following the effective date of the regulations pled in the claim (which would be October 20, 2009). Under the first provision of section 17551(c), then, the Commission would not have jurisdiction of this test claim.

The claimant alleges, however, that it first incurred costs on November 10, 2008, and requests that the statute of limitations be determined based on the second provision in Government Code section 17551(c), allowing test claims to be filed within 12 months of incurring increased costs, which as defined in section 1183(c) of the Commission's regulations, means the test claim can be filed by "June 30 of the fiscal year *following* the fiscal year in which increased costs were first incurred by the test claimant." Using the second provision of section 17551(c) extends the statute of limitations from October 20, 2009, to June 30, 2010. Since the notice of intent to develop an LDM was filed on October 22, 2009, *before* the June 30, 2010 deadline for filing the test claim, the notice would be considered timely and the statute of limitations properly tolled until March 11, 2011, when the parties decided to not submit a joint request for a legislatively determined mandate to the Legislature and the tolling period ended. Under the law, whatever period of time that remained when the clock was stopped was available when the clock was restarted after the tolling period ended. The test claim here was filed on March 28, 2011, just two weeks after the tolling period ended.

Since the Legislature has provided two alternative statutes of limitation to be used by a claimant, without any express limitation as to which option a claimant may use, the Commission finds that the test claim was timely filed and the Commission has jurisdiction to hear and determine the claim.

B. The Test Claim Regulations Do Not Impose a State-Mandated Program on Counties within the Meaning of Article XIII B, Section 6 of the California Constitution.

The plain language of the test claim regulations requires county elections officials, in counties that use a voting system in an election, to perform the following activities:

- Determine the margin of victory in each contest based upon the semifinal official canvass results, and for any contest in which the margin of victory is less than one half of one percent (0.5%), and to conduct a manual tally of 10% of randomly selected precincts, as specified.[47]
- In any contest voted upon in more than one jurisdiction, or for a legislative or statewide contest, in each jurisdiction in which votes were cast in the contest, determine whether a ten percent (10%) manual tally is required, as specified.[48]
- Document and disclose to the public any variances[49] between the semifinal official canvass results and the manual tally results.[50]

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[47] Former California Code of Regulations, title 2, section 20121.

[48] Former California Code of Regulations, title 2, section 20122.

[49] A "variance" is any difference between the machine tally and the manual tally for a contest. For purposes of determining whether additional precincts must be manually tallied under section 20124, variances found in the manual tally sample for a given contest are presumed to exist in at

- Calculate the variance percentage for any contest with one or more variances, as specified. If any variance is found between manually tallied voter verifiable paper audit trail (VVPAT) records and corresponding electronic vote results that cannot be accounted for by some obvious mechanical problem, preserve the VVPAT records, memory cards and devices, and direct recording electronic (DRE) voting machines and notify the Secretary of State in order to allow for an investigation to determine the cause of the problem.[51]
- Keep a log to record the manual tally process, including the results of each round of manual tallying for each precinct included in the sample, how variances were resolved, and details of any actions taken, and make the log available to the public.[52]
- Track, record in the log and report to the public by precinct the number of undervotes and overvotes discovered in the manual tally of a contest.[53]
- Make any semifinal official canvass precinct tally results available to the public before the manual tally of the results from those precincts begins, and comply with the notice requirements established in Elections Code §15360 when conducting any post-election manual tallying required. [54]
- Permit the public to observe all parts of the manual tally process, including the random selection of precincts, in a manner that allows them to verify the tally.[55]
- Prohibit members of the public from touching ballots, voter verifiable paper audit trails or other official materials used in the manual tally process or from interfering in any way with the process.[56]
- Complete all tasks and make all reports required by the regulations within the canvass period established by Elections Code sections 10262 and 15372.[57]

Finance argues that the PEMT requirements were already declared to be existing law by the court's decision in *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, and, thus, the requirements imposed by the emergency regulations, listed above, are be reimbursable pursuant Government Code section 17556(b). Section 17556(b) states:

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least the same proportion in the remaining ballots cast in the contest. (Former Cal. Code Regs., tit. 5, § 20123.)

[50] Former California Code of Regulations, title 2, section 20123(b).

[51] Former California Code of Regulations, title 2, section 20124.

[52] Former California Code of Regulations, title 2, section 20125(a).

[53] Former California Code of Regulations, title 2, section 20125(b).

[54] Former California Code of Regulations, title 2, section 20126(a).

[55] Former California Code of Regulations, title 2, section 20126(c).

[56] Former California Code of Regulations, title 2, section 20126(c).

[57] Former California Code of Regulations, title 2, section 20127.

> 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 any one of the following:
>
> [¶] . . . [¶]
>
> (b) The statute or executive order affirmed for the state a mandate that has been declared existing law or regulation by action of the courts. This subdivision applies regardless of whether the action of the courts occurred prior to or after the date on which the statute or executive order was enacted or issued.

In *County of San Diego v. Bowen*, the court held that the SOS had statutory authority to adopt the PEMT requirements, but that they must be adopted as regulations based on the procedures in the Administrative Procedure Act. The court held that the 2007 PEMT requirements were void.[58] The court did not find that the requirements imposed by the test claim regulations were existing law, or that the SOS was required to adopt the regulations at all. Therefore, Government Code section 17556(b) is not relevant and does not apply to this test claim.

However, the PEMT regulations do not impose a state-mandated program on county elections officials because the regulations only apply to counties that have decided to adopt mechanical, electromechanical, or electronic voting systems for casting ballots or tabulating votes and use the voting system in an election.[59] Counties are not required to adopt voting systems.

The California Supreme Court, in *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.), held that when analyzing state-mandate claims, the underlying program must be reviewed to determine if the claimant's participation in the underlying program is voluntary or legally compelled. As the court said:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.[60]

Thus, the Supreme Court in *Kern* held that participation in the underlying program must be considered:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have

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[58] *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, 520.

[59] Elections Code section 362.

[60] *Kern High School Dist., supra,* 30 Cal.4th 727, 743. (Emphasis in original.)

> participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.*[61]

Here, the plain language of section 20120(b) of the regulations states that the regulations apply to all elections conducted in whole or in part on a voting system:

> This chapter [former Chapter 3 of Division 7 of Title 2] applies to the Secretary of State and all elections officials in the State of California **for all elections in this state conducted in whole or in part on a voting system,** the approval of which is conditioned by the Secretary of State on performance of increased manual tallies in contests with narrow margins of victory. [Emphasis added.]

Elections Code section 19210 authorizes county governing boards to adopt voting systems for use in elections as follows:

> The governing board *may* adopt for use at elections any kind of voting system, any combination of voting systems, any combination of a voting system and paper ballots, provided the use of the voting system or systems involved has been approved by the Secretary of State or specifically authorized by law. [Emphasis added.]

Elections Code section 354, a statute that provides definitions for the interpretation of the Code, states that "'Shall' is mandatory and 'may' is permissive."

Thus, counties are not legally compelled by state law to use mechanical, electromechanical, or electronic voting systems to tabulate votes, but make a local decision to adopt them. A local decision requiring a county to incur costs does not result in a reimbursable state-mandated program.[62]

Additionally, there is no evidence that elections officials are practically compelled to use voting systems. Practical compulsion requires a concrete showing, with evidence in the record, that a county faces certain and severe penalties, such as double taxation or other draconian consequences for not using voting systems, or that a county is left with no reasonable alternative but to use a voting system in order to carry out its core mandatory function to provide election services to the public.[63] In the 2009 case, *Department of Finance v. Commission on State Mandates* (*POBRA*), the court addressed the issue of the evidence needed to support a finding of practical compulsion. In that case, it was argued that districts "employ peace officers when necessary to carry out the essential obligations and functions established by law."[64] The Commission found that the POBRA statutes constituted a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for counties, cities, school districts, and special districts identified in Government Code section 3301 that employ peace

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[61] *Id.* at page 731. (Emphasis added.)

[62] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 880.

[63] *Kern High School Dist., supra,* 30 Cal.4th 727, 731, 743, 749-754; *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 884-887; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1362-1368.

[64] *Id.* at page 1368.

officers.[65] In 2006, the Commission reconsidered the claim, as required by Government Code section 3313, and found that *San Diego Unified* supported the Commission's 1999 Statement of Decision. Specifically, with regard to schools, the Commission found that districts were practically compelled to employ peace officers based upon the district's "obligation to protect pupils from other children, and also to protect teachers themselves from the violence by the few students whose conduct in recent years has prompted national concern."[66]

The Commission's Statement of Decision on reconsideration pointed out that its decision was supported by the fact that the California Supreme Court found that the state "fulfills its obligations under the safe schools provision of the Constitution (Cal. Const., art. I, § 28, subd. (c)) by permitting local school districts to establish a police or security department to enforce rules governing student conduct and discipline."[67] The Commission relied on a general requirement in the law (i.e. to provide safe schools) to support a finding of practical compulsion to perform specific activities (i.e. to hire police officers and comply with the down-stream requirements of hiring those officers). This line of reasoning was rejected by the appellate court.

The court in *POBRA* found that the superior court erred in concluding as a matter of law that, "'[a]s a practical matter,' the employment of peace officers by the local agencies is 'not an optional program' and 'they do not have a genuine choice of alternative measures that meet their agency-specific needs for security and law enforcement." Moreover, the *POBRA* court did not find any evidence in the record to support a finding of legal or practical compulsion and the court provided some guidance regarding the kind of evidentiary showing required to make such a finding. Specifically, the court stated:

> The 'necessity' that is required is facing 'certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences.' That cannot be established in this case without a concrete showing that reliance upon the general law enforcement resources of cities and counties will result in such severe adverse consequences. [68]

Thus, practical compulsion must be demonstrated by specific facts in the record showing that unless the alleged activity is performed, here the activity of using a voting system, which would in turn trigger the requirement to comply with the PEMT requirements, the county faces "certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences.'" Only a showing that relying on paper ballots would result in such severe consequences will meet the practical compulsion standard. Here, however, there is no concrete showing, as required by the *POBRA* court, that reliance upon paper ballots would result in severe adverse consequences.

The law does not penalize a county if it chooses to not use a voting system to tabulate votes. Instead, the Elections Code provides an alternative and expressly authorizes counties to count

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[65] See Commission on State Mandates, Decision CSM-4499.

[66] Commission on State Mandates, Decision CSM 05-RL-4499-01, p. 26, citing *In re Randy G.* (2001) 26 Cal.4th 556, 562-563.

[67] *Id.*

[68] *POBRA, supra,* 170 Cal.App.4th 1355**,** 1368, (POBRA) citing *Kern, supra,* 30 Cal.4th at p. 754, quoting *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 74.) Exhibit S.

ballots by hand rather than use a voting system. Elections Code sections 15270, et seq. and 15290, et seq., establish procedures for counting ballots by hand for the semifinal official canvass and official canvass. Counties are authorized to choose whether to count ballots manually, or automatically using voting systems, or use both methods so long as the precinct results are determined in accordance with the article of the Elections Code applicable to the precinct.[69] And although, as a practical matter, counties may depend on voting systems to save time and money,[70] there is no concrete evidence in the record showing that certain and severe penalties or other draconian consequences will occur from a local decision to manually tabulate votes.

Accordingly, the Commission finds that the test claim regulations do not impose a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

V. Conclusion

Based on the analysis above, the Commission concludes that California Code of Regulations, title 2, sections 20120, 20121, 20122, 20123, 20124, 20125, 20126, and 20127 (Register 2008, No. 43) do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

[69] Elections Code section 15212. This is consistent with section 19210 that authorizes counties to "adopt for use at elections any kind of voting system, any combination of voting systems, any combination of a voting system and paper ballots, provided the use of the voting system or systems involved has been approved by the Secretary of State or specifically authorized by law."

[70] In 2002, the Legislature enacted the Voting Modernization Bond Act of 2002 that allows counties to purchase updated voting systems with bond money. (Elections Code sections 19230, et seq.)

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December 12, 2013

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Re: **Comments on Draft Staff Analysis and Proposed Statement of Decision**
***Post Election Manual Tally (PEMT)* (10-TC-08)**

Dear Ms. Halsey:

The California State Association of Counties respectfully submits these comments in response to the draft staff analysis issued in the above-named case. Although the deadline for comments has been extended, we know staff is pressed for time and we wanted to be sure to get these comments to you as soon as possible. If you or your staff have any questions about the information below, please feel free to get in touch with us at any time.

The draft analysis recommends that the Commission deny the claim. It says that the regulations only apply to "county election officials in counties that use a…voting system" and also that "counties are not required by state law to use…voting systems," and therefore, it reasons, "counties are not legally or practically compelled by state law to comply with the regulations."

The web of laws and regulations governing elections in California are particularly complex, and as representatives of counties across the state, we think that we are in a position to provide some information that staff preparing the analysis might not have been aware of. Once you are aware of some of these complexities, we think you will agree that the regulation did impose a mandate that is fully reimbursable. In fact, we think that any single one of the points we make below would be enough for the Commission to determine that the regulation's mandates are fully reimbursable.

First of all, presuming that counties could have chosen whether or not to use a voting system, by the time the regulatory action took effect, any choice wither to do so was irrevocable. In fact, the statewide election in question (November 2008) had already been conducted in part on a voting system, eliminating any ability to avoid the mandated activities.

The emergency regulatory action became effective on October 20, 2008, sixteen days before the only statewide election that took place during the period the regulation was effective. By October 20, every county's decision to use a voting system for that election was certified by the Secretary of State and was irrevocable.

If a local agency can avoid a mandate by making one decision or another, they must have a reasonable opportunity to make or change that decision after the law implementing the mandate is passed. If a choice is already irrevocable before the promulgation of a regulation, then it rings hollow to claim that a county could have avoided the regulation's requirements by making a different decision, under the same principle that prohibits charging people with crimes for actions they took prior to the actions being outlawed.

In some counties, votes had already been cast by use of a voting system before October 20. State law defines a voting system partially by it being used to "cast or tabulate votes, or both." Some counties were certified by the Secretary of State to use a voting system that includes the use of direct recording electronic (DRE) voting machines. Voters cast their ballots on directly on DREs. Some counties that employ DREs use them to offer early voting to vote-by-mail voters. Early voting began as early as October 6. By October 20, thousands of voters had cast their votes on DREs. Therefore, the November 4, 2008 statewide election had already been "conducted…in part on a voting system" before the regulations became effective, thus triggering the regulations immediately upon their enactment and contradicting any claim that counties could have chosen to avoid them.

Also, four counties in California—Kings, Merced, Monterey, and Yuba— are "preclearance" counties. These counties must obtain permission (called "preclearance") from the Civil Rights Division of the United States Department of Justice or from the United States District Court for the District of Columbia before making any change to their voting procedures. Preclearance is required for "any change affecting voting, even though it appears to be minor or indirect…[or] ostensibly expands voting rights." [Source: www.justice.gov/crt/about/vot/sec_5/types.php.] The USDOJ is required to respond within 60 days. A jurisdiction can request that preclearance be expedited, but expedited review is not guaranteed. On such short notice, these four counties could not have changed the method by which votes were cast or tabulated without preclearance.

Furthermore, each county must have the Secretary of State certify the component of their elections regarding provisions for voters with disabilities. This certification includes a component describing how these voters' ballots will be cast and tabulated. The process must be certified by the Secretary of State long before sixteen days prior to an election, and could not have been changed on such short notice. In the case of the November 2008 election, the Secretary of State had already certified every county's use of a voting system, and knew when promulgating the regulation that these counties decisions on this matter would be irrevocable when the regulation purporting to give them a choice became effective, so to have included the language in question that seems to give counties an option is puzzling.

Lastly, to the point that any choice was irrevocable, every county had already used a "voting system" to begin conducting the election. In 2008, Elections Code 362 read: "'Voting system' means any mechanical, electromechanical, or electronic system *and its software*, or any combination of these, used to cast or tabulate votes, or both." (Emphasis added.) Elections Code

355 states: "'Software' includes all programs, voting devices, cards, ballot cards or papers, operating manuals or instructions, test procedures, printouts, and other nonmechanical or nonelectrical items necessary to the operation of a voting system."

As noted above, the regulations in question took effect very close to the election. Since "software" is expressly included in the definition of a "voting system," and since "ballot cards" and "test procedures" are expressly included in the definition of "software," the fact that ballot cards had already been issued—and in some cases returned—and test procedures had already been performed mean that, at the time the regulations became effective, the election had already been conducted, in part, on "voting systems" in every county.

Secondly, aside from the fact that any choice on a county's part was irrevocable, the way the regulation was written, any single county's use of a voting system would have meant every county was subject to the regulation. The requirement to incur costs was therefore not in the hands of the local governing board, but rather in the hands of other jurisdictions over which the county's governing board had no control.

The language in the regulation that the draft analysis cites as giving counties an option states that the regulation applies "to *all* elections officials within the State of California for all elections in this state conducted in whole or in part on a voting system" (emphasis added). In the case of a statewide election, this language does not leave the option to each county individually. For a statewide election, any single county's decision to use a voting system would make the regulation apply to every county, because the statewide election would have been conducted "in part" on a voting system. As noted above, when the regulations became effective, the election had already been conducted in part on a voting system, because votes had been cast and because ballot cards had been issued and returned and test procedures had been carried out. Thus, no county had an option to evade the required activities.

Thirdly, counties were required by the compound requirements of federal and state law to use voting systems for the election in question.

Counties were required by federal law to buy and use voting systems for federal elections. The November 2008 election was a federal election. As the Secretary of State notes, "*HAVA required county elections officials to buy and deploy new voting systems* designed to improve the voting process and enable voters to vote independently and privately." (Emphasis added; source: http://www.sos.ca.gov/elections/hava.htm.)

The California Elections Code also requires the use of certain elements of voting systems at each polling place. Elections Code Section 19227(b) states: "At each polling place, at least one voting unit approved pursuant to subdivision (a) by the Secretary of State shall provide access to individuals who are blind or visually impaired." Subdivision (c) makes that requirement optional under certain circumstances, but it is only a ministerial option based on whether sufficient funds

are available, not a discretionary option. A voting unit is a component of a voting system, and the Secretary of State certifies their use *only* as part of a voting system. Thus, state statute requires every county to use a device that they may only use as part of a voting system, therefore requiring use of a voting system.

Also, under federal law, HAVA, counties must have a DRE (referenced above) or AutoMARK (a particular brand of ballot marking machine) at each polling place by 2006 at the latest. In California, the Secretary of State has only authorized the use of DREs and AutoMARKs in conjunction with a voting system, not independently. Therefore, every county in California, in order to be in compliance with federal and state law, must use a voting system.

Lastly, even if a county decided to tabulate ballots by hand instead of using a voting system, but still use a DRE or AutoMARK in each polling place to comply with state and federal law, the ballots themselves would still have to be designed in conjunction with a voting system. Voting system software is the only way to program DREs and AutoMARKs to mark and (in the case of DREs) tabulate the appropriate spot on the ballot to represent the choice the voter has indicated. With this use also, the election would have been conducted, in part, using a voting system, even if that system was not used to tabulate the ballots.

Our last point is more abstract. We would point out that the "choice" counties supposedly had amounted to either complying with the required activities by choice or else because the regulation required it, and therefore did not amount to a choice at all.

According to the draft analysis, prior to the enactment of the regulation counties had an *option* whether to tabulate votes by hand or use a voting system. The regulation instead *requires* tabulation by hand, but only if a county is not tabulating by hand. In other words, the "choice" that a county supposedly had was to either tabulate votes by hand of its own volition, or else tabulate votes by hand on the state's orders.

Any law or rule could be written so that it only applies when the affected person or agency already doing it. Indeed, that's the whole point of imposing a rule. Imagine income tax law was drafted to say "For any year in which a person doesn't pay 25% of their income to the government, they must follow the requirement below," followed by a regulation requiring people to pay 25% of their income to the government. That wording doesn't make the payment optional, it requires the payment.

Applying the reasoning in the draft analysis to another mandate might help illustrate the counterpoint in more familiar terms. The animal control mandate required local agencies to hold animals for at least 72 hours before euthanizing them. This unquestionably constituted a reimbursable mandate over the preexisting requirement of at least 24 hours, and the commission determined that it was. Imagine that the law had been written slightly differently, and read "In the case of any animal that a county does not hold for at least 72 hours before euthanizing, the

following requirement applies: Animal control officers must hold animals for at least 72 hours before euthanizing them." Would that then mean that that mandate would not have been reimbursable, since the mandate purported to hinge on a local decision? Of course not. The choice is a false one: whether to hold an animal for 72 hours of one's own volition or else hold an animal for 72 hours because the state required it.

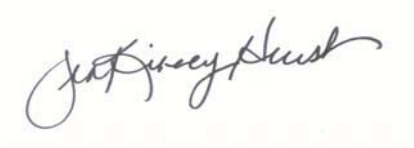
Likewise, the regulation here at issue here says that counties must either tabulate votes by hand of their own volition, by not using a voting system, or else tabulate votes by hand when the state requires it. It was not a choice in any real sense of the word, because the requirements enacted by the regulation only applied when counties were not already complying with them.

We hope the points offered above are helpful in your ongoing analysis of the PEMT test claim. We think that, combined with the analysis you and your staff have already performed, the points above show that the Commission should approve the test claim in full. In fact, we think that any one of the reasons in this letter is sufficient to warrant full reimbursement.

If you have any questions about our comments or anything else related to this mandate, please feel free to contact Geoff Neill at gneill@counties.org or 916/327-7500 x567.

Thank you.

Respectfully,



Jean Kinney Hurst
Senior Legislative Representative

cc: Renee Bischof, County of Santa Barbara

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On December 13, 2013, I served the:

> **California State Association of Counties Comments on Draft Staff Analysis and Proposed Statement of Decision.**
> *Post Election Manual Tally (PEMT)*, 10-TC-08
> Former California Code of Regulations, Title 2, Sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127; Register 2008, No.43
> County of Santa Barbara, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

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 December 13, 2013 at Sacramento, California.

Lorenzo R. Duran
Commission on State Mandates
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COMMISSION ON STATE MANDATES

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Last Updated: 12/13/13

Claim Number: 10-TC-08

Matter: Post Election Manual Tally (PEMT)

Claimant(s): County of Santa Barbara

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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I, Jean Kinney Hurst, hereby declare under penalty of perjury that my comments on the Post Election Manual Tally (10-TC-08) dated 12/12/13, which make a number of factual assertions, are true and complete to the best of my personal knowledge or information or belief.

Signature

1·16·14

Date

RECEIVED
January 16, 2014
Commission on
State Mandates

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

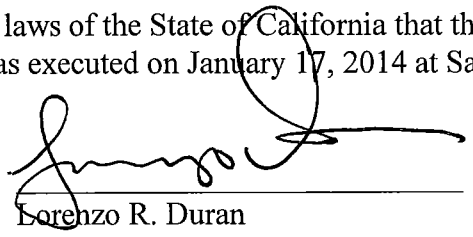
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On January 17, 2014, I served the:

CSAC Declaration for Previously Submitted Comments
Post Election Manual Tally (PEMT), 10-TC-08
Former California Code of Regulations, Title 2, Sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127; Register 2008, No.43
County of Santa Barbara, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

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 January 17, 2014 at Sacramento, California.



Lorenzo R. Duran
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 1/16/14

Claim Number: 10-TC-08

Matter: Post Election Manual Tally (PEMT)

Claimant: County of Santa Barbara

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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.)

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JOSEPH E. HOLLAND
COUNTY CLERK, RECORDER AND ASSESSOR

Exhibit F

RECEIVED
January 17, 2014
Commission on State Mandates

January 17, 2014

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA 95814

Re: **Comments on Draft Staff Analysis and Proposed Statement of Decision**
***Post Election Manual Tally (PEMT)* (10-TC-08)**

Dear Ms. Halsey:

Santa Barbara County wishes to thank the Commission on State Mandates for accepting our request for an extension of the comment period on the Draft Staff Analysis and Proposed Statement of Decision on the Post Election Manual Tally (PEMT) (10-TC-08).

We would like to state our concurrence with the comments submitted by the California State Association of Counties (CSAC) on December 12, 2013 to the Commission on the above referenced claim. Rather than repeat what they have so eloquently conveyed, I would like to expand upon one of the subjects mentioned, the requirements for counties to comply with The Help America Vote Act (HAVA) for federal elections and specifically the method of compliance for Santa Barbara County.

HAVA Section 301(a)(3)(A) provides that the voting system shall "be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters." In addition, Section 301(a)(3)(B) provides that States may satisfy this requirement "through the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place."

In 2003, the State of California submitted the "State Plan" on how the state intended to comply with HAVA. This submission of a State Plan was required if a state wished to receive HAVA funds. Included in this plan was to have one accessible voting system at each polling place.

In order to comply with HAVA Section 301 (a)(3)(A) and (B) and Elections Code Section 19227 (b) which stated "At each polling place, least one voting unit approved pursuant to subdivision (a) by the Secretary of State shall provide access to individuals who are blind or visually impaired." Santa Barbara County used funding sources available to procure the Election Systems & Software, Inc. (ES&S) AutoMARK Voter Assist Terminal and sought the approval from the Secretary of State's Office to certify a blended system using our existing Diebold Elections Systems, Inc (DESI) AccuVote-OS optical scan voting system and the AutoMARK Voter Assist Terminal.

The Secretary of State's office reviewed and accepted our request with the condition that the "Users of this blended system must adhere to the **Official Use Procedures for Use of the ES&S AutoMARK in conjunction with the Diebold GEMS/AccuVote-OS System** as approved by the Secretary of State". The approval of this request along with the Official Use Procedures for Use of the ES&S AutoMARK in conjunction with the Diebold GEMS/AccuVote-OS System (hereinto referred to as the Official Use Procedures) are included in this response as Attachment A.

On September 29, 2006 Santa Barbara County received permanent approval for use of the blended system. In September of 2007, Santa Barbara County submitted a Voting System Change Notification Form to seek approval to use a modified version of the GEMS Election Management System and the AccuVote OS Firmware Version. The written notification for any changes is a condition of our use of the blended system. The condition states, "No substitution or modification of the voting system shall be made with respect to any component of the voting system, including the Use Procedures, until the Secretary has been notified in writing and has determined that the proposed change or modification does not impair the accuracy and efficiency of the voting systems sufficient to require a re-examination and approval."

The vote by mail period begins 29 days before the election. California Elections Code Section 3018 provides for the voting of vote by mail ballots in the office of the election official up through the close of polls on Election Day. Therefore, as of October 20, 2008, Santa Barbara County was allowing voters to vote in our offices and by mail.

In order to protect, as stated in California Elections Code Section 19225 (e) "the incontrovertible right of all citizens regardless of blindness or visual impairment to vote" and as stated in California Elections Code Section 19225 (f) "for individuals who are blind or visually impaired to cast and verify their ballots independently", Santa Barbara County had an AutoMARK voter assist terminal available in our offices for those voters during the 29 day period prior to the election. California Elections Code Sections 19225 (e) and (f) were in effect in 2008 and have since been added and renumbered as other sections effective January 1, 2014.

The November 4, 2008 General Election was a federal election and Santa Barbara County's compliancy with HAVA was dependent on the use of the AutoMARK voter assist terminal as part of a blended system which included a "voting system" certified by the Secretary of State's office. Furthermore, a condition for use of the blended system was to adhere to the

Official Use Procedures, which included the tabulation of the AutoMARK ballots on the AccuVote central count machines.

The emergency regulations for the Post Election Manual Tally became effective on October 20, 2008. In order for the County of Santa Barbara to make any changes to our "Use Procedures" our written notification needed to be submitted to the Secretary of State for review.

California Elections Code Section 15002 requires the Secretary of State to review and amend administrative procedures for the use of voting systems by January 1st of each even-numbered year.

Additionally, California Elections Code Section 15003 requires elections officials to adopt semifinal official and official canvass procedures to conform to the applicable voting system procedures that have been approved by the Secretary of State. It further required these procedures to be available for public inspection no later than 29 days before the election.

Therefore, by nature of our blended system certification, that fact that we had already begun using our voting system and the deadlines imposed by the California Elections Code Sections 15002 and 15003, we believe that we were compelled to continue with the use of our system and procedures adopted by our County.

Again, the comments submitted only address one of the points conveyed in the response submitted by CSAC on December 12, 2013 in an effort to clarify the circumstances Santa Barbara County faced with respect to compliance with state and federal laws and regulations.

If you have any questions regarding these comments, please feel free to contact me at (805) 696-8963 or by email to rbischo@co.santa-barbara.ca.us.

Sincerely,

Renee Bischof

Renee Bischof
Chief Deputy Registrar of Voters
Santa Barbara County

Cc: Geoff Neill, CSAC

Attachment A – Secretary of State Approval for Use Of Blended System

BRUCE McPHERSON | SECRETARY OF STATE | STATE OF CALIFORNIA
OFFICE OF VOTING SYSTEMS TECHNOLOGY ASSESSMENT
1500 11th Street | Sacramento, CA, 95814 | tel 916.653.7244 | www.ss.ca.gov

May 11, 2006

Billie Alvarez
Elections Division Manager
Santa Barbara County
130 E. Victoria St., Suite 200
Santa Barbara, CA 93101

Dear Ms. Alvarez:

We have reviewed your request for approval to use the Election Systems & Software, Inc. (ES&S) AutoMARK device in conjunction with your existing Diebold Elections Systems, Inc (DESI) AccuVote-OS optical scan voting system.

This proposed blended system, consisting of the DESI AccuVote-OS, firmware version 1.96.4, DESI AccuVote-OS Central Count, firmware version 2.0.12, DESI GEMS Election Management System, version 1.18.19, ES&S AutoMARK Voter Assist Terminal, version 1.0, ES&S AutoMARK Information Management System (AIMS), version 1.0, and ES&S Unity Election Management System, version 2.4.3.1, is approved for use in California only for the June 6, 2006 Primary Election subject to the following conditions:

- Users of this blended system must adhere to the **Official Use Procedures for Use of the ES&S AutoMARK in Conjunction with the Diebold GEMS/Accuvote-OS System** as approved by the Secretary of State; and
- Any jurisdictions that use this blended system for the June 6, 2006 Primary Election must submit a written report about how well the systems functioned and any recommendations of ways to improve such blended system use in the future. This report is due to the Secretary of State no later than close of business on July 10, 2006.

Sincerely,

BRUCE McDANNOLD
Interim Director
Office of Voting Systems Technology Assessment

OFFICIAL USE PROCEDURES FOR USE OF THE ES&S AUTOMARK IN CONJUNCTION WITH THE DIEBOLD GEMS/ACCUVOTE-OS SYSTEM

1. INTRODUCTION.

1.1 System description and components.

- Diebold AccuVote-OS, firmware version 1.96.4
- Diebold AccuVote-OS Central Count, firmware version 2.0.12
- Diebold GEMS Election Management System, version 1.18.19
- ES&S AutoMARK Voter Assist Terminal, version 1.0
- ES&S AutoMARK Information Management System (AIMS), version 1.0
- ES&S Unity Election Management System, version 2.4.3.1

1.2 Overview.

These procedures were developed and apply only to jurisdictions using the Diebold mark sense voting system with the components described above, together with one ES&S AutoMARK per polling place to provide accessibility support to special needs voters in compliance with HAVA. The procedures assume that the jurisdiction will contract with a third party vendor to provide AutoMARK programming and print ES&S compatible ballots for use with the AutoMARK devices.

In general, the jurisdiction (and their vendor) is required to adhere to the governing Use Procedures approved by the Secretary of State for use with the respective systems. These procedures set forth the specific additional procedures required by the combination of these system components.

2. BALLOT DEFINITION.

For absentee and precinct voters whose ballots will be tabulated on the Diebold AccuVote-OS (AV-OS) and the AccuVote-OS Central Count (AV-OS CC), the paper ballots will be printed in accordance with the governing Use Procedures approved by the Secretary of State for use with that system.

Ballots used by voters voting on the AutoMARK will be printed in accordance with the governing Use Procedures approved by the Secretary of State for use with that system.

3. SYSTEM INSTALLATION AND CONFIGURATION.

The jurisdiction shall comply fully with the governing Use Procedures approved by the Secretary of State for the Diebold AV-OS, AV-OS CC and the Diebold GEMS Election Management System (GEMS) with respect to acceptance testing, installation and configuration.

The jurisdiction will comply fully with the governing Use Procedures approved by the Secretary of State for the AutoMARK with respect to acceptance testing, installation and configuration of the AutoMARK.

4.0 ELECTION SET-UP AND DEFINITION.

4.1 Programming and configuration of election management system/software, including audit records to be generated and retained.

County will program the election in its respective election management system, including district, contest and candidate set-up, precinct consolidation and polling place assignment. System reports will be proofed for correct race information, ballot type configuration, precinct consolidation, and polling place assignment. All audit records and reports will be retained as legally required.

4.2 Programming and configuration of vote recording/tabulation devices, including audit records to be generated and retained.

Election definition and data from the county's respective election management system will be exported according to the system specifications and imported into the GEMS system, and GEMS ballots will be created by county elections staff. All memory cards will be created by county elections staff according to the governing Use Procedures for the AccuVote system approved by the Secretary of State. Additionally, the jurisdiction will fully comply with the additional security procedures in the handling of memory cards specified by the Secretary of State in his Diebold Certification on February 17, 2006, section 4f.

Election definition and data from the county's respective election management system will be exported according to the system specifications and sent to ES&S staff, under contract with the county elections official, for import into the Unity system. AutoMARK ballots and flash memory cards will be created, on the version of Unity and AIMS certified for use with this version of the AutoMARK, by ES&S staff under

contract with the county elections official, and in accordance with the Use Procedures on file with the Secretary of State. Flash memory cards will be created by ES&S staff, under contract with the county elections official, according to the governing Use Procedures approved by the Secretary of State.

All audit records will be generated and retained as specified by the governing Use Procedures for both systems approved by the Secretary of State. The required proof and audit reports from Unity and AIMS will be generated and provided by the jurisdiction, who shall review, proof and review all such reports *prior* to programming of the AutoMARK units.

4.3 **System diagnostic testing procedures, including audit records to be generated and retained.**

The jurisdiction will fully comply with the governing Use Procedures for each system approved by the Secretary of State.

4.4 **System Proofing.**

In system proofing, the jurisdiction will fully comply with the governing Use Procedures of the applicable Diebold system as approved by the Secretary of State. The jurisdiction will contractually require that ES&S fully comply with the requirements for system proofing as provided in the governing Use Procedure for the AutoMARK system, as approved by the Secretary of State.

Additionally, the jurisdiction will proof the AutoMARK ballots against the GEMS ballots and the elections management system reports to ensure the following:

- correct assignment of contests to ballot types,
- correct assignment of candidates to contests,
- correct assignment of “Vote For” number to contests,
- correct spelling of all materials including instructions,
- candidate names,
- occupational designations,
- district and contest names.

The jurisdiction will ensure that all contests and candidates are in proper order as required by the CA Elections Code and the rotation assignment for the county.

4.5 **Logic and accuracy testing of system and components.**

Logic and accuracy testing will be completed on all AV-OS units and AV-OS CC units as required in the governing Use Procedures approved by the Secretary of State for the Diebold system.

Logic and accuracy testing will be completed on all AutoMARK units as required in the governing Use Procedures approved by the Secretary of State for the ESS AutoMARK system.

4.6 **Ballot Tally Programs.**

The jurisdiction will fully comply with the governing Use Procedures for the AccuVote OS approved by the Secretary of State. The AutoMARK system does not tally ballots so there is no requirement to submit the ballot tally program to the Secretary of State.

4.7 **Election Observer Panel.**

The jurisdiction will create and follow an Election Observer Panel plan that addresses the combination of systems and fully complies with the requirements specified in the governing Use Procedures approved by the Secretary of State for each system.

4.8 **Hardware maintenance and preparation for use.**

The jurisdiction will fully comply with the governing Use Procedures for both systems approved by the Secretary of State.

5. POLLING PLACE PROCEDURES.

5.1 General requirements

The jurisdiction shall fully comply with the governing Use Procedures for the Diebold System and the ES&S AutoMARK system as approved by the Secretary of State, with respect to:

- Precinct supplies, delivery and inspection
- Polling place set-up
- Opening the polls
- General polling place procedures
- Provisional voters
- Closing the polls and vote reporting
- Securing audit logs and backup records
- Troubleshooting and problem resolution

5.2 Special Needs Voters

5.2.1 **Polling place procedures**.
At the polling place, voters requesting assistance in marking their ballot will sign the official roster like all other voters. There will be no special designation on the roster that would identify voters issued an AutoMARK ballot. The poll worker will write the voter's precinct number, ballot type and party on a secrecy envelope designed for the AutoMARK ballot. The voter will be directed to the AutoMARK station where he/she will receive an AutoMARK ballot and instructions on using the device in accordance with the governing Use Procedures approved by the Secretary of State for the AutoMARK system.

5.2.2 **Ballot Security/Secrecy.**
After the voter has cast his/her ballot, in order to ensure the anonymity of the vote, the ballot will be ejected directly from the AutoMARK device into the secrecy envelope, sealed and deposited in a locked ballot box. The ballot box will remain locked and will be opened only by the elections official after the close of the polls.

6. ABSENTEE/MAILED BALLOT PROCEDURES (CENTRAL TABULATION).

The jurisdiction shall fully comply with the governing Use Procedures approved by the Secretary of State for the Diebold System .

7. SEMI-OFFICIAL AND POST-ELECTION PROCEDURES.

The jurisdiction shall fully comply with the governing Use Procedures approved by the Secretary of State for the Diebold System .

Ballots cast on the AutoMARK by special needs voters will not be tabulated during the semi-official canvass.

8. OFFICIAL CANVASS AND POST-ELECTION PROCEDURES.

8.1 Canvassing AutoMARK voted ballots .

8.1.1 The ES&S AutoMARK ballots cast at the polls on Election Day will be duplicated onto the Diebold (GEMS) ballots for counting on the AccuVote central count machines. This process will take place during the official canvass. Elections Code §15208 and 15210 govern the segregation and duplication of ballots.

The AutoMARK ballots will arrive from the polls in individually sealed envelopes that are transported in a locked or sealed ballot container. During the canvass, with two people present, the envelopes will be opened and handled only by elections staff who do not have access to the polling place rosters. There will be no way that the ballot cast can be tied back to a voter.

The precinct information written on the envelope will be transferred to the ballot. The ballots will be sorted by precinct (sorted by party, then by precinct, if it is a primary election). For every precinct and party (if applicable) that has marked AutoMARK ballots, a corresponding number of Diebold ballots will be pulled and paired with the AutoMARK ballots.

The duplication board will consist of three members. One member calls the votes from the AutoMARK ballot card, one member duplicates the votes cast onto the Diebold ballot, and the remaining member verifies that the votes are being called and duplicated correctly.

The AutoMARK ballot will be stamped as “Void” and the corresponding Diebold ballot will be stamped with “Duplicate.” Each duplicated ballot will be assigned a unique serial number that will correspond to the voided AutoMARK ballot. Serial numbers are assigned sequentially. The information, including the precinct number, party and the serial number for the ballots, will be written on a duplication log.

With the AutoMARK ballots, there should not be a question as to voter intent, as the ballots will be clearly marked. However, in the case of a question, the voter intent must be determined by a supervisor. The guidelines set by the Secretary of State shall be followed and the decision of the supervisor shall be documented. This documentation shall be maintained with the voided ballot.

The duplicated ballots will be batched, counted on the AccuVote-OS central count system and added to the precinct vote totals.

All election materials, including logs and ballots, will be stored in accordance with election law and system Use Procedures on file with the Secretary of State.

8.2 **OTHER**

In all other respects, the jurisdiction will fully comply with the governing Use Procedures approved by the Secretary of State for the Diebold system.

9. **MANUAL RECOUNT PROCEDURES.**

The jurisdiction will fully comply with the governing Use Procedures approved by the Secretary of State for the Diebold system.

10. **SECURITY.**

For the Diebold components of the system, the jurisdiction will fully comply with the governing Use Procedures approved by the Secretary of State for that Diebold system.

For the AutoMARK component of the system, the jurisdiction will fully comply with the governing Use Procedures approved by the Secretary of State for the AutoMARK system.

11. **BIENNIAL HARDWARE CERTIFICATION AND NOTIFICATION.**

For the Diebold components of the system, the jurisdiction will fully comply with the governing Use Procedures approved by the Secretary of State for that Diebold system.

For the AutoMARK component of the system, the jurisdiction will fully comply with the governing Use Procedures approved by the Secretary of State for the AutoMARK system.

Post Election Manual Tally (PEMT) 10-TC-08
Declaration Supporting Comments on
Draft Analysis and Proposed Statement of Decision

I, Renee Bischof, Chief Deputy Registrar of Voters for the County of Santa Barbara, declare under penalty of perjury, that the information provided herein is true and complete to the best of my personal knowledge, information or belief and that this declaration is executed this 17th day of January, 2014, at Santa Barbara, California.

Renee Bischof
Chief Deputy Registrar of Voters
County of Santa Barbara

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On January 21, 2014, I served the:

Claimant Comments
Post Election Manual Tally (PEMT), 10-TC-08
Former California Code of Regulations, Title 2, Sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127; Register 2008, No.43
County of Santa Barbara, Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

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 January 21, 2014 at Sacramento, California.

Lorenzo R. Duran
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 1/16/14

Claim Number: 10-TC-08

Matter: Post Election Manual Tally (PEMT)

Claimant: County of Santa Barbara

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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.)

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October 17, 2008

Office of Administrative Law
Reference Attorney
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Re: Proposed Emergency Regulations (2008-1009-02E)

Dear OAL Research Attorney:

Secretary of State Debra Bowen submits this letter to respond to the comments and objections to the above-captioned proposed emergency regulations. Comments and objections opposed to the proposed emergency regulations were filed by the Counties of San Diego, Tulare, Kern and Butte and their respective Registrars of Voters and by Mr. Stephen N. Trout of Election Solution Providers.

An Emergency Exists

The President of the United States has more power over the lives of Californians than any other elected official. Election of the President occurs only once every four years. The next presidential election will be held on November 4, 2008, now less than three weeks away. The number of citizens participating in the election is expected to reach historic levels.

Public confidence in election results is essential to the legitimacy of our system of government, not only with respect to the presidency but also the many other contests on the same ballot, from federal, state and local offices to state and local ballot measures affecting major public policy and fiscal issues.

In a national Gallup Poll in December 2000, 67% of respondents said they had little or no confidence in the nation's vote counting. Six years later, public confidence had not been fully restored. In September 2006, 12% of registered voters in a national AP/Ipsos Poll said they were not too confident or not at all confident that their votes would be counted accurately. More troubling, there was a marked contrast in opinions depending on the race of the respondent. Among white respondents, 63% said they were very confident their votes would be counted accurately and only 8% that they were not too confident or not at all confident. Among black respondents, only 30% reported they were very confident their votes would be counted accurately, while 29% said they were not too confident or not at all confident. See http://pewresearch.org/pubs/87/public-concern-about-the-vote-count-and-uncertainty-about-electronic-voting-machines.

Here in California, a Field Poll in August 2007 found that only 44% of likely voters reported having a great deal of confidence in the vote count while 14% (1 in 7) said they had little or no confidence their votes were being tabulated correctly. Voters who were not registered with any political party reported the greatest concern, with 22% (more than 1 in 5) having little or no confidence that votes were being properly tallied. See http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/08/23/BAB0RNAO8.DTL.

These dry statistics represent millions of California voters who have grave doubts about the trustworthiness of our elections. For purposes of the Administrative Procedure Act (APA), "emergency" is defined as "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare." Gov. Code § 11342.545. Permitting elections to continue to be held without taking steps to increase confidence among those millions of voters would risk serious harm to the public general welfare. An emergency exists, and the proposed emergency regulations are necessary to avoid that serious harm.

When she issued the Post Election Manual Tally Requirements (PEMT Requirements) in October 2007, the Secretary of State reasonably believed she had direct authority for her action under her exclusive statutory power over the approval and withdrawal of approval for use of electronic voting systems in the state. The Secretary acted only after months of extensive research and expert consultation that revealed the vulnerability of electronic voting systems to error and tampering, and the value of enhanced post election manual tallies to ensure the integrity and accuracy of results produced by those systems in close contests. The Secretary reasonably believed the PEMT Requirements were valid and not subject to the requirements of the APA. Indeed, the Superior Court in San Diego County entered judgment to that effect on March 7, 2008, rejecting a challenge brought by San Diego County, one of the parties that filed objections to the proposed emergency regulations.

In the June 2008 Statewide Primary Election, the PEMT Requirements were successfully implemented by local elections officials in the seven counties where contests with initial margins of victory smaller than 0.5% called for manual tallies of those contests in 10% of the precincts. The other 51 counties were prepared, but not called upon, to conduct such tallies, because they had no margins of victory below the 0.5% threshold.

The situation did not change until August 29, 2008, when the Court of Appeal issued its decision in the case challenging the PEMT Requirements. See *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501. The decision upheld the Secretary's authority to require post election manual tallies as part of her power to approve and withdraw approval for voting systems. The court also ruled, however, that the Secretary could adopt the PEMT Requirements only through the APA process. The Secretary of State respectfully disagrees with the latter ruling, and has petitioned the California Supreme Court to grant review on that issue.

In the interim, however, the Secretary recognized the vital importance of ensuring the accuracy—and public confidence in the accuracy—of results in any contests on the November 4, 2008, ballot with very narrow margins of apparent victory. By August 29, 2008, it was too late to complete the lengthy APA process for approval and implementation of permanent regulations in time for the election on November 4, 2008. For this reason, the Secretary of State decided it was necessary to take action under the emergency regulatory provisions of the APA. Without changing their operation or effect, the PEMT Requirements were re-structured into the format of formal regulations and submitted to the Office of Administrative Law on October 9, 2008.

The Post Election Manual Tally Regulations Are Necessary to Address the Emergency

Fair and accurate elections in which every eligible voter's ballot is counted as it was cast are the foundation of our representative democracy. Numerous scientific studies have proven that electronic voting poses serious new threats to the integrity and accuracy of election results. Electronic voting systems pose a qualitatively different and more serious risk of tampering than prior voting technologies, because it is possible for a single individual or handful of individuals to control the operation of thousands of voting devices by gaining brief access to just one of the devices. Worse, such tampering can be extremely difficult or impossible to detect or prove. Other government-funded studies have reinforced the findings to this effect found in Secretary of State Bowen's Top-To-Bottom Review, citing in the Finding of Emergency. See, e.g., Project EVEREST (Evaluation & Validation of Election-Related Equipment, Standards, & Testing), Risk Assessment Study of Ohio Voting Systems Executive Report, Ohio Secretary of State Jennifer Brunner, December 14, 2007, available at http://www.sos.state.oh.us/elections.aspx. Both Congress and the California Legislature have recognized the risks of electronic voting, enacting requirements for accuracy and security. See the Help America Vote Act of 2002 § 301(a)(5), 42 U.S.C. 15481(a)(5) ; Elec. Code § 19250.

Electronic voting systems, with their complex software code and sensitive hardware components, are also prone to errors and inaccuracies even in the absence of malicious tampering. Hundreds of serious incidents have been documented nationwide, including here in California. (See examples provided on page 5 below.)

Election procedures and administrative "checks and balances" before, during and after elections are an important means of mitigating these risks. Indeed, the elections officials from the same counties that have objected to the proposed emergency regulations have argued that such processes are essential. Post election manual tallies are one such check on the trustworthiness and accuracy of results and one that research shows is particularly effective.

Increased Percentage Manual Audits Are Necessary to Ensure the Integrity and Accuracy of Results in Close Contests

Several comments assert that the 1% post election manual tally, required by Elections Code § 15360 is sufficient to ensure voting system integrity and accuracy. For example, the Butte County Registrar of Voters makes the following three, unsupported assertions:

> The 1% manual tally that has been in Election (sic) Code section 15360 for years has provided the check necessary to guarantee accurate and secure results. There is no evidence anywhere in this state where ballots have been miscounted or counting machines have been compromised. There is academic research which shows that not only is a 1% manual audit sufficient to ensure the accuracy of election results, but it also says that anything more than 1% provides not additional safeguards.

San Diego County and its Registrar of Voters make similar unsupported claims:

> All counties in the state already perform a legislatively required 1% manual tally of randomly selected precincts after each election (Elec. Code § 15360) and there is no evidence that the 1% manual tally is inadequate or that a 10% manual tally is more likely to determine if a voting system has been tampered with.

In fact, as shown below, there is clear evidence that the 1% manual tally is not adequate, particularly in contests with very narrow margins of victory; that the 10% manual tally called for in the emergency regulations is more likely to ensure the accuracy of the results and determine if a voting system has been tampered with, and that ballots have been miscounted and counting machines have been compromised in many California counties.

In 2007, the Secretary of State convened the Post Election Audit Standards Working Group. The Working Group included a computer scientist from the Lawrence Livermore National Laboratory who is an expert on voting systems; a county registrar of voters; a city clerk responsible for conducting elections in her city; the President of the respected California Voters Foundation; a Certified Public Accountant; and a Professor of Statistics at the University of California, Berkeley. After reviewing the scientific literature in the field and interviewing dozens of elections officials and other experts, the Working Group reached the following general conclusions:

> o The larger the random sample, the more likely it is that human and voting system errors will be detected.
> o Close races require larger random samples to determine whether errors could overturn election results.
> o Races involving a small number of precincts require a larger percentage random sample to determine whether errors could overturn election results.

The Working Group found specifically that the 1% manual tally provided for in Elections Code § 15360 was inadequate to detect many errors or fraud that could alter the outcome in a close contest:

> As a result of the increasing sophistication of voting systems, the current flat 1% percent manual count is no longer sufficient for confirming election results and checking voting system accuracy and reliability. (Page 5.)

The Secretary's PEMT Requirements (and the proposed emergency regulations) followed closely the following recommendations in the Working Group's report, which is cited in the Finding of Emergency submitted to OAL on October 9, 2008:

> The Working Group recommends that the Secretary of State develop a comprehensive approach to verifying election outcomes. Such an approach would involve a hand count of a minimum percentage of precincts for all races, and more precincts for close races and races involving only a small number of precincts. The approach would specify an initial sample size and how the sample should be expanded if discrepancies are found. Ultimately the approach must be able to determine whether the outcome of each race is in doubt, given the discrepancies found by the hand count.

Numerous expert statistical studies demonstrating the benefits of 10% manual tallies in ensuring the correctness of the outcome in close races are presented in the 2007 report by the Brennan Center for Justice, "Post Election Audits: Restoring Trust in Elections," available at http://www.brennancenter.org/content/section/category/voting_technology.

Finally, there is clear evidence that ballots have been miscounted by electronic voting systems in California elections and that thousands of the state's vote counting machines have been compromised.

Weeks after the March 2004 Statewide Primary Election, local officials discovered that votes were miscounted by a Diebold electronic voting system. In this instance, 2,821 absentee ballots cast for Democratic presidential hopeful John Kerry were actually counted for Dick Gephardt. In a Senate race on the same ballot, 68 votes for one candidate and six votes for another were credited to a third candidate. The error may have been caused by multiple scanners feeding data into the tabulation system at once. See Brennan Center for Justice, "Post Election Audits: Restoring Trust in Elections," Appendix A, page 48. Five months earlier, the same system switched thousands of Democratic absentee votes in the election to replace recalled Governor Davis to an obscure Southern California socialist candidate. See Ian Hoffman, "County's vote-counting snafu crops up in San Diego," April 9, 2004, available at http://findarticles.com/p/articles/mi_qn4176/is_/ai_n14573856.

As for evidence that vote counting machines have been compromised, a December 15, 2003, field audit report prepared for the Secretary of State by R&G Associates, LLC, found that Diebold had provided and multiple counties had used versions of Diebold voting system software that lacked federal certification, California approval, or both. Sale and use of this uncertified software violated California law, as it had not been fully examined or tested to determine whether it functioned properly or whether it contained viruses or other malware that could affect the outcome of elections.

Conclusion

An emergency exists in the form of proven risks that electronic voting systems will produce inaccurate results as a result of defects or tampering. Knowledge of those risks has produced deep distrust in the way our votes are counted among millions of California voters. Routine 1% manual tallies are insufficient to detect many such problems, particularly where there is a risk due to narrow margins of victory that the initial results falsely identify the losing candidate as the winner or indicate that a ballot measure has passed when in fact it received an insufficient number of votes, or failed when in fact it received sufficient votes to pass. Increased 10% manual tallies in contests with initial margins of victory under 0.5%, as required in the proposed emergency regulations, are necessary to provide a high level of confidence that the final results are correct, whether by confirming the initial count or by revealing and correcting errors. The Secretary of State reasonably believed that the APA did not apply until a court decision holding that it did was rendered too close to Election Day to employ the permanent regulation.

For all these reasons and the reasons stated in the Finding of Emergency, the Secretary of State requests that OAL approve the emergency regulations.

Sincerely,

Lowell Finley
Deputy Secretary of State
Voting Systems Technology and Policy

The Official Canvass of the Vote

Immediately upon the close of polls on election day, the county elections officials and the Secretary of State begin what is called the "semifinal official canvass of the vote" - the tallying of early-returned vote-by-mail ballots and the ballots cast in each of the state's 24,000+ voting precincts. The semifinal official canvass begins at 8:00 p.m. on election night and continues uninterrupted until the last precinct is counted and reported to the Secretary of State.

The vote tallying process actually begins before election night, with the vote-by-mail ballots. Counties may begin processing vote-by-mail seven (7) business days before the election. Having verified the signatures on the return envelopes, elections officials remove the voted ballots and process them through their vote tallying system. Under no circumstances may they tabulate the results until after the close of polls on election day. Most counties continue this processing until they begin their election-day preparations for counting the precinct votes. Mail ballots not counted by that time and all those received on election day, either through the mail or at the precincts, are tabulated during the official canvass of the vote.

The California Elections Code requires that the official canvass begin no later than the Thursday following the election, that it be open to the public, and that it continue daily (Saturdays, Sundays, and holidays excepted) for not less than six hours each day until completed. The county elections officials must complete the official canvass no later than the 28th day after the election and submit a certified statement of the results of the election to the Secretary of State by the 31st day.

By law, the activities undertaken during the official canvass include:

1. Processing and counting any valid vote-by-mail and provisional ballots not included in the semifinal official canvass. Provisional ballots are cast by voters whose names do not appear on the precinct roster. The voter uses a regular precinct ballot which is then placed in a special envelope that the voter must sign, much like a vote-by-mail envelope. During the official canvass, the elections official checks the voter registration file to verify the voter's eligibility to cast the ballot. Once verified, the ballot is added to the official count. These ballots added to the vote-by-mail ballots not processed on election night can number 500,000 to over 1,000,000.
2. An inspection of all materials and supplies returned by poll workers.
3. A reconciliation of the number of signatures on the roster with the number of ballots recorded on the ballot statement.
4. A reconciliation of the number of ballots counted, spoiled, canceled, or invalidated due to identifying marks or overvotes with the number of votes counted, including vote-by-mail and provisional ballots.

5. Counting any valid write-in votes.
6. Reproducing any damaged ballots, if necessary.
7. Conducting a hand count of the ballots cast in one (1) percent of the precincts, chosen at random by the elections official.
8. Reporting final results to the Secretary of State, as required.

No later than the 38th day after the election, the Secretary of State must determine the votes cast for candidates for state and federal office and for the statewide ballot measures, certify those results, and issue certificates of nomination/election to those candidates who were nominated/elected.

EMERGENCY

STATE OF CALIFORNIA--OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-08)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-		2008-1009-02E

For use by Office of Administrative Law (OAL) only

2008 OCT -9 PM 1:14

OFFICE OF ADMINISTRATIVE LAW

NOTICE | REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
Secretary of State

AGENCY FILE NUMBER (If any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S)
Post Election Manual Tally Requirements in Close Contests

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
None

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) **(Including title 26, if toxics related)**

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)

ADOPT: 20120, 20121, 20122, 20123, 20124, 20125, 20126, 20127

AMEND:

TITLE(S): Title 2

REPEAL:

3. TYPE OF FILING

- ☐ Regular Rulemaking (Gov. Code §11346)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☒ Emergency (Gov. Code, §11346.1(b))
- ☐ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☐ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ File & Print
- ☐ Other (Specify) _____
- ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)
n.a.

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- ☐ Effective 30th day after filing with Secretary of State
- ☒ Effective on filing with Secretary of State
- ☐ §100 Changes Without Regulatory Effect
- ☐ Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- ☐ Department of Finance (Form STD. 399) (SAM §6660)
- ☐ Fair Political Practices Commission
- ☐ State Fire Marshal
- ☐ Other (Specify) _____

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Pam Giarrizzo, Chief Counsel	(916) 653-7244		PGiarrizzo@sos.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE: Pam Giarrizzo — DATE: 10/9/08

TYPED NAME AND TITLE OF SIGNATORY
Pam Giarrizzo, Chief Counsel

TITLE 2. ADMINISTRATION
DIVISION 7. SECRETARY OF STATE

EMERGENCY REGULATIONS

Finding of Emergency

The Secretary of State finds that an emergency exists, and that the adoption of the foregoing regulations is necessary for the immediate preservation of the public peace, health and safety, or general welfare, as required by subdivision (b) of Section 11346.1 of the Government Code.

Specific Facts Showing the Need for Immediate Action

Overview: The Secretary of State reasonably believed that the Post Election Manual Tally Requirements (PEMT) were not regulations subject to the requirements of the Administrative Procedure Act (APA), Government Code section 11340 et seq. In forming this view, the Secretary relied on the advice of counsel and subsequently on a Superior Court decision in a case challenging her authority to issue the PEMT. On August 29, 2008, the Court of Appeal upheld the Superior Court's ruling that the Secretary has authority to require post election manual tallies as a condition of voting system certification, but reversed the trial court's ruling on the APA issue. See *County of San Diego v. Debra Bowen* (2008) 166 Cal.App.4th 501. By then, it was too late to promulgate the PEMT as permanent regulations through the full APA process and have them in effect for the November 4, 2008, General Election.

Soon after taking office in January 2007, Secretary of State Debra Bowen, pursuant to the authority granted by section 19222 of the Elections Code, initiated an in-depth scientific review of voting systems previously approved for use in California elections. The project came to be known as the Top-To-Bottom Review (TTBR).

On August 3, 2007, the Secretary of State made compliance with forthcoming post-election manual tally requirements a condition of re-approval of each of the voting systems examined in the TTBR. At that time, the Secretary did not believe such requirements would constitute regulations subject to the requirements of the APA. This belief was based in part upon the decision of the United States District Court for the Central District of California in *American Association of People with Disabilities v. Shelley*. On October 25, 2007, the Secretary issued the written requirements. Two months passed before San Diego County sought a judicial determination that the Secretary of State did not have the authority to impose the PEMT and, in the alternative, that the PEMT were regulations subject to the APA. On January 22, 2008, the Superior Court denied the Counties' request for relief. The trial court entered judgment on March 7, 2008. The Counties filed a Joint Notice of Appeal on March 19, 2008.

On August 29, 2008, the Court of Appeal upheld the trial court's ruling that the Secretary of State had authority to make the PEMT a condition of re-approval of voting systems following the

TTBR. The Court of Appeal reversed the trial court's ruling on the APA issue, holding that the PEMT were regulations subject to the requirements of the APA. The APA process typically requires at least four months before permanent regulations become effective, more if there are substantive changes to the proposed regulations during the process. Had the Secretary of State filed the proposed PEMT regulations with the Office of Administrative Law the day following the court decision, there would not have been enough time to complete the full APA process and have the PEMT in effect as permanent regulations in time for the November 4, 2008, General Election.

The TTBR showed that voting systems in widespread use throughout California are vulnerable to error and tampering. Escalating post election hand counts of ballots cast in randomly selected precincts are essential to confirm the correctness of the results reported by these voting systems, particularly in contests in which the apparent margin of victory is quite small. The PEMT were successfully implemented by the handful of counties in which close contests triggered their use following the June 3, 2008, Statewide Primary Election. Unless the PEMT are in effect as emergency regulations for the November 4, 2008, General Election, the accuracy and integrity of the results in close contests, as well as public confidence in those results, could be compromised.

Accordingly, immediate action is required to implement these regulations on an emergency basis.

Authority and Reference

Authority: Section 12172.5, Government Code and Sections 10, 19200, 19201, 19205, 19222, Elections Code.

Reference: Sections 19200, 19201, 19205, 19222, Elections Code.

Informative Digest

In 2007, the Secretary retained the University of California and a team of computer security experts to evaluate the security, reliability and accessibility of voting systems approved for use in California. Upon completion of this review, on August 3, 2007, the Secretary withdrew her approval of the voting systems studied by the review team, including certain Diebold, Sequoia and Hart InterCivic voting systems. The Secretary simultaneously issued a conditional re-approval of each of the voting systems that set forth approximately 40 preconditions to their use.

One of the conditions common to each of the re-approvals required the counties that chose to use the machines subject to the TTBR to follow, "post-election manual count auditing requirements," in addition to those already required by statute. The conditional re-approvals were amended on October 25, 2007, with the post election manual count condition revised to state this point more precisely: "Elections officials must comply with . . . requirements as set forth by the Secretary of State in the document entitled 'Post-Election Manual Tally Requirements' and any successor document." That same day, the Secretary issued a stand-alone document entitled "Post-Election Manual Tally Requirements" (the PEMT).

The PEMT sets forth a comprehensive post election manual tally procedure. The PEMT requires that: (i) "Elections officials shall conduct a manual tally of 10% of randomly selected precincts for any contest where the margin of victory is less than one half of one percent (0.5%)"; (ii) in contests that span multiple jurisdictions (e.g., statewide contests), "if the margin of victory within a given jurisdiction is more than 0.5%, but the overall margin . . . is less than 0.5%, then each jurisdiction involved in the contest shall conduct a manual tally of 10% of the precincts in which voters cast ballots for that contest in the jurisdiction"; and (iii) the tallies "must be completed within the canvass period established by Elections Code § 10262 and § 15372." See Elections Code sections 335.5 [defining " 'official canvass' "] and 353.5 [defining 'semifinal official canvass' "].

On December 18, 2007, the County of San Diego and Deborah Seiler, in her official capacity as the Registrar of Voters for the County of San Diego (County of San Diego), filed a complaint for declaratory and injunctive relief and a petition for writ of mandate in the superior court, asking the court to void the PEMT. County of San Diego argued that the Secretary had overstepped her statutory authority in issuing the PEMT and that, even if she possessed the authority to issue the PEMT, she could only do so pursuant to the APA. In January 2008, the parties stipulated to permitting the counties of Kern, Riverside and San Bernardino to intervene in the case.

On January 22, 2008, the Superior Court denied the counties' request for relief. The court concluded that the Secretary had acted within her legislatively delegated authority in issuing the challenged requirements, and that because the PEMT did not constitute a "regulation," the Secretary was not required to comply with the APA. The trial court entered judgment on March 7, 2008. The counties filed a Joint Notice of Appeal on March 19, 2008. They also filed a motion seeking expedited review and a decision in the appeal prior to the November 4, 2008, election. The Court of Appeal granted the motion to expedite. On August 29, 2008, 66 days before the election, the Court of Appeal issued its decision. The court upheld the trial court's ruling that the Secretary has authority to issue the PEMT. The court reversed the trial court's ruling that the PEMT were not regulations and therefore not subject to the APA.

Identification of Each Technical, Theoretical, and Empirical Study, Report, or Similar Document On Which the Secretary of State Relies

In proposing these emergency regulations, the Secretary of State relies upon the following documents:

- TTBR Red Team report on Premier Voting Solutions/Diebold, available at http://www.sos.ca.gov/elections/elections_vsr.htm
- TTBR Red Team report on Sequoia Voting Systems, available at http://www.sos.ca.gov/elections/elections_vsr.htm
- TTBR Red Team report on Hart InterCivic, available at http://www.sos.ca.gov/elections/elections_vsr.htm
- ES&S Red Team report, available at http://www.sos.ca.gov/elections/elections_vs_ess.htm

- TTBR Source Code Team report on Premier Voting Solutions/Diebold, available at http://www.sos.ca.gov/elections/elections_vsr.htm
- TTBR Source Code Team report on Sequoia Voting Systems, available at http://www.sos.ca.gov/elections/elections_vsr.htm
- TTBR Source Code Team report on Hart InterCivic, available at http://www.sos.ca.gov/elections/elections_vsr.htm
- ES&S Source Code report, available at http://www.sos.ca.gov/elections/elections_vs_ess.htm
- Source Code report on Sequoia Voting System 4.0, available at http://www.sos.ca.gov/elections/elections_vs_sequoia.htm
- Post-Election Audit Standards Working Group report, available at http://www.sos.ca.gov/elections/elections_peas.htm

Local Mandate Determination

Mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: The Secretary of State has determined that the proposed regulations will impose a reimbursable mandate on those counties where narrow margins of victory require Post Election Manual Tallies pursuant to the regulations.

Fiscal Impact Estimate

In submitting these regulations to the Office of Administrative Law, the Secretary of State incorporates form STD 399, a copy of which is attached to this document.

Cost or savings to any state agency: The Secretary of State has determined that the proposed regulations will not impose an additional cost to the Secretary of State or any other state agency.

Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: The Secretary of State has determined that the proposed regulations may impose a cost to less than one quarter of the 58 counties in each election in an amount that could range from under $1,000 to a high of approximately $10,000 to conduct post election manual tallies in contests in which the margin of victory is less than 0.5% according to the semifinal official results. This estimate is based on a survey of the seven counties that used the PEMT procedures in the June 2008 election, in which counties reported costs ranging from a low of $160 to a high of $9,131.

Other non-discretionary cost or savings imposed upon local agencies: The Secretary of State has determined that the proposed regulations will not impose other non-discretionary costs or savings upon local agencies.

Cost or savings in federal funding to the state: The Secretary of State has determined that the proposed regulations will not result in cost or savings in federal funding to the state.

TEXT OF PROPOSED EMERGENCY REGULATIONS

Add Sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127 of Chapter 3 to Division 7 of Title 2 of the California Code of Regulations.

Chapter 3. Post Election Manual Tallies.

§ 20120. Purpose and Applicability.

(a) The purpose of this chapter is to establish standards and procedures for conducting increased manual tallies in contests in which the margin of victory is very narrow.

(b) This chapter applies to the Secretary of State and all elections officials within the State of California for all elections in this state conducted in whole or in part on a voting system, the approval of which is conditioned by the Secretary of State on performance of increased manual tallies in contests with narrow margins of victory.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20121. Increased manual tally in contests with narrow margins of victory.

(a) After each election, the elections official shall determine the margin of victory in each contest based upon the semifinal official canvass results, as defined in Elections Code section 353.5.

(1) For single-winner elections, the margin of victory is the difference between the percentage of votes won by the candidate with the number of votes needed to win the seat and the percentage of votes won by the candidate with the next lowest number of votes.

(2) For multi-winner elections, the margin of victory is the difference between the percentage of votes won by the candidate with the lowest number of votes needed to win a seat and the percentage of votes won by the candidate with the next lowest number of votes. For example, for a contest with three open seats, the margin of victory would be the difference between the percentage of the votes won by the third and fourth place candidates.

(3) For ballot measure contests, including recall contests, the margin of victory is the difference between the percentages of votes for and against the ballot measure.

(b) For any contest in which the margin of victory is less than one half of one percent (0.5%), the elections official shall conduct a manual tally, employing the methods set forth in Elections Code section 15360, of ten percent (10%) of randomly selected precincts. The ten percent (10%) manual tally shall apply only to votes cast in the contest

or contests with a margin of victory less than one half of one percent (0.5%), not to other contests on the same ballot in which the margin of victory equals or exceeds one half of one percent (0.5%).

(c) Precincts manually tallied under Elections Code section 15360 may be included as part of the ten percent (10%) manual tally.

(d) In any contest in which a ten percent (10)%) manual tally would otherwise be required pursuant to subdivision (b), an elections official may instead conduct a one hundred percent (100%) manual tally of the ballots.

(e) The elections official shall begin the manual tally as soon as practicable after the random selection of precincts for the manual tally.

(f) The manual tally shall be conducted in public view by hand without the use of electronic scanning equipment.

(g) Individuals performing the manual tally shall not at any time during the manual tally process be informed of the corresponding machine tally results.

(h) A poll worker participating in the manual tally shall not be assigned to tally the results from a precinct in which that individual served as a poll worker on Election Day.

(i) The elections official shall take appropriate measures to ensure that direct recording electronic (DRE) ballots that were cancelled before being cast are not inadvertently tallied as valid ballots in the manual tally process.

(j) The elections official shall take appropriate measures to ensure that damaged or defective ballots are not inadvertently tallied as valid ballots in the manual tally process.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20122. Contests voted upon in more than one jurisdiction.

(a) In any contest voted upon in more than one jurisdiction, the elections official in each jurisdiction in which votes were cast in the contest shall determine whether a ten percent (10%) manual tally is required by section 20121, subdivision (b) by calculating the overall margin of victory in all jurisdictions in which votes were cast in the contest. The examples in subdivisions (a)(1) and (a)(2) below of contests voted upon in two counties illustrate the application of the general rule stated in this subdivision (a).

(1) If the margin of victory in a contest voted upon in counties A and B is less than one half of one percent (0.5%) within county A but the overall margin of victory in

counties A and B combined is more than one half of one percent (0.5%), then a ten percent (10%) manual tally is not required in either county.

(2) If the margin of victory in a contest voted upon in counties A and B is more than one half of one percent (0.5%) within county A but the overall margin of victory in counties A and B combined is less than one half of one percent (0.5%), then County A shall conduct a manual tally of a randomly selected ten percent (10%) of the County A precincts in which voters cast ballots for that contest and County B shall conduct a manual tally of a randomly selected ten percent (10%) of the County B precincts in which voters cast ballots for that contest.

(b) For a legislative or statewide contest, the elections official shall determine whether a ten percent (10%) manual tally is required based upon the semifinal official canvass results and margin of victory for the entire district for a legislative contest or the entire state for a state contest posted on the canvass website of the Secretary of State.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20123. Determination, counting and disclosure of variances.

(a) A "variance" is any difference between the machine tally and the manual tally for a contest. For purposes of determining whether additional precincts must be manually tallied under section 20124, variances found in the manual tally sample for a given contest are presumed to exist in at least the same proportion in the remaining ballots cast in the contest. The examples in subdivisions (a)(1) through (a)(3) illustrate how the number of variances in a contest should be calculated.

(1) If the manual tally establishes that the machine tally erroneously attributed a vote for Candidate A to Candidate B, two variances result because the vote totals for Candidate A and for Candidate B are each changed by one vote in the manual tally.

(2) If the manual tally establishes that the machine tally erroneously attributed a vote for Measure 1 as a vote against Measure 1, two variances result because the vote totals for Measure 1 and against Measure 1 are each changed by one vote in the manual tally.

(3) If the manual tally determines that a vote was cast in a contest on a ballot that the machine tally interpreted as an undervote in the contest, one variance results because the machine tally undervote becomes a vote for a candidate or a vote for or against a measure in the manual tally.

(b) An elections official must document and disclose to the public any variances between the semifinal official canvass results and the manual tally results.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20124. Manual tally escalation requirements for variances.

(a) The elections official shall calculate the variance percentage for any contest with one or more variances by dividing the total number of variances found in the manual tally sample for the contest by the total number of votes cast for that contest in the manual tally sample. For single-winner contests, only variances that narrow the margin between the winner and any of the losers shall be included in the total number of variances. For multi-winner contests, only variances that narrow the margin of victory between any of the winners and any of the losers shall be included in the total number of variances. If the variance percentage represents at least one-tenth (10%) of the margin of victory for that contest based on the semifinal official canvass results, then additional precincts must be manually tallied for that contest as provided in subdivision (b).

(b) Additional precincts shall be tallied in randomly selected blocks of five percent (5%) until the total number of variances presumed to exist – re-calculated using the method above – is smaller than ten percent (10%) of the overall margin of victory in that contest, based on the semifinal official canvass results, or until all ballots have been manually tallied, whichever occurs first.

(c) If any variance is found between manually tallied voter verifiable paper audit trail (VVPAT) records and corresponding electronic vote results that cannot be accounted for by some obvious mechanical problem, then the VVPAT records, memory cards and devices, and direct recording electronic (DRE) voting machines must be preserved and the Secretary of State must be notified in order to allow for an investigation to determine the cause of the problem. The Secretary of State shall conduct the investigation in such a manner as to minimize adverse impact on the conclusion of the canvass and certification of the election, as well as preparation for any upcoming elections.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20125. Records To Be Maintained During And After The Manual Tally Process.

(a) The elections official shall keep a log to record the manual tally process, including the results of each round of manual tallying for each precinct included in the sample, how variances were resolved, and details of any actions taken that are contrary to this chapter. The elections official shall make the log available to the public.

(b) The elections official shall track, record in the log and report to the public by precinct the number of undervotes and overvotes discovered in the manual tally of a contest.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20126. Public Right To Observe.

(a) The elections official shall make any semifinal official canvass precinct tally results available to the public before the manual tally of the results from those precincts begins.

(b) The elections official shall comply with the notice requirements established in Elections Code §15360 when conducting any post-election manual tallying required by this chapter. This notice requirement may be satisfied by providing a single notice containing the times and places of:

(1) the initial selection of precincts for the one percent (1%) manual tally and any ten percent (10%) manual tally required;
(2) the beginning of the manual tally process; and
(3) any additional random selection of precincts which may become necessary to comply with escalation requirements.

(c) The elections official shall permit the public to observe all parts of the manual tally process, including the random selection of precincts, in a manner that allows them to verify the tally. The elections official shall not permit members of the public to touch ballots, voter verifiable paper audit trails or other official materials used in the manual tally process or to interfere in any way with the process.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20127. Completion Within Official Canvass Period.

For any contest in which an increased manual tally is required by this chapter, the elections official shall complete all tasks and make all reports required by this chapter within the canvass period established by Elections Code sections 10262 and 15372.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

VOTING SYSTEMS IN USE FOR THE NOVEMBER 4, 2008, GENERAL ELECTION

As of APRIL 28, 2009 - Subject to Change

NOTE: Voters and media representatives are urged to contact counties to confirm the use of a specific voting system for the November 4, 2008 election. The following information is the most current information provided by the counties to the Secretary of State's office.

County	*Vote by Mail System*	*Polling Place System*	*Polling Place - Accessibility Support*	*Early Voting*	*EV System*	*EV Dates*
Alameda	Sequoia Optech 400-C/WinETP v. 1.12.4	Sequoia Optech Insight Plus APX K2.10, HPX K1.42	Sequoia AVC Edge Model II v. 5.0.24	Yes	Sequoia AVC Edge Model II v. 5.0.24	10/06 - 11/03
Alpine	Premier AccuVote-OS v. 2.0.12	All mail ballot precincts (Central Tabulation)	Premier AccuVote-TSX v. 4.6.4	No		
Amador	ES&S M100 v. 5.0.0.0	ES&S M100 v. 5.0.0.0	ES&S AutoMARK A100 v. 1.0.168	No		
Butte	Premier AccuVote-OS v. 2.0.12	Premier AccuVote-OS v. 1.96.6	Premier AccuVote-TSX v. 4.6.4	No		
Calaveras	ES&S M100 v. 5.0.0.0	ES&S M100 v. 5.0.0.0	ES&S AutoMARK A100 v. 1.0.168	No		
Colusa	ES&S M100 v. 5.0.0.0	ES&S M100 v. 5.0.0.0	ES&S AutoMARK A200 v. 1.0.168	No		
Contra Costa	ES&S M650 v. 1.2.0.0	ES&S M100 v. 5.0.0.0	ES&S AutoMARK A100 v. 1.0.168	No		
Del Norte	Sequoia Optech Insight APX K2.10, HPX K1.42	Sequoia Optech Insight APX K2.10, HPX K1.42	Sequoia AVC Edge Model II v. 5.0.24	No		
El Dorado	Premier AccuVote-OS v. 1.96.6	Premier AccuVote-OS v. 1.96.6	Premier AccuVote-TSX v. 4.6.4	No		
Fresno	Premier AccuVote-OS v. 2.0.12	Premier AccuVote-OS v. 1.96.6	Premier AccuVote-TSX v. 4.6.4	No		
Glenn	Sequoia Optech Insight Plus APX K2.10, HPX K1.42	Same as Vote-by-Mail (Central Tabulation)	Sequoia AVC Edge Model II v. 5.0.24	No		
Humboldt	Premier AccuVote-OS v. 1.96.4	Premier AccuVote-OS v. 1.96.4	Hart eSlate v. 4.2.13	Yes	Hart eSlate v. 4.2.13	10/06 - 11/03
Imperial	Sequoia Optech 400-C/WinETP v. 1.12.4	Same as Vote-by-Mail (Central Tabulation)	Sequoia AVC Edge Model II v. 5.0.24	Yes	Sequoia AVC Edge Model II v. 5.0.24	10/28 - 11/03
Inyo	Sequoia Optech Insight APX K2.10, HPX K1.42	Same as Vote-by-Mail (Central Tabulation)	Sequoia AVC Edge Model II v. 5.0.24	No		
Kern	Premier AccuVote-OS v. 2.0.12	Same as Vote-by-Mail (Central Tabulation)	Premier AccuVote-TSX v. 4.6.4	No		
Kings	Sequoia Optech 400-C/WinETP v. 1.12.4	Same as Vote-by-Mail (Central Tabulation)	Sequoia AVC Edge Model II v. 5.0.24	No		
Lake	DFM Mark-A-Vote	Same as Vote-by-Mail (Central Tabulation)	Hart eSlate v. 4.2.13	No		
Lassen	Premier AccuVote-OS v. 1.96.6	Premier AccuVote-OS v. 1.96.6	Premier AccuVote-TSX v. 4.6.4	No		
Los Angeles	MTS v. 1.3.1	Same as Vote-by-Mail (Central Tabulation)	ES&S InkaVote Plus PBR v. 1.10	Yes	MTS v. 1.3.1	10/06 - 11/03; 10/25, 11/01
Madera	DFM Mark-A-Vote	Same as Vote-by-Mail (Central Tabulation)	Hart eSlate v. 4.2.13	No		
Marin	Premier AccuVote-OS v. 2.0.12	Premier AccuVote-OS v. 1.96.6	ES&S AutoMARK A200 v. 1.0.168	Yes	Premier AccuVote-OS v. 1.96.6	10/06 - 11/03
Mariposa	Sequoia Optech Insight APX K2.10, HPX K1.42	Same as Vote-by-Mail (Central Tabulation)	Sequoia AVC Edge Model II v. 5.0.24	No		
Mendocino	Premier AccuVote-OS v. 1.96.6	Same as Vote-by-Mail (Central Tabulation)	Premier AccuVote-TSX v. 4.6.4	Yes	Premier AccuVote-TSX v. 4.6.4	10/06 - 11/03
Merced	ES&S M650 v. 1.2.0.0	ES&S M100 v. 5.0.0.0	ES&S AutoMARK A200 v. 1.0.168	No		
Modoc	Premier AccuVote-OS v. 1.96.6	Premier AccuVote-OS v. 1.96.6	Premier AccuVote-TSX v. 4.6.4	No		
Mono	Sequoia Optech Insight APX K2.10, HPX K1.42	Sequoia Optech Insight APX K2.10, HPX K1.42	Sequoia AVC Edge Model II v. 5.0.24	No		
Monterey	Sequoia Optech 400-C/WinETP v. 1.12.4	Same as Vote-by-Mail (Central Tabulation)	Sequoia AVC Edge Model II v. 5.0.24	Yes	Sequoia AVC Edge Model II v. 5.0.24	10/6 - 11/03; 10/11, 10/18, 10/25, 11/01
Napa	Sequoia Optech 400-C/WinETP v. 1.12.4	Same as Vote-by-Mail (Central Tabulation)	Sequoia AVC Edge Model I v. 5.0.24	No		
Nevada	Hart BallotNow v. 3.3.11	Hart eScan v. 1.3.14	Hart eSlate v. 4.2.13	Yes	Hart eSlate v. 4.2.13	10/6 - 11/03
Orange	Hart BallotNow v. 3.3.11	Hart eSlate v. 4.2.13	Hart eSlate v. 4.2.13	Yes	Hart eSlate v. 4.2.13	10/19 - 1103
Placer	Premier AccuVote-OS v. 2.0.12	Premier AccuVote-OS v. 1.96.6	Premier AccuVote-TSX v. 4.6.4	No		
Plumas	Premier AccuVote-OS v. 1.96.6	Premier AccuVote-OS v. 1.96.6	Premier AccuVote-TSX v. 4.6.4	No		
Riverside	Sequoia Optech 400-C/WinETP v. 1.12.4	Same as Vote-by-Mail (Central Tabulation)	Sequoia AVC Edge Model II v. 5.0.24	Yes	Sequoia AVC Edge Model II v. 5.0.24	10/06 - 11/03
Sacramento	ES&S M650 v. 1.2.0.0	ES&S M100 v. 5.0.0.0	ES&S AutoMARK A100 v. 1.0.168	No		
San Benito	Sequoia Optech 400-C/WinETP v. 1.12.4	Same as Vote-by-Mail (Central Tabulation)	Sequoia AVC Edge Model II v. 5.0.24	Yes	Sequoia AVC Edge Model II v. 5.0.24	10/25/08, 11/01/08
San Bernardino	Sequoia Optech 400-C/WinETP v. 1.12.4	Same as Vote-by-Mail (Central Tabulation)	Sequoia AVC Edge Model II v. 5.0.24	Yes	Sequoia AVC Edge Model II v. 5.0.24	10/06 - 11/03
San Diego	Premier AccuVote-OS v. 2.0.12	Same as Vote-by-Mail (Central Tabulation)	Premier AccuVote-TSX v. 4.6.4	No		
San Francisco	Sequoia Optech 400-C/WinETP v. 1.16.6	Sequoia Optech Insight Plus APX K2.16, HPX K1.44	Sequoia AVC Edge Model II v. 5.0.24	Yes	Sequoia AVC Edge Model II v. 5.0.24	10/6 - 11/03; 10/18&19, 10/25&26,
San Joaquin	Premier AccuVote-OS v. 2.0.12	Premier AccuVote-OS v. 1.96.6	Premier AccuVote-TSX v. 4.6.4	No		
San Luis Obispo	Premier AccuVote-OS v. 2.0.12	Premier AccuVote-OS v. 1.96.4	ES&S AutoMARK A100 v. 1.0.168	No		
San Mateo	Hart BallotNow v. 3.3.11	Hart eSlate v. 4.2.13	Hart eSlate v. 4.2.13	Yes	Hart eSlate v. 4.2.13	10/06 - 11/03; 10/25, 11/01, 11/02
Santa Barbara	Premier AccuVote-OS v. 2.0.12	Premier AccuVote-OS v. 1.96.4	ES&S AutoMARK A100 v. 1.0.168	Yes	Premier AccuVote-OS v. 2.0.12	10/06 - 11/03
Santa Clara	Sequoia Optech 400-C/WinETP v. 1.12.4	Same as Vote-by-Mail (Central Tabulation)	Sequoia AVC Edge Model II v. 5.0.24	Yes	Sequoia Optech 400-C/WinETP v. 1.12.4	10/06 - 11/03, 10/25, 11/01
Santa Cruz	Sequoia Optech 400-C/WinETP v. 1.12.4	Sequoia Optech Insight APX K2.10, HPX K1.42	Sequoia AVC Edge Model II v. 5.0.24	No		
Shasta	Sequoia Optech 400-C/WinETP v. 1.12.4	Same as Vote-by-Mail (Central Tabulation)	Sequoia AVC Edge Model I v. 5.0.24	No		
Sierra	Premier AccuVote-OS v. 1.96.6	All mail ballot precincts (Central Tabulation)	Premier AccuVote-TSX v. 4.6.4	No		
Siskiyou	Premier AccuVote-OS v. 2.0.12	Premier AccuVote-OS v. 1.96.6	ES&S AutoMARK A100 v. 1.0.168	No		
Solano	ES&S M650 v. 1.2.0.0	ES&S M100 v. 5.0.0.0	ES&S AutoMARK A200 v. 1.0.168	No		
Sonoma	DFM Mark-A-Vote	Same as Vote-by-Mail (Central Tabulation)	Hart eSlate v. 4.2.13	No		
Stanislaus	ES&S M650 v. 1.2.0.0	ES&S M100 v. 5.0.0.0	ES&S AutoMARK A100 v. 1.0.168	No		
Sutter	Sequoia Optech 400-C/WinETP v. 1.12.4	Same as Vote-by-Mail (Central Tabulation)	Sequoia AVC Edge Model II v. 5.0.24	No		
Tehama	Sequoia Optech 400-C/WinETP v. 1.12.4	Same as Vote-by-Mail (Central Tabulation)	Sequoia AVC Edge Model I v. 5.0.24	No		
Trinity	Premier AccuVote-OS v. 1.96.6	Premier AccuVote-OS v. 1.96.6	Premier AccuVote-TSX v. 4.6.4	No		
Tulare	Sequoia Optech 400-C/WinETP v. 1.12.4	Sequoia Optech Insight Plus APX K2.10, HPX K1.42	Sequoia AVC Edge Model II v. 5.0.24	Yes	Sequoia AVC Edge Model II v. 5.0.24	10/06 - 11/03
Tuolumne	ES&S M650 v. 1.2.0.0	ES&S M100 v. 5.0.0.0	ES&S AutoMARK A100 v. 1.0.168	Yes	ES&S M650 v. 1.2.0.0	10/06 - 11/03
Ventura	Sequoia Optech 400-C/WinETP v. 1.12.4	Sequoia Optech Insight APX K2.10, HPX K1.42	Sequoia AVC Edge Model II v. 5.0.24	No		
Yolo	Hart BallotNow v. 3.3.11	Same as Vote-by-Mail (Central Tabulation)	Hart eSlate v. 4.2.13	Yes	Hart BallotNow v. 3.3.11	10/06 - 11/03
Yuba	Sequoia Optech 400-C/WinETP v. 1.12.4	Same as Vote-by-Mail (Central Tabulation)	Sequoia AVC Edge Model II v. 5.0.24	No		

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

COMMISSION ON STATE MANDATES
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November 12, 2009

Ms. Jean Kinney Hurst
California State Association
of Counties (CSAC)
1100 K Street, Suite 101
Sacramento, CA 95814-3941

Ms. Carla Castaneda
Department of Finance (A-15)
915 L Street, 12th Floor
Sacramento, CA 95814

RE: **Legislatively Determined Mandate**
Post Election Manual Tally, 09-LDM-01

Dear Ms. Hurst and Ms. Castaneda:

On November 2, 2009, the Commission on State Mandates (Commission) received a letter of intent from the California State Association of Counties (CSAC) to work with the Department of Finance to develop a Legislatively Determined Mandate (LDM) for the *Post Election Manual Tally* program.

Pursuant to Government Code section 17573, subdivision (b), the statute of limitation for the filing of a test claim shall be tolled as of October 22, 2009.

Please contact Heidi Palchik at (916) 323-8218 if you have any questions.

Sincerely,

NANCY PATTON
Assistant Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR STATEMENT OF DECISION ON: Government Code Sections 3300 through 3310 As Added and Amended by Statutes 1976, Chapter 465;Statutes 1978, Chapters 775, 1173, 1174, and 1178; Statutes1979, Chapter 405; Statutes 1980, Chapter 1367; Statutes 1982, Chapter 994; Statutes 1983, Chapter 964; Statutes 1989, Chapter 1165; and Statutes 1990, Chapter 675 (CSM 4499) Directed by Government Code Section 3313, Statutes 2005, chapter 72, section 6 (Assem. Bill (AB) No. 138), Effective July 19, 2005.	**Case No.: 05-RL-4499-01** ***Peace Officer Procedural Bill of Rights*** STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (Adopted on April 26, 2006)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

Paula Higashi
PAULA HIGASHI, Executive Director

May 1, 2006
Date

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR STATEMENT OF DECISION ON: Government Code Sections 3300 through 3310 As Added and Amended by Statutes 1976, Chapter 465;Statutes 1978, Chapters 775, 1173, 1174, and 1178; Statutes1979, Chapter 405; Statutes 1980, Chapter 1367; Statutes 1982, Chapter 994; Statutes 1983, Chapter 964; Statutes 1989, Chapter 1165; and Statutes 1990, Chapter 675 (CSM 4499) Directed by Government Code Section 3313, Statutes 2005, chapter 72, section 6 (Assem. Bill (AB) No. 138), Effective July 19, 2005.	**Case No.: 05-RL-4499-01** ***Peace Officer Procedural Bill of Rights*** STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (Adopted on April 26, 2006)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on April 26, 2006. Pam Stone, Dee Contreras, and Ed Takach appeared for the City of Sacramento. Lt. Dave McGill appeared for the Los Angeles Police Department. Susan Geanacou appeared for the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 5 to 1.

Summary of Findings

Statutes 2005, chapter 72, section 6 (AB 138) added section 3313 to the Government Code to direct the Commission to "review" the Statement of Decision, adopted in 1999, on the *Peace Officer Procedural Bill of Rights* test claim (commonly abbreviated as "POBOR") to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable court decisions.

In 1999, the Commission approved the test claim and adopted the original Statement of Decision. The Commission found that certain procedural requirements under POBOR were rights already provided to public employees under the due process clause of the

United States and California Constitutions. Thus, the Commission denied the procedural requirements of POBOR that were already required by law on the ground that they did not impose a new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c). Government Code section 17556, subdivision (c), generally provides that the Commission shall not find costs mandated by the state for test claim statutes that implement a federal law, unless the test claim statute mandates costs that exceed the federal mandate. The Commission approved the activities required by POBOR that exceeded the requirements of existing state and federal law.

On July 27, 2000, the Commission adopted parameters and guidelines that authorized reimbursement, beginning July 1, 1994, to counties, cities, a city and county, school districts, and special districts that employ peace officers for the ongoing activities summarized below:

- Developing or updating policies and procedures.
- Training for human resources, law enforcement, and legal counsel.
- Updating the status of cases.
- Providing the opportunity for an administrative appeal for permanent, at-will, and probationary employees that were subject to certain disciplinary actions that were not covered by the due process clause of state and federal law.
- When a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the employer that could lead to certain disciplinary actions, the following costs and activities are eligible for reimbursement: compensation to the peace officer for interrogations occurring during off-duty time; providing prior notice to the peace officer regarding the nature of the interrogation and identification of investigating officers; tape recording the interrogation; providing the peace officer employee with access to the tape prior to any further interrogation at a subsequent time or if any further specified proceedings are contemplated; and producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of complaints of reports or complaints made by investigators.
- Performing certain activities, specified by the type of local agency or school district, upon the receipt of an adverse comment against a peace officer employee.

On review of this claim pursuant to Government Code section 3313, the Commission finds that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision, which found that the POBOR legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for counties, cities, school districts, and special districts identified in Government Code section 3301 that employ peace officers.

The Commission further finds that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision that the test claim legislation constitutes a partial reimbursable state-mandated program within the meaning of article XIII B,

section 6 of the California Constitution and Government Code section 17514 for all activities previously approved by the Commission except the following:

- The activity of providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) pursuant to Government Code section 3304 is no longer a reimbursable state-mandated activity because the Legislature amended Government Code section 3304 in 1998. The amendment limited the right to an administrative appeal to only those peace officers "who successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.)
- The activities of obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, pursuant to Government Code sections 3305 and 3306, when the adverse comment results in a punitive action protected by the due process clause[1] does not constitute a new program or higher level of service and does not impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

BACKGROUND

Statutes 2005, chapter 72, section 6 (AB 138) added section 3313 to the Government Code to direct the Commission to "review" the Statement of Decision, adopted in 1999, on the *Peace Officer Procedural Bill of Rights* test claim. Government Code section 3313 states the following:

> In the 2005-06 fiscal year, the Commission on State Mandates shall review its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim and make any modifications necessary to this decision to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal.4th 859 and other applicable court decisions. If the Commission on State Mandates revises its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim, the revised decision shall apply to local government Peace Office Procedural Bill of Rights activities occurring after the date the revised decision is adopted.

Commission's Decision on *Peace Officer Procedural Bill of Rights* (CSM 4499)

The Legislature enacted the Peace Officers Procedural Bill of Rights Act (commonly abbreviated as "POBOR"), by adding Government Code sections 3300 through 3310, in 1976. POBOR provides a series of rights and procedural safeguards to peace officers employed by local agencies and school districts that are subject to investigation or

[1] Due process attaches when a permanent employee is dismissed, demoted, suspended, receives a reduction in salary, or receives a written reprimand. Due process also attaches when the charges supporting a dismissal of a probationary or at-will employee constitute moral turpitude that harms the employee's reputation and ability to find future employment and, thus, a name-clearing hearing is required.

discipline. Generally, POBOR prescribes certain protections that must be afforded officers during interrogations that could lead to punitive action against them; gives officers the right to review and respond in writing to adverse comments entered in their personnel files; and gives officers the right to an administrative appeal when any punitive action is taken against them, or they are denied promotion on grounds other than merit.[2]

Legislative intent for POBOR is expressly provided in Government Code section 3301 as follows:

> The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, within the State of California.

POBOR applies to all employees classified as "peace officers" under specified provisions of the Penal Code, including those peace officers employed by counties, cities, special districts and school districts.[3]

In 1995, the City of Sacramento filed a test claim alleging that POBOR, as it existed from 1976 until 1990, constituted a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.[4] In 1999, the Commission approved the test claim and adopted a Statement of Decision.[5] The Commission found that certain procedural requirements under POBOR were rights already provided to public employees under the due process clause of the United States and California Constitutions. Thus, the Commission denied the procedural requirements of POBOR that were already required by law on the ground that they did not impose a new program or

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[2] See California Supreme Court's summary of the legislation in *Baggett v. Gates* (1982) 32 Cal.3d 128, 135.

[3] Government Code section 3301 states: "For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code."

[4] The POBOR Act has been subsequently amended by the Legislature. (See Stats. 1994, ch. 1259; Stats. 1997, ch. 148; Stats. 1998, ch. 263; Stats. 1998, ch. 786; Stats. 1999, ch. 338; Stats. 2000, ch. 209; Stats. 2002, ch. 1156; Stats. 2003, ch. 876; Stats. 2004, ch. 405; and Stats. 2005, ch. 22.) These subsequent amendments are outside the scope of the Commission's decision in POBOR (CSM 4499), and therefore are *not* analyzed to determine whether they impose reimbursable state-mandated activities within the meaning of article XIII B, section 6.

[5] Administrative Record, page 859.

higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c). Government Code section 17556, subdivision (c), generally provides that the Commission shall not find costs mandated by the state for test claim statutes that implement a federal law, unless the test claim statute mandates costs that exceed the federal mandate. The Commission approved the activities required by POBOR that exceeded the requirements of existing state and federal law.

On July 27, 2000, the Commission adopted parameters and guidelines that authorized reimbursement, beginning July 1, 1994, to counties, cities, a city and county, school districts, and special districts that employ peace officers for the ongoing activities summarized below:

- Developing or updating policies and procedures.
- Training for human resources, law enforcement, and legal counsel.
- Updating the status of cases.
- Providing the opportunity for an administrative appeal for permanent, at-will, and probationary employees that were subject to certain disciplinary actions that were not covered by the due process clause of state and federal law.
- When a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the employer that could lead to certain disciplinary actions, the following costs and activities are eligible for reimbursement: compensation to the peace officer for interrogations occurring during off-duty time; providing prior notice to the peace officer regarding the nature of the interrogation and identification of investigating officers; tape recording the interrogation; providing the peace officer employee with access to the tape prior to any further interrogation at a subsequent time or if any further specified proceedings are contemplated; and producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of complaints of reports or complaints made by investigators.
- Performing certain activities, specified by the type of local agency or school district, upon the receipt of an adverse comment against a peace officer employee.[6]

On March 29, 2001, the Commission adopted a statewide cost estimate covering fiscal years 1994-1995 through 2001-2002 in the amount of $152,506,000.[7]

Audit by the Bureau of State Audits

The Legislative Analyst's Office (LAO), in its Analysis of the 2002-2003 Budget Bill, reviewed a sample of POBOR reimbursement claims and found that the annual state costs associated with the program was likely to be two to three times higher than the amount projected in the statewide cost estimate and significantly higher than what the Legislature initially expected. LAO projected costs in the range of $50 to $75 million annually.

[6] Administrative Record, page 1273.

[7] Administrative Record, page 1309.

LAO also found a wide variation in the costs claimed by local governments. Thus, LAO recommended that the Legislature refer the POBOR program to the Joint Legislative Audit Committee for review, possible state audit, and possible revisions to the parameters and guidelines.

In March 2003, the Joint Legislative Audit Committee authorized the Bureau of State Audits to conduct an audit of the process used by the Commission to develop statewide cost estimates and to establish parameters and guidelines for the claims related to POBOR.

On October 15, 2003, the Bureau of State Audits issued its audit report, finding that reimbursement claims were significantly higher than anticipated and that some agencies claimed reimbursement for questionable activities.[8] While the Bureau of State Audits recommended the Commission make changes to the overall mandates process, it did not recommend the Commission make any changes to the parameters and guidelines for the POBOR program. The Commission implemented all of the Bureau's recommendations.

On July 19, 2005, the Legislature enacted Government Code section 3313 (Stats. 2005, ch. 72, § 6 (AB 138)) and directed the Commission to "review" the Statement of Decision in POBOR.

Comments Filed Before the Issuance of the Draft Staff Analysis by the City and County of Los Angeles

On October 19, 2005, Commission staff requested comments from interested parties, affected state agencies, and interested persons on the Legislature's directive to "review" the POBOR program. Comments were received from the City of Los Angeles and the County of Los Angeles. The City and County both contend that the Commission properly found that POBOR constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. The County further argues that, under the California Supreme Court decision in *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, reimbursement must be expanded to include all activities required under the test claim statutes including those procedures required by the federal due process clause. The County of Los Angeles also proposes that the Commission adopt a reasonable reimbursement methodology in the parameters and guidelines to reimburse these claims.

Comments Filed on the Draft Staff Analysis

On February 24, 2006, Commission staff issued the draft staff analysis and requested comments on the draft. The Commission received responses from the following parties:

City of Sacramento

The City of Sacramento argues the following:

- Prior law does not require due process protections for employees receiving short-term suspensions, reclassifications, or reprimands. Therefore, the administrative appeal required by the test claim legislation constitutes a new program or higher

[8] Administrative Record, page 1407 et seq.

level of service when an officer receives a short-term suspension, reclassification, or reprimand.

- Not every termination of a police chief warrants a liberty interest hearing required under prior law. The decision of the Commission should distinguish between those situations where there is a valid right to a liberty interest hearing under principles of due process, from the remaining situations where a police chief is terminated.
- The decision of the Commission should reflect "the onerous requirements imposed when interrogations are handled under POBOR."
- All activities required when an officer receives an adverse comment are reimbursable.

County of Alameda

The County of Alameda states that interrogation of a sworn officer under POBOR is difficult and requires preparation. The County alleges that ten hours of investigation must be conducted before an interview that might take thirty minutes.

County of Los Angeles

The County of Los Angeles contends that investigation is a reimbursable state-mandated activity. The County also argues that, pursuant to the *San Diego Unified School Dist.* case, all due process activities are reimbursable.

County of Orange

The County of Orange believes the staff analysis "does not fully comprehend or account for the [investigation] requirements of interrogation governed by Government Code section 3303." The County contends that the requirements of law enforcement agencies to investigate complaints have correspondingly increased under POBOR. When a complaint is received, the County argues that "every department is called upon to conduct very detailed investigations when allegations of serious misconduct occur. These investigations can vary in scope and depth from abuses of authority, the use of deadly force, excessive force where injuries may be significant, serious property damage, and criminal behavior." The County also contends that the investigation involves the subject officer and other officer witnesses.

Department of Finance

The Department of Finance contends that the *San Diego Unified School Dist.* case does not support the finding that the test claim legislation constitutes a reimbursable state-mandated program for school districts. Finance acknowledges the language in *San Diego Unified School Dist.* declining to extend the *City of Merced* decision to preclude reimbursement whenever any entity makes a discretionary decision that triggers mandated costs. Finance argues, however, that the Supreme Court's findings are not applicable to school districts since there is no requirement in law for school districts to form a police department. Finance states the following:

> . . . there is no requirement in law for these districts to form a police department and safe schools can be maintained without the need to hire

police officers as is evidenced by the many school districts that do not have police departments. The fact that the Legislature has declared it necessary for POBOR to apply to all public safety officers is not the same as requiring their hiring in the first place. School districts could, indeed, control or even avoid the extra cost of the POBOR legislation by not forming a police department at all, which is materially different from fire protection services that must be provided by fire protection districts. POBOR activities that might be claimed by school districts are, instead, analogous to non-reimbursable activities in the *Department of Finance v. Commission on State Mandates [Kern High School Dist.]* case that flowed from an underlying exercise of discretion and those in past Commission decisions that denied reimbursement to school districts for other peace officer activities.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[9] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[10] "Its purpose 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."[11] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[12] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[13]

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[9] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "(a) 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 that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[10] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[11] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[12] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[13] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[14] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[15] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[16]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[17]

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.[18] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[19]

I. Commission Jurisdiction and Period of Reimbursement for Decision on Reconsideration

It is a well-settled issue of law that administrative agencies, such as the Commission, are entities of limited jurisdiction. Administrative agencies have only the powers that have been conferred on them, expressly or by implication, by statute or constitution. The Commission's jurisdiction in this case is based solely on Government Code section 3313. Absent Government Code section 3313, the Commission would have no jurisdiction to review and reconsider its decision on POBOR since the decision was adopted and issued well over 30 days ago.[20]

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[14] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[15] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[16] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[17] *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 (*County of Sonoma*); Government Code sections 17514 and 17556.

[18] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[19] *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.

[20] Government Code section 17559.

Thus, the Commission must act within the jurisdiction granted by Government Code section 3313, and may not substitute its judgment regarding the scope of its jurisdiction on reconsideration for that of the Legislature.[21] Since an action by the Commission is void if its action is in excess of the powers conferred by statute, the Commission must narrowly construe the provisions of Government Code section 3313.

Government Code section 3313 provides:

> In the 2005-06 fiscal year, the Commission on State Mandates shall review its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim and make any modifications necessary to this decision *to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal.4th 859 and other applicable court decisions.* If the Commission on State Mandates revises its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim, the revised decision shall apply to local government Peace Office Procedural Bill of Rights activities occurring after the date the revised decision is adopted. (Emphasis added.)

The Commission's jurisdiction on review is limited by Government Code section 3313, to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist.* ... and other applicable court decisions."

In addition, Government Code section 3313 states that "the revised decision shall apply to local government Peace Officer Procedural Bill of Rights activities *occurring after the date the revised decision is adopted.*" Thus, the Commission finds that the decision adopted by the Commission on this reconsideration or "review" of POBOR applies to costs incurred and claimed for the 2006-2007 fiscal year.

II. Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

In 1999, the Commission found that the test claim legislation mandates law enforcement agencies to take specified procedural steps when investigating or disciplining a peace officer employee.[22] The Commission found that Government Code section 3304 mandates, under specified circumstances, that "no punitive action ['any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment'], nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

The Commission also found that the following activities are mandated by Government Code section 3303 when the employer wants to interrogate an officer:

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[21] *Cal. State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 346-347.

[22] Original Statement of Decision (AR, p. 862).

- When required by the seriousness of the investigation, compensating the peace officer for interrogations occurring during off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
- Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)
- Providing the peace officer employee with access to a tape recording of his or her interrogation prior to any further interrogation at a subsequent time, as specified. (Gov. Code, § 3303, subd. (g).)
- Under specified circumstances, producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of reports or complaints made by investigators or other persons when requested by the officer. (Gov. Code, § 3303, subd. (g).)

Finally, Government Code sections 3305 and 3306 provide that no peace officer shall have any adverse comment entered into the officer's personnel file without having first read and signed the adverse comment. If the peace officer refuses to sign the adverse comment, that fact shall be noted on the document and signed or initialed by the peace officer. In addition, the peace officer shall have 30 days to file a written response to any adverse comment entered into the personnel file. The Commission found that Government Code sections 3305 and 3306 impose the following requirements on employers before an adverse comment is placed in an officer's personnel file:

- To provide notice of the adverse comment to the officer.
- To provide an opportunity to review and sign the adverse comment.
- To provide an opportunity to respond to the adverse comment within 30 days.
- To note on the document that the peace officer refused to sign the adverse comment and to obtain the peace officer's signature or initials under such circumstances.

POBOR, by the terms set forth in Government Code section 3301, expressly applies to counties, cities, school districts, and special districts and the Commission approved the test claim for these local entities. Government Code section 3301 states the following: "For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.4, and 830.5 of the Penal Code." The legislation, however, does not apply to reserve or recruit officers,[23] coroners, or railroad police officers commissioned by the Governor.

Government Code section 3313 requires the Commission to review these findings to clarify whether the subject legislation imposes a mandate consistent with the California Supreme Court Decision in *San Diego Unified School Dist.* and other applicable court decisions.

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[23] *Burden v. Snowden* (1992) 2 Cal.4th 556, 569.

Generally, in order for test claim legislation to impose a reimbursable state-mandated program, the statutory language must mandate an activity or task on local governmental entities. If the statutory language does not impose a mandate, then article XIII B, section 6 of the California Constitution is not triggered and reimbursement is not required.

In the present case, although the procedural rights and protections afforded a peace officer under POBOR are expressly required by statute, the required activities are not triggered until the employing agency makes certain local decisions. For example, in the case of a city or county, agencies that are required by the Constitution to employ peace officers,[24] the POBOR activities are not triggered until the city or county decides to interrogate the officer, take punitive action against the officer, or place an adverse comment in the officer's personnel file. These initial decisions are not expressly mandated by state law, but are governed by local policy, ordinance, city charter, or memorandum of understanding.[25]

In the case of a school district or special district, the POBOR requirements are not triggered until the school district or special district (1) decides to exercise the statutory authority to employ peace officers, and (2) decides to interrogate the officer, take punitive action against the officer, or place an adverse comment in the officer's personnel file.

After the Commission issued its decision in this case, two California Supreme Court decisions were decided that address the "mandate" issue; *Kern High School Dist.* and *San Diego Unified School Dist.*[26] Thus, based on the court's ruling in these cases, the issue is whether the test claim legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 in light of the local decisions that trigger the POBOR requirements.

As described below, the Legislature expressly declared its intent that the POBOR legislation is a matter of statewide concern and was designed to assure that effective police protection services are provided to all people of the state. The California Supreme Court found that POBOR protects the health, safety, and welfare of the citizens. Thus,

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[24] Article XI of the California Constitution provides for the formation of cities and counties. Section 1, Counties, states that the Legislature shall provide for an elected county sheriff. Section 5, City charter provision, specifies that city charters are to provide for the "government of the city police force."

[25] See *Baggett v. Gates* (1982) 32 Cal.3d 128, 137-140, where the California Supreme Court determined that POBOR *does not* (1) interfere with the setting of peace officers' compensation, (2) regulate qualifications for employment, (3) regulate the manner, method, times, or terms for which a peace officer shall be elected or appointed, nor does it (4) affect the tenure of office or purpose to regulate or specify the causes for which a peace officer can be removed. These are local decisions. But the court found that POBOR impinges on the city's implied power to determine the *manner* in which an employee can be disciplined.

[26] *Kern High School Dist., supra,* 30 Cal.4th 727; *San Diego Unified School Dist., supra,* 33 Cal.4th 859.

based on the facts of this case, the Commission finds that the Supreme Court's decision in *San Diego Unified School Dist.* supports the Commission's original finding that the test claim legislation constitutes a state-mandated program for cities, counties, school districts, and special districts as described below.

A. POBOR constitutes a state-mandated program even though a local decision is first made to interrogate the officer, take punitive action against the officer, or place an adverse comment in the officer's personnel file.

The procedural rights and protections afforded a peace officer under POBOR are required by statute. The rights are not triggered, however, until the employing agency decides to interrogate an officer, take punitive action against the officer, or place an adverse comment in an officer's personnel file. These initial decisions are not mandated by the state, but are governed by local policy, ordinance, city charter, or a memorandum of understanding.

Nevertheless, based on findings made by the California Supreme Court regarding the POBOR legislation and in *San Diego Unified School Dist.*, the Commission finds that the test claim legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

After the Commission issued its Statement of Decision in this case, the California Supreme Court decided the *Kern High School Dist.* case and considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution.[27] In *Kern High School Dist.*, school districts requested reimbursement for notice and agenda costs for meetings of their school site councils and advisory bodies. These bodies were established as a condition of various education-related programs that were funded by the state and federal government.

When analyzing the term "state mandate," the court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[28] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[29]

The court also reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, determining 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.[30] The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a

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[27] *Kern High School Dist., supra*, 30 Cal.4th 727.

[28] *Id.* at page 737.

[29] *Ibid.*

[30] *Id.* at page 743.

> reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)[31]

Thus, the Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][32]

Based on the plain language of the statutes creating the underlying education programs in *Kern High School Dist.*, the court determined that school districts were not legally compelled to participate in eight of the nine underlying programs.[33]

The school districts in *Kern High School Dist.*, however, urged the court to define "state mandate" broadly to include situations where participation in the program is coerced as a result of severe penalties that would be imposed for noncompliance. The court previously applied such a broad construction to the definition of a federal mandate in the case of *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74, where the state's failure to comply with federal legislation that extended mandatory coverage under the state's unemployment insurance law would result in California businesses facing "a new and serious penalty – full, double unemployment taxation by both state and federal governments."[34] Although the court in *Kern High School Dist.* declined to apply the reasoning in *City of Sacramento* that a state mandate may be found in the absence of strict legal compulsion on the facts before it in *Kern*, after reflecting on the purpose of article XIII B, section 6 – to preclude the state from shifting financial responsibilities onto local agencies that have limited tax revenue– the court stated:

> In light of that purpose, we do not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6, properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds.[35]

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[31] *Ibid.*

[32] *Id.* at page 731.

[33] *Id.* at pages 744-745.

[34] *City of Sacramento, supra*, 50 Cal.3d 51, 74.

[35] *Kern High School Dist., supra*, 30 Cal.4th 727, 752.

Thus, the court in *Kern* recognized that there could be a case, based on its facts, where reimbursement would be required under article XIII B, section 6 in circumstances where the local entity was not legally compelled to participate in a program.

One year later, the Supreme Court revisited the "mandate" issue in *San Diego Unified School Dist.*, a case that addressed a challenge to a Commission decision involving a school district's expulsion of a student. The school district acknowledged that under specified circumstances, the statutory scheme at issue in the case gave school districts discretion to expel a student. The district nevertheless argued that it was mandated to incur the costs associated with the due process hearing required by the test claim legislation when a student is expelled. The district argued that "although any particular expulsion recommendation may be discretionary, as a practical matter it is inevitable that some school expulsions will occur in the administration of any public school program" and, thus, the ruling in *City of Merced* should not apply.[36]

In *San Diego Unified School Dist.*, the Supreme Court did not overrule the *Kern* or *City of Merced* cases, but stated that "[u]pon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[37] The court explained as follows:

> Indeed, it would appear that under a strict application of the language of *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, in *Carmel Valley* [citation omitted] an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. [Citation omitted.] the court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ – and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced* [citation omitted], such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence

[36] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887.

[37] *Id.* at page 887.

> we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such result.[38]

Ultimately, however, the court did not resolve the issue regarding the application of the *City of Merced* case to the discretionary expulsions, and resolved the case on alternative grounds.[39]

In the present case, the purpose of POBOR, as stated in Government Code section 3301, is to assure that stable employment relations are continued throughout the state and to further assure that effective law enforcement services are provided to all people of the state. The Legislature declared POBOR a matter of statewide concern.

In 1982, the California Supreme Court addressed the POBOR legislation in *Baggett v. Gates*.[40] In *Baggett*, the City of Los Angeles received information that certain peace officer employees were engaging in misconduct during work hours. The city interrogated the officers and reassigned them to lower paying positions (a punitive action under POBOR). The employees requested an administrative appeal pursuant to the POBOR legislation and the city denied the request, arguing that charter cities cannot be constitutionally bound by POBOR. The court acknowledged that the home rule provision of the Constitution gives charter cities the power to make and enforce all ordinances and regulations, subject only to the restrictions and limitations provided in the city charter. Nevertheless, the court found that the City of Los Angeles was required by the POBOR legislation to provide the opportunity for an administrative appeal to the officers.[41] In reaching its conclusion, the court relied, in part, on the express language of legislative intent in Government Code section 3301 that the POBOR legislation is a "matter of statewide concern."[42]

The court in *Baggett* also concluded that the consequences of a breakdown in employment relations between peace officers and their employers would create a clear and present threat to the health, safety, and welfare of the citizens of the city, which would extend far beyond local boundaries.

> Finally, it can hardly be disputed that the maintenance of stable employment relations between police officers and their employers is a matter of statewide concern. The consequences of a breakdown in such relations are not confined to a city's borders. These employees provide an essential service. Its absence would create a clear and present threat not only to the health, safety, and welfare of the citizens of the city, but also to the hundreds, if not thousands, of nonresidents who daily visit there. Its effect would also be felt by the many nonresident owners of property and businesses located within the city's borders. Our society is no longer a

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[38] *Id.* at pages 887-888.

[39] *Id.* at page 888.

[40] *Baggett v. Gates* (1982) 32 Cal.3d 128.

[41] *Id.* at page 141.

[42] *Id.* at page 136.

> collection of insular local communities. Communities today are highly interdependent. The inevitable result is that labor unrest and strikes produce consequences which extend far beyond local boundaries.[43]

Thus, the court found that "the total effect of the POBOR legislation is not to deprive local governments of the right to manage and control their police departments but to secure basic rights and protections to a segment of public employees who were thought unable to secure them for themselves."[44]

In 1990, the Supreme Court revisited the POBOR legislation in *Pasadena Police Officers Assn. v. City of Pasadena (Pasadena)*.[45] The *Pasadena* case addressed the POBOR requirement in Government Code section 3303 to require the employer to provide an officer subject to an interrogation with any reports or complaints made by investigators. In the language quoted below, the court described the POBOR legislation and recognized that the public has a high expectation that peace officers are to be held above suspicion of violation of the laws they are sworn to enforce. Thus, in order to maintain the public's confidence, "a law enforcement agency *must* promptly, thoroughly, and fairly investigate allegations of officer misconduct ... [and] institute disciplinary proceedings." (Emphasis added.)

> Courts have long recognized that, while the off-duty conduct of employees is generally of no legal consequence to their employers, the public expects peace officers to be "above suspicion of violation of the very laws they are sworn ... to enforce." [Citations omitted.] Historically, peace officers have been held to a higher standard than other public employees, in part because they alone are the "guardians of peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them." [Citation omitted.] To maintain the public's confidence in its police force, a law enforcement agency must promptly, thoroughly, and fairly investigate allegations of officer misconduct; if warranted, it must institute disciplinary proceedings.[46]

Under a strict application of the *City of Merced* case, the requirements of the POBOR legislation would not constitute a state-mandated program within the meaning of article XIII B, section 6 "for the simple reason" that the local entity's ability to decide who to discipline and when "could control or perhaps even avoid the extra costs" of the POBOR legislation.[47] But a local entity does not decide who to investigate or discipline based on the costs incurred to the entity. The decision is made, as indicated by the Supreme Court, to maintain the public's confidence in its police force and to protect the health, safety,

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[43] *Id.* at page 139-140.

[44] *Id.* at page 140.

[45] *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564.

[46] *Id.* at page 571-572.

[47] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887-888.

and welfare of its citizens. Thus, as indicated by the Supreme Court in *San Diego Unified School Dist.*, a finding that the POBOR legislation does not constitute a mandated program would conflict with past decisions like *Carmel Valley*, where the court found a mandated program for providing protective clothing and safety equipment to firefighters and made it clear that "[p]olice and fire protection are two of the most essential and basic functions of local government."[48] Moreover, the POBOR legislation implements a state policy to maintain stable employment relations between police officers and their employers to "assure that effective services are provided to all people of the state." POBOR, therefore, carries out the governmental function of providing a service to the public, and imposes unique requirements on local agencies to implement the state policy.[49] Thus, a finding that the test claim legislation does not impose a state-mandated program contravenes the purpose of article XIII B, section 6 "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" due to the tax and spend provisions of articles XIII A and XIII B.[50]

Accordingly, even though local decisions are first made to interrogate an officer, take punitive action against the officer, or to place an adverse comment in an officer's personnel file, the Commission finds, based on *San Diego Unified School Dist.* and the facts presented in this case, that POBOR constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

B. POBOR constitutes a state-mandated program for school districts and for special districts identified in Government Code section 3301 that employ peace officers.

Government Code section 3301, the statute that identifies the peace officers afforded the rights and protections granted in the POBOR legislation, expressly includes peace officers employed by school districts and community college districts pursuant to Penal Code section 830.32. Penal Code section 830.32 provides that members of a school district and community college district police department appointed pursuant to Education Code sections 39670 and 72330 are peace officers if the primary duty of the officer is the enforcement of law as prescribed by Education Code sections 39670 (renumbered section 38000) and 72330, and the officers have completed an approved course of training prescribed by the Commission on Peace Officer Standards and Training (POST) before exercising the powers of a peace officer.

POBOR also applies to special districts authorized by statute to maintain a police department, including police protection districts, harbor or port police, transit police, peace officers employed by the San Francisco Bay Area Rapid Transit District (BART),

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[48] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887-888; *Carmel Valley Fire Protection Dist. v. State* (1987) 190 Cal.App.3d 521, 537.

[49] *San Diego Unified School, supra*, 33 Cal.4th at page 874.

[50] *Id.* at page 888, fn. 23.

peace officers employed by airport districts, peace officers employed by a housing authority, and peace officers employed by fire protection districts.[51]

While counties and cities are mandated by the California Constitution to employ peace officers,[52] school districts and special districts are not expressly required by the state to employ peace officers. School districts and special districts have statutory authority to employ peace officers.

Following the Supreme Court's decision in *Kern High School Dist.*, the Commission denied school district test claims addressing peace officer employees on the ground that school districts are not mandated by state law to have a police department and employ peace officers. In these decisions, the Commission acknowledged the provision in the Constitution (Cal. Const., art. 1, § 28, subd. (c)) that requires K-12 school districts to maintain safe schools. The Commission found, however, that there is no constitutional or statutory requirement to maintain safe schools through school security or a school district police department. Moreover, school districts have governmental immunity under Government Code section 845 and cannot be liable for civil damages for "failure to establish a police department or otherwise to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service."[53] Comments on Government Code section 845 by the Law Revision Commission state that the immunity was enacted by the Legislature to prevent judges and juries from removing the ultimate decision-making authority regarding police protection from those (local governments) that are politically responsible for making the decision.[54]

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[51] Government Code section 3301; Penal Code section 830.1, subdivision (a) ["police officer of a district (including police officers of the San Diego Unified Port District Harbor Police) authorized by statute to maintain a police department"]; Penal Code section 830.31, subdivision (d) ["A housing authority patrol officer employed by the housing authority of a ... district ..."]; Penal Code section 830.33 ["(a) A member of the San Francisco Bay Area Rapid Transit District Police Department appointed pursuant to Section 28767.5 of the Public Utilities Code ... (b) Harbor or port police regularly employed and paid ... by a ... district ... (c) Transit police officers or peace officers of a ... district ... (d) Any person regularly employed as an airport law enforcement officer by a ... district ..."; and Penal Code section 830.37 ["(a) Members of an arson-investigating unit ... of a fire department or fire protection agency of a ... district ... if the primary duty of these peace officers is the detection and apprehension of persons who have violated any fire law or committed insurance fraud ...(b) Members ... regularly paid and employed in that capacity, of a fire department or fire protection agency of a ... district ... if the primary duty of these peace officers ... is the enforcement of law relating to fire prevention or fire suppression."

[52] See ante, footnote 21.

[53] See *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448.

[54] 4 California Law Revision Commission Reports 801 (1963).

Immunity under Government Code section 845 also applies to community college districts and special districts.[55]

Thus, based on the Supreme Court's holding in *Kern High School Dist.*, past decisions of the Commission have determined that local entities, such as school districts, are not entitled to reimbursement for activities required by the state when the activities are triggered by the discretionary local decision to employ peace officers.

This case presents different facts, however. Here, unlike the other cases, the Legislature expressly stated in Government Code section 3301 that POBOR is a matter of statewide concern and found that it was necessary to apply the legislation to all public safety officers, as defined. Government Code section 3301 states the following:

> The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California.

Legislative declarations of policy are entitled to great weight by the courts "and it is not the duty or prerogative of the courts to interfere with such legislative finding unless it clearly appears to be erroneous and without reasonable foundation."[56]

Furthermore, in *San Diego Unified School Dist.*, the Supreme Court acknowledged the school district's argument that the due process hearing procedures were mandated when the district exercised its discretion and expelled a student, despite the *City of Merced* and *Kern* cases. The court stated the following:

> Indeed, the Court of Appeal below suggested that the present case is distinguishable from *City of Merced* [citation omitted], in light of article I, section 28, subdivision (c), of the state Constitution. That constitutional subdivision, part of Proposition 8 (known as the Victim's Bill of Rights initiative, adopted by the voters at the Primary Election in June 1982), states: "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure, and peaceful." The Court of Appeal below concluded: "In light of a school district's constitutional obligation to provide a safe educational environment ..., the incurring [due process] hearing costs ... cannot properly be viewed as a nonreimbursable 'downstream' consequence of a decision to seek to expel a student under

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[55] *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799; *Hernandez v. Southern California Rapid Transit Dist.* (1983) 142 Cal.App.3d 1063.

[56] *Paul v. Eggman* (1966) 244 Cal.App.2d 461, 471-472.

> Education Code section 48915's discretionary provision for damaging or stealing school or private property, receiving stolen property, engaging in sexual harassment or hate violence, or committing other specified acts of misconduct ... that warrant such expulsion."[57]

In response, the Supreme Court stated that "[u]pon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[58] The court explained as follows:

> Indeed, it would appear that under a strict application of the language of *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, in *Carmel Valley* [citation omitted] an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. [Citation omitted.] The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ – and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced* [citation omitted], such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such result.[59]

The Department of Finance contends that the *San Diego Unified School Dist.* case does not support the finding that the test claim legislation constitutes a reimbursable state-mandated program for school districts. Finance acknowledges the language in *San Diego Unified School Dist.* declining to extend the *City of Merced* decision to preclude reimbursement whenever any entity makes a discretionary decision that triggers mandated costs. Finance argues, however, that the Supreme Court's findings are not

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[57] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 887, footnote 22.

[58] *Id.* at page 887.

[59] *Id.* at pages 887-888.

applicable to school districts since there is no requirement in law for school districts to form a police department. Finance states the following:

> In the *Carmel Valley Fire Protection District* case ((1987) 190 Cal.App.3d 521), unlike the situation here, the fire districts did not have the option to form a fire department and hire firefighters. In fact, the *San Diego Unified School Dist.* case cited *Carmel Valley* to make it clear that "[p]olice and fire protection are two of the most essential and basic functions of local government." (*San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887-888, *Carmel Valley Fire Protection Dist., supra*, 190 Cal.App.3d 521, 537). Such is not the case for school districts and community college districts.
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> As stated above, there is no requirement in law for these districts to form a police department and safe schools can be maintained without the need to hire police officers as is evidenced by the many school districts that do not have police departments. The fact that the Legislature has declared it necessary for POBOR to apply to all public safety officers is not the same as requiring their hiring in the first place. School districts could, indeed, control or even avoid the extra cost of the POBOR legislation by not forming a police department at all, which is materially different from fire protection services that must be provided by fire protection districts. POBOR activities that might be claimed by school districts are, instead, analogous to non-reimbursable activities in the *Department of Finance v. Commission on State Mandates [Kern High School Dist.]* case that flowed from an underlying exercise of discretion and those in past Commission decisions that denied reimbursement to school districts for other peace officer activities.

Finance, in response to the draft staff analysis, makes no comments with respect to special districts that also have the authority, but are not required, to employ peace officers.[60] At the hearing, however, Finance argued that its comments apply equally to special districts.

The Commission disagrees with the Department of Finance. The fire protection districts in *Carmel Valley* were not mandated by the state to be formed, as asserted by Finance. Fire protection districts are established either by petition of the voters or by a resolution adopted by the legislative body of a county or city within the territory of the proposed district. Once a petition has been certified or a resolution adopted, the local agency

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[60] See, for example, Public Utilities Code section 28767.5, which authorizes BART to employ peace officers:

> The district may employ a suitable security force. The employees of the district that are designated by the general manager as security officers shall have the authority and powers conferred by Section 830.9 of the Penal Code upon peace officers. The district shall adhere to the standards for recruitment and training of peace officers established by the Commission on Peace Officer Standards and Training …

formation commission must approve the formation of the district "with or without amendment, wholly, partially, or conditionally." A local election is then held and the district is created if a majority of the votes are cast in favor of forming the district.[61] Furthermore, the implication that the phrase "local government" in the *Carmel Valley* case excludes school districts is wrong. "Local government" is specifically defined in article XIII B, section 8 of the Constitution to include school districts and special districts. The definitions in article XIII B, section 8 apply to the mandate reimbursement provisions of section 6. Article XIII B, section 8 states in relevant part the following:

> As used in this article and except as otherwise expressly provided herein:
>
> (d) "Local government" means any city, county, city and county, school district, special district, authority, or other political subdivision of or within the state.

Therefore, the arguments raised by the Department of Finance do not resolve the issue. The Supreme Court in *San Diego Unified School Dist.* did not resolve the issue either. Rather, the court stated the following:

> In any event, we have determined that we need not address in this case the problems posed by such an application of the rule articulated in *City of Merced,* because this aspect of the present case can be resolved on an alternative basis.[62]

Thus, the Commission has the difficult task of resolving the issue for purposes of this claim. For the reasons below, the Commission finds that the POBOR legislation constitutes a state-mandated program for school districts and the special districts identified in Government Code section 3301 that employ peace officers.

Under a strict application of the *City of Merced* case, the requirements of the POBOR legislation would not constitute a state-mandated program within the meaning of article XIII B, section 6 for school districts and the special districts that employ peace officers "for the simple reason" that the ability of the school district or special district to decide whether to employ peace officers "could control or perhaps even avoid the extra costs" of the POBOR legislation.[63] But here, the Legislature has declared that, as a matter of statewide concern, it is necessary for POBOR to apply to all public safety officers, as defined in the legislation. As previously indicated, the California Supreme Court concluded that the peace officers identified in Government Code section 3301 of the POBOR legislation provide an "essential service" to the public and that the consequences of a breakdown in employment relations between peace officers and their employers would create a clear and present threat to the health, safety, and welfare of the citizens of the state.[64]

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[61] Health and Safety Code sections 13815 et seq.

[62] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 888.

[63] *Ibid.*

[64] *Baggett, supra*, 32 Cal.3d 128, 139-140.

In addition, in 2001, the Supreme Court determined that school districts, apart from education, have an "obligation to protect pupils from other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern." The court further held that California fulfills its obligations under the safe schools provision of the Constitution (Cal. Const., art. I, § 28, subd. (c)) by permitting local school districts to establish a police or security department to enforce rules governing student conduct and discipline.[65] The arguments by the school districts regarding the safe schools provision of the Constitution caused the Supreme Court in *San Diego Unified School Dist.* to question the application of the *City of Merced* case.[66]

The Legislature has also recognized the essential services provided by special district peace officers in Government Code section 53060.7. The special districts identified in that statute (Bear Valley Community Services District, Broadmoor Police Protection District, Kensington Police Protection and Community Services District, Lake Shastina Community Services District, and Stallion Springs Community Services District) "wholly supplant the law enforcement functions of the county within the jurisdiction of that district."

Thus, as indicated by the Supreme Court in *San Diego Unified School Dist.*, a finding that the POBOR legislation does not constitute a state-mandated program for school districts and special districts identified in Government Code section 3301 would conflict with past decisions like *Carmel Valley*, where the court found a mandated program for providing protective clothing and safety equipment to firefighters and made it clear that "[p]olice and fire protection are two of the most essential and basic functions of local government."[67] The constitutional definition of "local government" for purposes of article XIII B, section 6 includes school districts and special districts. (Cal. Const., art. XIII B, § 8.)

Accordingly, the Commission finds that POBOR constitutes a state-mandated program for school districts that employ peace officers. The Commission further finds that POBOR constitutes a state-mandated program for the special districts identified in Government Code section 3301. These districts include police protection districts, harbor or port police, transit police, peace officers employed by airport districts, peace officers employed by a housing authority, and peace officers employed by fire protection districts.

III. Does the test claim legislation constitute a new program or higher level of service and impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

Government Code section 3313 requires the Commission to review its previous findings to clarify whether the test claim legislation constitutes a new program or higher level of service and imposes costs mandated by the state consistent with the California Supreme

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[65] *In re Randy G.* (2001) 26 Cal.4th 556, 562-563.

[66] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887, fn. 22.

[67] *Id.* at pages 887-888; *Carmel Valley Fire Protection Dist. v. State* (1987) 190 Cal.App.3d 521, 537.

Court Decision in *San Diego Unified School Dist.* and other applicable court decisions. The test claim legislation will impose a new program or higher level of service, and costs mandated by the state when it compels a local entity to perform activities not previously required, and results in actual increased costs mandated by the state. [68] In addition, none of the exceptions to reimbursement found in Government Code section 17556 can apply. The activities found by the Commission to be mandated are analyzed below.

Administrative Appeal

Government Code section 3304, as added by the test claim legislation, provides that "no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

Punitive action is defined in Government Code section 3303 as follows:

> "For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary,[69] written reprimand, or transfer for purposes of punishment."

The California Supreme Court determined that the phrase "for purposes of punishment" in the foregoing section relates only to a transfer and not to other personnel actions.[70] Thus, in transfer cases, the peace officer is required to prove that the transfer was intended for purposes of punishment in order to be entitled to an administrative appeal. If the transfer is to "compensate for a deficiency in performance," however, an appeal is not required.[71]

In addition, at least one California appellate court determined that employers must extend the right to an administrative appeal under the test claim legislation to peace officers for other actions taken by the employer that result in "disadvantage, harm, loss or hardship" and impact the peace officer's career.[72] In *Hopson*, the court found that an officer who received a report in his personnel file by the police chief regarding a shooting in violation of policies and procedures was entitled to an administrative appeal under Government Code section 3304. The court held that the report constituted "punitive action" under the

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[68] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar Unified School Dist., supra*, 44 Cal.3d 830, 835.

[69] The courts have held that "reduction in salary" includes loss of skill pay (*McManigal* v. *City of Seal Beach* (1985) 166 Cal.App.3d 975, pay grade (*Baggett* v. *Gates* (1982) 32 Cal.3d 128, rank (*White* v. *County of Sacramento* (1982) 31 Cal.3d 676, and probationary rank (*Henneberque* v. *City of Culver City* (1983) 147 Cal.App.3d 250.

[70] *White* v. *County of Sacramento* (1982) 31 Cal.3d 676.

[71] *Holcomb* v. *City of Los Angeles* (1989) 210 Cal.App.3d 1560; *Heyenga* v. *City of San Diego* (1979) 94 Cal.App.3d 756; *Orange County Employees Assn., Inc.* v. *County of Orange* (1988) 205 Cal.App.3d 1289.

[72] *Hopson* v. *City of Los Angeles* (1983) 139 Cal.App.3d 347, 354, relying on *White* v. *County of Sacramento* (1982) 31 Cal.3d 676, 683.

test claim legislation based on the source of the report, its contents, and its potential impact on the career of the officer.[73]

Thus, under Government Code section 3304, as it existed when the Statement of Decision was adopted, the employer is required to provide the opportunity for an administrative appeal to permanent, at-will or probationary peace officers for any action leading to the following actions:

- Dismissal.
- Demotion.
- Suspension.
- Reduction in salary.
- Written reprimand.
- Transfer for purposes of punishment.
- Denial of promotion on grounds other than merit.
- Other actions against the employee that results in disadvantage, harm, loss or hardship and impacts the career opportunities of the employee.

The test claim legislation does not specifically set forth the hearing procedures required for the administrative appeal. Rather, the type of administrative appeal is left up to the discretion of each local entity.[74] The courts have determined, however, that the type of hearing required under Government Code section 3304 must comport with due process standards.[75, 76]

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[73] *Id* at p. 353-354.

[74] *Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795, 1806.

[75] *Doyle* v. *City of Chino* (1981) 117 Cal.App.3d 673, 684. In addition, the court in *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1442, held that the employee's due process rights were protected by the administrative appeals process mandated by Government Code section 3304.

[76] At least two cases have referred to the need for an administrative appeals procedure that would enable the officer to obtain court review pursuant to Code of Civil Procedure section 1094.5. Such a review implies that an evidentiary hearing be held from which a record and findings may be prepared for review by the court. (*Doyle, supra*, 117 Cal.App. 3d 673; *Henneberque, supra*, 147 Cal.App.3d 250. In addition, the California Supreme Court uses the words "administrative appeal" of section 3304 interchangeably with the word "hearing." (*White, supra*, 31 Cal.3d 676.) A hearing before the Chief of Police was found to be appropriate within the meaning of Government Code section 3304 in a case involving a written reprimand since the Chief of Police was not in any way involved in the investigation and the employee and his attorney had an opportunity to present evidence and set forth arguments on the employee's behalf. (*Stanton, supra*, 226 Cal.App,3d 1438, 1443.)

Finally, the courts have been clear that the administrative hearing required by Government Code section 3304 does *not* mandate an investigatory process. "It is an adjudicative process by which the [peace officers] hope to restore their reputations" and where "the reexamination [of the employer's decision] must be conducted by someone who has not been involved in the initial determination."[77]

In 1999, the Commission concluded that under certain circumstances, the administrative appeal required by the POBOR legislation was already required to be provided by the due process clause of the United States and California Constitutions when an action by the employer affects an employee's property interest or liberty interest. A permanent employee with civil service protection, for example, has a property interest in the employment position if the employee is dismissed, demoted, suspended, receives a reduction in salary, or receives a written reprimand. Under these circumstances, the permanent employee is entitled to a due process hearing.[78]

In addition, the due process clause applies when the charges supporting a dismissal of a probationary or at-will employee harms the employee's reputation and ability to find future employment. [79] For example, an at-will employee, such as the chief of police, is entitled to a liberty interest hearing (or name-clearing hearing) under the state and federal constitutions when the dismissal is supported by charges of misconduct, mismanagement, and misjudgment – all of which "stigmatize [the employee's] reputation and impair his ability to take advantage of other employment opportunities in law enforcement administration."[80] In *Williams v. Department of Water and Power*, a case cited by the City of Sacramento, the court explained that the right to a liberty interest hearing arises in cases involving moral turpitude. There is no constitutional right to a liberty interest hearing when an at-will employee is removed for incompetence, inability to get along with others, or for political reasons due to a change of administration.

> The mere fact of discharge from public employment does not deprive one of a liberty interest hearing. [Citations omitted.] Appellant must show her dismissal was based on charges of misconduct which "stigmatize" her reputation or "seriously impair" her opportunity to earn a living. [Citations omitted.] ... "Nearly any reason assigned for dismissal is likely to be to some extent a negative reflection on an individual's ability, temperament, or character. [Citation omitted.] But not every dismissal assumes a constitutional magnitude." [Citation omitted.]
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> The leading case of *Board of Regents v. Roth* (1972) 408 U.S. 564, 574 [unofficial cite omitted] distinguishes between a stigma of moral turpitude, which infringes the liberty interest, and other charges such as incompetence or inability to get along with coworkers which does not. The Supreme Court recognized that where "a person's good name,

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[77] *Caloca v. County of San Diego* (2002) 102 Cal.App.4th 433, 443-444 and 447-448.

[78] See original Statement of Decision (AR, p. 864).

[79] See original Statement of Decision (AR, pp. 863-866, 870).

[80] *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1807.

> reputation, honor or integrity is at stake" his right to liberty under the Fourteenth Amendment is implicated and deserves constitutional protection. [Citation omitted.] "In the context of *Roth*-type cases, a charge which infringes one's liberty can be characterized as an accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence is likely to have severe repercussions of which primarily affect professional life, and which may well force the individual down one or more notches in the professional hierarchy." [Citation omitted.][81]

Thus, the Commission found that, when a hearing was required by the due process clause of the state and federal constitutions, the activity of providing the administrative appeal did not constitute new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

The Commission found that the administrative appeal constitutes a new program or higher level of service, and imposes costs mandated by the state, in those situations where the due process clause of the United States and California Constitutions did not apply. These include the following:

- Dismissal, demotion, suspension, salary reduction or written reprimand received by *probationary and at-will employees* whose liberty interest *are not* affected (i.e.; the charges do not harm the employee's reputation or ability to find future employment).
- Transfer of permanent, probationary and at-will employees for purposes of punishment.
- Denial of promotion for permanent, probationary and at-will employees for reasons other than merit.
- Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

As noted by the Commission in the Statement of Decision and parameters and guidelines, the Legislature amended Government Code section 3304 in 1998 by limiting the right to an administrative appeal to only those peace officers "who [have] successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.) Thus, as of January 1, 1999, providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) is no longer a reimbursable state-mandated activity.

Thus, the issue is whether the activity of providing the opportunity for an administrative appeal is reimbursable under current law when (1) permanent peace officer employees are subject to punitive actions, as defined in Government Code section 3303, or denials of promotion on grounds other than merit; and when (2) a chief of police is subject to removal.

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[81] *Williams v. Department of Water and Power* (1982) 130 Cal.App.3d 677, 684-685.

As indicated above, under prior law, permanent employees were already entitled to an administrative hearing pursuant to the due process clause of the United States and California Constitutions if they were subject to the following punitive actions: dismissal, demotion, suspension, reduction in salary, or a written reprimand. In addition, an at-will employee, such as the chief of police, was entitled to a due process liberty interest hearing under prior law if the charges supporting the dismissal constitute moral turpitude that harms the employee's reputation and ability to find future employment. The County of Los Angeles argues, however, that under the California Supreme Court decision in *San Diego Unified School District*, reimbursement must be expanded to include all activities required under the test claim statute, including those procedures previously required by the due process clause. A close reading of the *San Diego Unified School District* case, however, shows that it does not support the County's position.

The County relies on the Supreme Court's analysis on pages 879 (beginning under the header "2. Are the hearing costs state-mandated?") through page 882 of the *San Diego Unified School District* case. There, the court addressed two test claim statutes: Education Code section 48915, which *mandated* the school principal to immediately suspend and recommend the expulsion of a student carrying a firearm or committing another specified offense; and Education Code section 48918, which lays out the due process hearing requirements once the mandated recommendation is made to expel the student. The court recognized that the expulsion recommendation required by Education Code section 48915 was mandated "in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing.[82] The Commission and the state, relying on Government Code section 17556, subdivision (c), argued, however, that the district's costs are reimbursable only if, and to the extent that, hearing procedures set forth in Education Code section 48918 exceed the requirements of federal due process.[83] The court disagreed. The court based its conclusion on the fact that the expulsion decision mandated by Education Code 48915, which triggers the district's costs incurred to comply with due process hearing procedures, did not implement a federal law. Thus, the court concluded that all costs incurred that are triggered by the state-mandated expulsion, including those that satisfy the due process clause, are fully reimbursable. The court's holding is as follows:

> [W]e cannot characterize any of the hearing costs incurred by the District, triggered by the mandatory provision of Education Code section 48915, as constituting a federal mandate (and hence being nonreimbursable). We conclude that under the statutes existing at the time of the test claim in this case (state legislation in effect through mid-1994), all such hearing costs – those designed to satisfy the minimum requirements of federal due process, and those that may exceed those requirements – are, with respect

[82] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 880.

[83] *Ibid.*

to the mandatory expulsion provision of section 48915, state mandated costs, fully reimbursable by the state.[84]

The POBOR legislation is different. The costs incurred to comply with the administrative appeal are *not* triggered by a state-mandated event, but are triggered by discretionary decisions made by local officials to take punitive action, or deny a promotion on grounds other than merit against a peace officer employee. Therefore, the Commission finds that the court's holding, authorizing reimbursement for *all* due process hearing costs triggered by a state-mandated event, does not apply to this case.

Rather, what applies from the *San Diego Unified School Dist.* decision to the administrative appeal activity mandated by Government Code section 3304 is the court's holding regarding discretionary expulsions. In the *San Diego* case, the court analyzed the portion of Education Code section 48915 that provided the school principal with the discretion to recommend that a student be expelled for specified conduct. If the recommendation was made and the district accepted the recommendation, then the district was required to comply with the mandatory due process hearing procedures of Education Code section 48918.[85] In this situation, the court held that reimbursement for the procedural hearing costs triggered by a local discretionary decision to seek an expulsion was not reimbursable because the hearing procedures were adopted to implement a federal due process mandate.[86] The court found that the analysis by the Second District Court of Appeal in *County of Los Angeles v. Commission on State Mandates* (*County of Los Angeles II*) was instructive.[87] In the *County of Los Angeles II* case, the court determined that even in the absence of the test claim statute, counties would be still be responsible for providing services under the constitutional guarantees of federal due process.[88]

This analysis applies here. As indicated above, permanent employees were already entitled to an administrative hearing pursuant to the due process clause of the United States and California Constitutions if they were subject to the following punitive actions: dismissal, demotion, suspension, reduction in salary, or a written reprimand. In addition, an at-will employee, such as the chief of police, was entitled to a due process hearing under prior state and federal law if the charges supporting the dismissal constitute moral turpitude that harms the employee's reputation and ability to find future employment.

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[84] *Id.* at pages 881-882.

[85] *San Diego Unified School Dist., supra*, 33 Cal.4th at pages 884-890.

[86] *Id.* at page 888.

[87] *Id.* at page 888-889; *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805. The test claim statute in *County of Los Angeles* required counties to provide indigent criminal defendants with defense funds for ancillary investigation services for capital murder cases. The court determined that even in the absence of the test claim statute, indigent defendants in capital cases were entitled to such funds under the Sixth Amendment of the federal Constitution. (*Id.* at p. 815.)

[88] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 888-889; *County of Los Angeles, supra,* 32 Cal.App.4th at page 815.

Thus, even in the absence of Government Code section 3304, local government would still be required to provide a due process hearing under these situations.

The City of Sacramento, however, contends in comments to the draft staff analysis that prior law does not require due process protections outlined by the Supreme Court in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, for employees receiving short-term suspensions, reclassifications, or reprimands. The City states that five-day suspensions, written reprimands and other lesser forms of punishment are covered by POBOR, but not *Skelly* and, thus, the administrative appeal required by POBOR is reimbursable for the lesser forms of punishment.

The City raised the same argument when the Commission originally considered the test claim, and the Commission disagreed with the arguments.[89] The Commission finds that the Commission's original conclusion on this issue is correct.

As discussed below, the City is correct that the *pre-disciplinary* protections outlined in *Skelly* do not apply to a short-term suspension or written reprimand. But prior law still requires due process protection, including an administrative hearing, when a permanent employee receives a short-term suspension, reprimand, or other lesser form of punishment. Thus, the administrative hearing required by the test claim legislation under these circumstances does not constitute a new program or higher level of service or impose costs mandated by the state.

Skelly involved the discharge of a permanent civil service employee. The court held that such employees have a property interest in the permanent position and the employee may not be dismissed or subjected to other forms of punitive action without due process of law. Based on the facts of the case (that a discharged employee faced the bleak prospect of being without a job and the need to seek other employment hindered by the charges against him), the court held that the employee was entitled to receive notice of the discharge, the reasons for the action, a copy of the charges and materials upon which the action is based, and the right to a hearing to respond to the authority imposing the discipline *before* the discharge became effective.[90] The Supreme Court in *Skelly* recognized, however, that due process requirements are not so inflexible as to require an evidentiary trial at the *preliminary* stage in every situation involving the taking or property. Although some form of notice and hearing must preclude a final deprivation of property, the timing and content of the notice, as well as the nature of the hearing will depend on the competing interests involved.[91]

Three years after *Skelly*, the Supreme Court decided *Civil Service Association v. the City and County of San Francisco*, a case involving the short-term suspensions of eight civil service employees.[92] The court held that the punitive action involved with a short-term suspension is minor and does not require pre-disciplinary action procedures of the kind

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[89] See original Statement of Decision (AR, pp. 865-866).

[90] *Skelly, supra*, 15 Cal.3d 194, 213-215.

[91] *Id.* at page 209.

[92] *Civil Service Association v. City and County of San Francisco* (1978) 22 Cal.3d 552.

required by *Skelly*.[93] But the employees were still entitled to due process protection, including the right to a hearing, since the temporary right of enjoyment to the position amounted to a taking for due process purposes.[94] The court held as follows:

> However, while the principles underlying *Skelly* do not here compel the granting of predisciplinary procedures there mentioned, it does not follow that the employees are totally without right to hearing. *While due process does not guarantee to these appellants any Skelly-type predisciplinary hearing procedure, minimal concepts of fair play and justice embodied in the concept of due process require that there be a 'hearing,' of the type hereinafter explained.* The interest to be protected, i.e., the right to continuous employment, is accorded due process protection. While appellants may not in fact have been deprived of a salary earned but only of the opportunity to earn it, they had the expectancy of earning it free from arbitrary administrative action. [Citation omitted.] This expectancy is entitled to some modicum of due process protection. [Citation and footnote omitted.]
>
> For the reasons state above, however, we believe that such protection will be adequately provided in circumstances such as these by procedures of the character outlined in *Skelly*, (i.e., one that will apprise the employee of the proposed action, the reasons therefore, provide for a copy of the charges including materials upon which the action is based, and the right to respond either orally or in writing, to the authority imposing the discipline) *if provided either during the suspension or within reasonable time thereafter*.[95] (Emphasis added.)

Thus, the court held that the employees that did not receive a hearing at all were entitled to one under principles of due process.[96] As indicated in the Commission's original Statement of Decision, the Third District Court of Appeal in the *Stanton* case also found that due process principles apply when an employee receives a written reprimand without a corresponding loss of pay.[97]

Therefore, in the following situations, the Commission finds that the Commission's original decision in this case was correct in that Government Code section 3304 does not constitute a new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c), since the administrative appeal merely implements the due process requirements of the state and federal Constitutions:

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[93] *Id.* at page 560.

[94] *Ibid.*

[95] *Id.* at page 564.

[96] *Id.* at page 565.

[97] *Stanton, supra,* 226 Cal.App.3d 1438, 1442.

- When a permanent employee is subject to a dismissal, demotion, suspension, reduction in salary, or a written reprimand.
- When the charges supporting the dismissal of a chief of police constitute moral turpitude, which harms the employee's reputation and ability to find future employment, thus imposing the requirement for a liberty interest hearing.

The due process clause, however, does not apply when a permanent employee is transferred for purposes of punishment, denied a promotion on grounds other than merit, or suffers other actions that result in disadvantage, harm, loss or hardship that impacts the career opportunities of the permanent employee. In addition, the due process clause does not apply when local officials want to remove the chief of police under circumstances that do not create a liberty interest since the chief of police is an at-will employee and does not have a property interest in the position. Providing the opportunity for an administrative appeal under these circumstances is new and not required under prior law. In addition, none of the exceptions in Government Code section 17556 to the finding of costs mandated by the state apply to these situations.

Accordingly, the Commission finds that Government Code section 3304 constitutes a new program or higher level of service and imposes costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for providing the opportunity for an administrative appeal in the following circumstances only:

- When a permanent employee is transferred for purposes of punishment, denied a promotion on grounds other than merit, or suffers other actions that result in disadvantage, harm, loss or hardship that impacts the career opportunities of the permanent employee.
- When local officials want to remove the chief of police under circumstances that do not create a liberty interest (i.e., the charges do not constitute moral turpitude, which harms the employee's reputation and ability to find future employment).

Interrogations

Government Code section 3303 prescribes protections that apply when "any" peace officer is interrogated in the course of an administrative investigation that might subject the officer to the punitive actions listed in the section (dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment). The procedures and rights given to peace officers under section 3303 do not apply to any interrogation in the normal course of duty, counseling, instruction, or informal verbal admonition by, or other routine or unplanned contact with, a supervisor. In addition, the requirements do not apply to an investigation concerned solely and directly with alleged criminal activities.[98]

The Commission found that the following activities constitute a new program or higher level of service and impose costs mandated by the state:

[98] Government Code section 3303, subdivision (i).

- When required by the seriousness of the investigation, compensating the peace officer for interrogations occurring during off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
- Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)
- Tape recording the interrogation when the peace officer employee records the interrogation. (Gov. Code, § 3303, subd. (g).)

Government Code section 3313 directs the Commission to review these findings in order "to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable court decisions." The Commission finds that neither the *San Diego Unified School Dist.* case, nor any other court decision published since 1999, changes the Commission's conclusion that these activities constitute a new program or higher level of service and impose costs mandated by the state. Thus, these activities remain eligible for reimbursement when interrogating "any" peace officer, including probationary, at-will, and permanent officers that might subject the officer to punitive action.

The Commission also found that Government Code section 3303, subdivision (g), requires that:

- The peace officer employee shall have access to the tape recording of the interrogation if (1) any further proceedings are contemplated or, (2) prior to any further interrogation at a subsequent time.
- The peace officer shall be entitled to a transcribed copy of any interrogation notes made by a stenographer or any reports or complaints made by investigators or other persons, except those that are deemed confidential.

The Commission found that providing the employee with access to the tape prior to a further interrogation at a subsequent time constitutes a new program or higher level of service and imposes costs mandated by the state. However, the due process clause of the United States and California Constitutions already requires the employer to provide an employee who holds either a property or liberty interest in the job with the materials upon which the punitive, disciplinary action is based. Thus, the Commission found that even in the absence of the test claim legislation, the due process clause requires employers to provide the tape recording of the interrogation, and produce the transcribed copy of any interrogation notes made by a stenographer or any reports or complaints made by investigators or other persons, except those that are deemed confidential, to the peace officer employee when:

- a permanent employee is dismissed, demoted, suspended, receives a reduction in pay, or written reprimand; or
- a probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by charges of moral turpitude, which support the dismissal.

Under these circumstances, the Commission concluded that the requirement to provide these materials under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause. Moreover, pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing these materials merely implements the requirements of the United States Constitution.

The Commission finds that the conclusion denying reimbursement to provide these materials following the interrogation when the activity is already required by the due process clause of the United States and California Constitutions is consistent with the Supreme Court's ruling in *San Diego Unified School Dist.* The costs incurred to comply with these interrogation activities are *not* triggered by a state-mandated event, but are triggered by discretionary decisions made by local officials to interrogate an officer. Under these circumstances, the court determined that even in the absence of the test claim statute, counties would still be responsible for providing services under the constitutional guarantees of due process under the federal Constitution.[99]

Thus, the Commission finds that the Commission's decision, that Government Code section 3303, subdivision (g), constitutes a new program or higher level of service and imposes costs mandated by the state for the following activities, is legally correct:

- Provide the employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories:

  (a) the further proceeding is not a disciplinary punitive action;

  (b) the further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e., the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);

  (c) the further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;

  (d) the further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;

  (e) the further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.

- Produce transcribed copies of any notes made by a stenographer at an interrogation, and copies of reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer following the interrogation, in the following circumstances:

  (a) when the investigation *does not* result in disciplinary punitive action; and

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[99] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 888-889; *County of Los Angeles, supra,* 32 Cal.App.4th at page 815.

(b) when the investigation results in:

- a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
- a transfer of a permanent, probationary or at-will employee for purposes of punishment;
- a denial of promotion for a permanent, probationary or at-will employees for reasons other than merit; or
- other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

In comments to the draft staff analysis, the Counties of Orange, Los Angeles, and Alameda, and the City of Sacramento contend that the interrogation of an officer pursuant to the test claim legislation is complicated and requires the employer to fully investigate in order to prepare for the interrogation. The County of Orange further states that "[t]hese investigations can vary in scope and depth from abuses of authority, the use of deadly force, excessive force when injuries may be significant, serious property damage, and criminal behavior." These local agencies are requesting reimbursement for the time to investigate.

The Commission disagrees and finds that investigation services are not reimbursable. First, investigation of criminal behavior is specifically excluded from the requirements of Government Code section 3303. Government Code section 3303, subdivision (i), states that the interrogation requirements do not apply to an investigation concerned solely and directly with alleged criminal activities. Moreover, article XIII B, section 6, subdivision (a)(2), and Government Code section 17556, subdivision (g), state that no reimbursement is required for the enforcement of a crime.

The County of Los Angeles supports the argument that reimbursement for investigative services is required by citing Penal Code section 832.5, which states that each department that employs peace officers shall establish a procedure to investigate complaints. Penal Code section 832.5, however, was not included in this test claim, and the Commission makes no findings on that statute. The County of Los Angeles also cites to the phrase in Government Code section 3303, subdivision (a), which states that "[t]he interrogation shall be conducted ..." to argue that investigation is required. The County takes the phrase out of context. Government Code section 3303, subdivision (a), states the following:

> The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If the interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for any off-duty time in accordance

with regular department procedures, and the public safety officer shall not be released from employment for any work missed.

Government Code section 3303, subdivision (a), establishes the timing of the interrogation, and requires the employer to compensate the interrogated officer if the interrogation takes place during off-duty time. In other words, the statute defines the process that is due the peace officer who is subject to an interrogation. This statute does not require the employer to investigate complaints. When adopting parameters and guidelines for this program, the Commission recognized that Government Code section 3303 does not impose new mandated requirements to investigate an allegation, prepare for the interrogation, conduct the interrogation, and review responses given by officers and/or witnesses to an investigation.[100]

Thus, investigation services go beyond the scope of the test claim legislation and are ***not*** reimbursable. As explained by the courts, POBOR deals with labor relations.[101] It does not interfere with the employer's right to manage and control its own police department.[102]

Finally, the County of Orange contends that "[s]erious cases also tend to involve lengthy appeals processes that require delicate handling due to the increased rights under POBOR." For purposes of clarification, at the parameters and guidelines phase of this claim, the Commission denied reimbursement for the cost of defending lawsuits appealing the employer action under POBOR, determining that the test claim did not allege that the defense of lawsuits constitutes a reimbursable state-mandated program.[103] Government Code section 3313 does not give the Commission jurisdiction to change this finding.

Nevertheless, when adopting parameters and guidelines for this program, the Commission recognized the complexity of the procedures required to interrogate an officer, and approved several activities that the Commission found to be reasonable methods to comply with the mandated activities pursuant to the authority in section 1183.1, subdivision (a)(4), of the Commission's regulations. For example, the Commission authorized reimbursement, when preparing the notice regarding the nature of the interrogation, for reviewing the complaints and other documents in order to properly prepare the notice. The Commission also approved reimbursement for the mandated interrogation procedures when a peace officer witness was interrogated since the interrogation could lead to punitive action for that officer. Unlike other reconsideration statutes that directed the Commission to revise the parameters and guidelines, the Commission does not have jurisdiction here to change any discretionary findings or add any new activities to the parameters and guidelines that may be

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[100] Analysis adopted by the Commission on the Parameters and Guidelines, July 22, 2000 (AR, p. 912).

[101] *Sulier v. State Personnel Bd.* (2004) 125 Cal.App.4th 21, 26.

[102] *Baggett, supra*, 32 Cal.3d 128, 135.

[103] Analysis adopted by the Commission on the Parameters and Guidelines, July 22, 2000 Commission hearing (AR, pp. 904-906).

considered reasonable methods to comply with the program. The jurisdiction in this case is very narrow and limited to reviewing the Statement of Decision to clarify, as a matter of law, whether the test claim legislation constitutes a new program or higher level of service and imposes costs mandated by the state consistent with the California Supreme Court Decision in *San Diego Unified School Dist.* and other applicable court decisions.[104]

Adverse Comments

Government Code sections 3305 and 3306 provide that no peace officer "shall" have any adverse comment entered in the officer's personnel file without the peace officer having first read and signed the adverse comment. If the peace officer refuses to sign the adverse comment, that fact "shall" be noted on the document and signed or initialed by the peace officer. In addition, the peace officer "shall" have 30 days to file a written response to any adverse comment entered in the personnel file. The response "shall" be attached to the adverse comment.

Thus, Government Code sections 3305 and 3306 impose the following requirements on employers:

- to provide notice of the adverse comment;[105]
- to provide an opportunity to review and sign the adverse comment;
- to provide an opportunity to respond to the adverse comment within 30 days; and
- to note on the document that the peace officer refused to sign the adverse comment and to obtain the peace officer's signature or initials under such circumstances.

As noted in the 1999 Statement of Decision, the Commission recognized that the adverse comment could be considered a written reprimand or could lead to other punitive actions taken by the employer. If the adverse comment results in a dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer or the comment harms an officer's reputation and opportunity to find future employment, then the provisions of the test claim legislation which require notice and an opportunity to review and file a written response are already guaranteed under the due process clause of the state and federal constitutions.[106] Under such circumstances, the Commission found that the notice, review and response requirements of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution. Moreover, the Commission recognized that pursuant to Government Code section 17556, subdivision (c), the costs incurred in

[104] However, any party may file a request to amend the parameters and guidelines pursuant to the authority in Government Code section 17557.

[105] The Commission found that notice is required since the test claim legislation states that "no peace officer shall have any adverse comment entered in the officer's personnel file *without the peace officer having first read and signed the adverse comment.*" Thus, the Commission found that the officer must receive notice of the comment before he or she can read or sign the document.

[106] *Hopson, supra,* 139 Cal.App.3d 347.

providing notice and an opportunity to respond do not impose "costs mandated by the state". The Commission finds that this finding is consistent with *San Diego Unified School Dist.* since the local entity would be required, in the absence of the test claim legislation, to perform these activities to comply with federal due process procedures.[107]

However, the Commission found that under circumstances where the adverse comment affects the officer's property or liberty interest as described above, the following requirements imposed by the test claim legislation *are not* specifically required by the case law interpreting the due process clause:

- obtaining the signature of the peace officer on the adverse comment, or
- noting the peace officer's refusal to sign the adverse comment and obtain the peace officer's signature or initials under such circumstances.

The Commission approved these two procedural activities since they were not expressly articulated in case law interpreting the due process clause and, thus, exceed federal law. The City of Sacramento contends that these activities remain reimbursable.

The Commission finds, however, that the decision in *San Diego Unified School Dist.* requires that these notice activities be denied pursuant to Government Code section 17556, subdivision (c), since they are "part and parcel" to the federal due process mandate, and result in "de minimis" costs to local government.

In *San Diego Unified School Dist.*, the Supreme Court held that in situations when a local discretionary decision triggers a federal constitutional mandate such as the procedural due process clause, "the challenged state rules or procedures that are intended to implement an applicable federal law -- and whose costs are, in context, de minimis -- should be treated as part and parcel of the underlying federal mandate."[108] Adopting the reasoning of *County of Los Angeles II*, the court reasoned as follows:

> In *County of Los Angeles II*, supra 32 Cal.App.4th 805 [unofficial cite omitted], the initial discretionary decision (in the former case, to file charges and prosecute a crime; in the present case, to seek expulsion) in turn triggers a federal constitutional mandate (in the former case, to provide ancillary defense services; in the present case, to provide an expulsion hearing). In both circumstances, the Legislature, in adopting specific statutory procedures to comply with the general federal mandate, reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they do not significantly increase the cost of compliance with the federal mandate. The Court of Appeal in *County of Los Angeles II* concluded that, for purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added cost, should be viewed as part and parcel of the underlying federal

[107] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 888-889.

[108] *Id.* at page 890.

> mandate, and hence nonreimbursable under Government Code section 17556, subdivision (c). We reach the same conclusion here.[109]

The Commission finds that obtaining the officer's signature on the adverse comment or indicating the officer's refusal to sign the adverse comment, when the adverse comment results in a punitive action protected by the due process clause, are designed to prove that the officer was on notice about the adverse comment. Since providing notice is already guaranteed by the due process clause of the state and federal constitutions under these circumstances, the Commission finds that the obtaining the signature of the officer or noting the officer's refusal to sign the adverse comment is part and parcel of the federal notice mandate and results in "de minimis" costs to local government.

Therefore, the Commission finds that, under current law, the Commission's conclusion that obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, when the adverse comment results in a punitive action protected by the due process clause is not a new program or higher level of service and does not impose costs mandated by the state. Thus, the Commission denies reimbursement for these activities.

Finally, the courts have been clear that an officer's rights under Government Code sections 3305 and 3306 are not limited to situations where the adverse comment results in a punitive action where the due process clause may apply. Rather, an officer's rights are triggered by the entry of "any" adverse comment in a personnel file, "or any other file used for personnel purposes," that may serve as a basis for affecting the status of the employee's employment.[110] In explaining the point, the Third District Court of Appeal stated: "[E]ven though an adverse comment does not directly result in punitive action, it has the potential for creating an adverse impression that could influence future personnel decisions concerning an officer, including decisions that do not constitute discipline or punitive action."[111] Thus, the rights under sections 3305 and 3306 also apply to uninvestigated complaints. Under these circumstances (where the due process clause does not apply), the Commission determined that the Legislature, in statutes enacted before the test claim legislation, established procedures for different local public employees similar to the protections required by Government Code sections 3305 and 3306. Thus, the Commission found no new program or higher level of service to the extent the requirements existed in prior statutory law. The Commission approved the test claim for the activities required by the test claim legislation that were not previously required under statutory law.[112] Neither *San Diego Unified School Dist.*, nor any other

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[109] *Id.* at page 889.

[110] *Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal.App.4th 916, 925.

[111] *Id.* at page 926.

[112] For example, for counties, the Commission approved the following activities that were not required under prior statutory law:

> If an adverse comment is related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

case, conflicts with the Commission's findings in this regard. Therefore, the Commission finds that the denial of activities following the receipt of an adverse comment that were required under prior statutory law, and the approval of activities following the receipt of an adverse comment that were *not* required under prior statutory law, was legally correct.

CONCLUSION

The Commission finds that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision, which found that the POBOR legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for counties, cities, school districts, and special districts identified in Government Code section 3301 that employ peace officers.

The Commission further finds that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision that the test claim legislation constitutes a partial reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for all activities previously approved by the Commission except the following:

- The activity of providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) pursuant to Government Code section 3304 is no longer a reimbursable state-mandated activity because the Legislature amended Government Code section 3304 in 1998. The amendment limited the right to an administrative appeal to only those peace officers "who successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.)

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

If an adverse comment is not related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

- The activities of obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, pursuant to Government Code sections 3305 and 3306, when the adverse comment results in a punitive action protected by the due process clause[113] does not constitute a new program or higher level of service and does not impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

[113] Due process attaches when a permanent employee is dismissed, demoted, suspended, receives a reduction in salary, or receives a written reprimand. Due process also attaches when the charges supporting a dismissal of a probationary or at-will employee constitute moral turpitude that harms the employee's reputation and ability to find future employment and, thus, a name-clearing hearing is required.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM: Government Code Sections 3300 through 3310, As Added and Amended by Statutes of 1976, Chapter 465; Statutes of 1978, Chapters 775, 1173, 1174, and 1178; Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675; and Filed on December 21, 1995; By the City of Sacramento, Claimant.	NO. CSM 4499 *Peace Officers Procedural Bill of Rights* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted November 30, 1999)*

STATEMENT OF DECISION

On August 26, 1999 the Commission on State Mandates (Commission) heard this test claim during a regularly scheduled hearing. Ms. Pamela A. Stone appeared for the City of Sacramento. Mr. Allan Burdick appeared for the League of California Cities/SB 90 Service. Ms. Elizabeth Stein appeared for the California State Personnel Board. Mr. James Apps and Mr. Joseph Shinstock appeared for the Department of Finance. The following persons were witnesses for the City of Sacramento: Ms. Dee Contreras, Director of Labor Relations, and Mr. Edward J. Takach, Labor Relations Officer.

At the hearing, oral and documentary evidence was introduced, the test claim was submitted, and the vote was taken.

The law applicable to the Commission's determination of a reimbursable state mandated program is Government Code section 17500 et seq. and section 6, article XIII B of the California Constitution and related case law.

The Commission, by a vote of 5 to 1, approved this test claim.

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BACKGROUND

In 1976, the Legislature enacted Government Code sections 3300 through 3310, known as the Peace Officers Procedural Bill of Rights Act. The test claim legislation provides a series of rights and procedural safeguards to peace officers employed by local agencies and school districts that are subject to investigation or discipline. Legislative intent is expressly provided in Government Code section 3301 as follows:

> "The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, within the State of California."

The test claim legislation applies to all employees classified as "peace officers" under specified provisions of the Penal Code, including those peace officers employed by counties, cities, special districts and school districts.[1] The test claim legislation also applies to peace officers that are classified as permanent employees, peace officers who serve at the pleasure of the agency and are terminable without cause ("at-will" employees)[2] and peace officers on probation who have not reached permanent status.[3]

COMMISSION FINDINGS

Issue: Does the test claim legislation, which establishes rights and procedures for peace officers subject to investigation or discipline, constitute a reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514[4]?

For a statute to impose a reimbursable state mandated program, the statutory language must direct or obligate an activity or task upon local governmental agencies. In addition, the required activity or task must be new, thus constituting a "new program", or create an increased or "higher level of service" over the former required level of service. The court has defined a "new

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[1] Government Code section 3301 states: "For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code."

[2] *Gray* v. *City of Gustine* (1990) 224 Cal.App.3d 621; *Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795.

[3] *Bell* v. *Duffy* (1980) 111 Cal.App.3d 643; *Barnes* v. *Personnel Department of the City of El Cajon* (1978) 87 Cal.App.3d 502.

[4] Government Code section 17514 defines "costs mandated by the state" as follows: "'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 XIII B of the California Constitution."

program" or "higher level of service" as a program that carries out the governmental function of providing services to the public, or a law which, to implement a state policy, imposes unique requirements on local agencies and does not apply generally to all residents and entities in the state. To determine if a required activity is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately prior to the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must be state mandated and impose "costs mandated by the state."[5]

The test claim legislation requires local agencies and school districts to take specified procedural steps when investigating or disciplining a peace officer employee. The stated purpose of the test claim legislation is to promote stable relations between peace officers and their employers and to ensure the effectiveness of law enforcement services. Based on the legislative intent, the Commission found that the test claim legislation carries out the governmental function of providing a service to the public. Moreover, the test claim legislation imposes unique requirements on local agencies and school districts that do not apply generally to all residents and entities of the state. Thus, the Commission determined that the test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.

The Commission recognized, however, that several California courts have analyzed the test claim legislation and found a connection between its requirements and the requirements imposed by the due process clause of the United States and California Constitutions. For example, the court in *Riveros* v. *City of Los Angeles* analyzed the right to an administrative appeal under the test claim legislation for a probationary employee and noted that the right to such a hearing arises from the due process clause.

> "*The right to such a hearing arises from the due process protections of the Fourteenth Amendment to the United States Constitution*. . . . .The limited purpose of the section 3304 appeal is to give the peace officer a chance to establish a formal record of the circumstances surrounding his termination and try to convince his employer to reverse its decision, either by showing that the charges are false or through proof of mitigating circumstances [citation omitted]. *This is very nearly the same purpose for the hearing mandated by due process requirements*, which must afford the officer a chance to refute the charges or clear his name." (Emphasis added.)[6]

Thus, the Commission continued its inquiry and compared the test claim legislation to the prior legal requirements imposed on public employers by the due process clause to determine if the activities defined in the test claim legislation are new or impose a higher level of service.

The Commission also considered whether there are any "costs mandated by the state." Since the due process clause of the United States Constitution is a form of federal law, the Commission recognized that Government Code section 17556, subdivision (c), is triggered. Pursuant to

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[5] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *City of Sacramento* v. *State of California* (1990) 50 Cal.3d 51, 66; *Lucia Mar Unified School Dist*. v. *Honig* (1988) 44 Cal.3d 830, 835; Gov. Code, § 17514.

[6] *Riveros* v. *City of Los Angeles* (1996) 41 Cal.App.4th 1342, 1359.

Government Code section 17556, subdivision (c), there are *no* "costs mandated by the state" and no reimbursement is required if the test claim legislation "implemented a federal law resulting in costs mandated by the federal government, unless the [test claim legislation] mandates costs which exceed the mandate in that federal law or regulation."[7]

These issues are discussed below.

The Due Process Clause of the U.S. and California Constitutions

The due process clause of the United States and California Constitutions provide that the state shall not "deprive any person of life, liberty, or property without due process of law."[8] In the public employment arena, an employee's property and liberty interests are commonly at stake.

Property Interest in Employment

Property interests protected by the due process clause extend beyond actual ownership of real estate or money. The U.S. Supreme Court determined that a property interest deserving protection of the due process clause exists when an employee has a "legitimate claim" to continued employment.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . ."
>
> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - -rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[9]

Applying the above principles, both the U.S. Supreme Court and California courts hold that "permanent" employees, who can only be dismissed or subjected to other disciplinary measures for "cause", have a legitimate claim of entitlement to their job and thus, possess a property interest in continued employment.[10]

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[7] Government Code section 17513 defines "costs mandated by the federal government" as follows:

> " 'Costs mandated by the federal government' means any increased costs incurred by a local agency or school district after January 1, 1973, in order to comply with the requirements of a federal statute or regulation. 'Costs mandated by the federal government' includes costs resulting from enactment of state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state. 'Costs mandated by the federal government' does not include costs which are specifically reimbursed or funded by the federal or state government or programs or services which may be implemented at the option of the state, local agency, or school district."

[8] U.S. Constitution, 14th Amendment; California Constitution, Article 1, §§ 7 and 15.

[9] *Board of Regents* v. *Roth* (1972) 408 U.S. 564, 577.

[10] *Slochower* v. *Board of Education* (1956) 350 U.S. 551, where the U.S. Supreme Court found that a tenured college professor dismissed from employment had a property interest in continued employment that was safeguarded by the due process clause; *Gilbert* v. *Homar* (1997) 520 U.S. 924, where the U.S. Supreme Court found that a police officer, employed as a permanent employee by a state university, had a property interest in continued employment and was afforded due process protections resulting from a suspension without pay; *Skelly* v. *State*

Moreover, California courts require employers to comply with due process when a permanent employee is dismissed[11], demoted[12], suspended[13], receives a reduction in salary[14] or receives a written reprimand.[15,]

The Department of Finance and the State Personnel Board contended that due process property rights attach when an employee is transferred. They cited *Runyon* v. *Ellis* and an SPB Decision (*Ramallo* SPB Dec. No. 95-19) for support.

The Commission disagreed with the State's argument in this regard. First, in *Runyon* v. *Ellis*, the court found that the employee was entitled to an administrative hearing under the due process clause as a result of a transfer *and an accompanying reduction of pay*. The court did not address the situation where the employee receives a transfer alone.[16] In addition, in *Howell* v. *County of San Bernardino*, the court recognized that "[a]lthough a permanent employee's right to continued employment is generally regarded as fundamental and vested, an employee enjoys no such right to continuation in a particular job assignment."[17] Thus, the Commission found that local government employers are not required to provide due process protection in the case of a transfer.

Furthermore, although the SPB decision may apply to the State as an employer, the Commission found that that the SPB decision does not apply to actions taken by a local government employer.

Accordingly, the Commission found that an employee does *not* enjoy the rights prescribed by the due process clause when the employee is transferred.

When a property interest is affected and due process applies, the procedural safeguards required by the due process clause generally require notice to the employee and an opportunity to respond, with some variation as to the nature and timing of the procedural safeguards. In cases of dismissal, demotion, long-term suspension and reduction of pay, the California Supreme Court in *Skelly* prescribed the following due process requirements *before* the discipline becomes effective:

- Notice of the proposed action;
- The reasons for the action;
- A copy of the charges and materials upon which the action is based; and

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Personnel Board (1975) 15 Cal.3d 194, where the California Supreme Court held a permanent civil service employee of the state has a property interest in continued employment and cannot be dismissed without due process of law.

[11] *Skelly, supra*, 15 Cal.3d 194.

[12] *Ng.* v. *State Personnel Board* (1977) 68 Cal.App.3d 600.

[13] *Civil Service Assn.* v. *City and County of San Francisco* (1978) 22 Cal.3d 552, 558-560.

[14] *Ng, supra,* 68 Cal.App.3d 600, 605.

[15] *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438.

[16] *Runyon* v. *Ellis* (1995) 40 Cal.App.4th 961.

[17] *Howell* v. *County of San Bernardino* (1983) 149 Cal.App.3d 200, 205.

- The right to respond, either orally or in writing, to the authority initially imposing discipline.[18]

In cases of short-term suspensions (ten days or less), the employee's property interest is protected as long as the employee receives notice, reasons for the action, a copy of the charges, and the right to respond *either during the suspension, or within a reasonable time thereafter*.[19]

Similarly, the Commission found that in the case of a written reprimand where the employee is not deprived of pay or benefits, the employer is not required to provide the employee with the due process safeguards *before* the effective date of the written reprimand. Instead, the court in *Stanton* found that an appeals process provided to the employee *after* the issuance of the written reprimand satisfies the due process clause.[20]

The claimant disagreed with the Commission's interpretation of the *Stanton* case and its application to written reprimands.

The claimant contended *Stanton* stands for the proposition that the due process guarantees outlined in *Skelly* do not apply to a written reprimand. Thus, the claimant concluded that an employee is not entitled to any due process protection when the employee receives a written reprimand. The claimant cited the following language from *Stanton* in support of its position:

> ". . . As the City notes, no authority supports plaintiff's underlying assertion that issuance of a written reprimand triggers the due process safeguards outlined in *Skelly*. Courts have required adherence to *Skelly* in cases in which an employee is demoted [citations omitted]; suspended without pay [citations omitted]; or dismissed [citations omitted]. We find no authority mandating adherence to *Skelly* when a written reprimand is issued."
>
> "We see no justification for extending *Skelly* to situations involving written reprimands. Demotions, suspension and dismissal all involve depriving the public employee of pay or benefits; a written reprimand results in no such loss to the employee."

The facts in *Stanton* are as follows. A police officer received a written reprimand for discharging a weapon in violation of departmental rules. After he received the reprimand, he appealed to the police chief in accordance with the memorandum of understanding and the police chief upheld the reprimand. The officer then filed a lawsuit contending that he was entitled to an administrative appeal. The court denied the plaintiff's request finding that that the meeting with the police chief satisfied the administrative appeals provision in the test claim legislation (Government Code section 3304), and thus, satisfied the employee's due process rights.

The Commission agreed that the court in *Stanton* held the rights outlined in *Skelly* do not apply when an employee receives a written reprimand. Thus, under *Skelly*, the rights to receive notice, the reasons for the reprimand, a copy of the charges and the right to respond are not required to be given to an employee *before* the reprimand takes effect.

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[18] *Skelly, supra,* 15 Cal.3d 194, 215.

[19] *Civil Service Assn., supra,* 22 Cal.3d 552, 564.

[20] *Stanton, supra* ,226 Cal.App.3d 1438, 1442.

However, the court found that the employee *is* guaranteed due process protection upon receipt of a written reprimand. The court found that when the appeals process takes places *after* the reprimand, due process is satisfied. The court in *Stanton* also states the following:

> "Moreover, Government Code section 3303 et seq., the Public Safety Officer Procedural Bill of Rights Act, provides police officers who are disciplined by their departments with procedural safeguards. Section 3304, subdivision (b) states no punitive action may be taken by a public agency against a public safety officer without providing the officer with an opportunity for administrative appeal. Punitive action includes written reprimands. [Citation omitted.] Even without the protection afforded by Skelly, plaintiff's *procedural due process rights*, following a written reprimand, ***are protected*** by the appeals process mandated by Government Code section 3304, subdivision (b)." (Emphasis added.)[21]

Accordingly, the Commission found that the due process clause of the United States and California Constitutions apply when a permanent employee is

- Dismissed;
- Demoted;
- Suspended;
- Receives a reduction in salary; and
- Receives a written reprimand.

Liberty Interest

Although probationary and at-will employees, who can be dismissed without cause, do not have a property interest in their employment, the employee may have a liberty interest affected by a dismissal when the charges supporting the dismissal damage the employee's reputation and impair the employee's ability to find other employment. The courts have defined the liberty interest as follows:

> "[A]n employee's liberty is impaired if the government, in connection with an employee's dismissal or failure to be rehired, makes a 'charge against him that might seriously damage his standing and associations in the community,' such as a charge of dishonesty or immorality, or would 'impose on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.' [Citations omitted.] A person's protected liberty interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. [Citations omitted.] Rather, the liberty interest is infringed only when the defamation is made in

[21] *Stanton, supra* ,226 Cal.App.3d 1438, 1442.

connection with the loss of a government benefit, such as,…employment. [Citations omitted.]" [22]

For example, in *Murden* v. *County of Sacramento*, the court found a protected liberty interest when a *temporary* deputy sheriff was dismissed from employment based on charges that he was engaging two female employees in embarrassing and inappropriate conversation regarding sexual activities. The court noted that the charge impugned the employee's character and morality, and if circulated, would damage his reputation and impair his ability to find other employment.

The court in *Murden* clarified that a dismissal based on charges that the employee was unable to learn the basic duties of the job does *not* constitute a protected interest.[23]

When the employer infringes on a person's liberty interest, due process simply requires notice to the employee, and an opportunity to refute the charges and clear his or her name. Moreover, the "name-clearing" hearing can take place *after* the actual dismissal.[24]

Accordingly, the Commission found that the due process clauses of the United States and California Constitutions apply when the charges supporting the dismissal of a probationary or at-will employee damage the employee's reputation and impair the employee's ability to find other employment.

Test Claim Legislation

As indicated above, employers are required by the due process clause to offer notice and hearing protections to *permanent* employees for dismissals, demotions, suspensions, reductions in salary and written reprimands.

Employers are also required by the due process clause to offer notice and hearing protections to *probationary* and *at-will* employees when the dismissal harms the employee's reputation and ability to obtain future employment.

As more fully discussed below, the Commission found that the test claim legislation imposes some of the *same* notice and hearing requirements imposed under the due process clause.

Administrative Appeal

Government Code section 3304, as added by the test claim legislation, provides that "no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."[25]

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[22] *Murden* v. *County of Sacramento* (1984) 160 Cal.App.3d 302, 308, quoting from *Board of Regents* v. *Roth*, *supra*, 408 U.S. at p. 573. See also *Paul* v. *Davis* (1976) 424 U.S. 693, 711-712; and *Lubey* v. *City and County of San Francisco* (1979) 98 Cal.App.3d 340.

[23] *Murden, supra.* 160 Cal.App.3d 302, 308.

[24] *Murden, supra,* 160 Cal.App.3d 302, 310; *Arnett* v.*Kennedy* (1974) 416 U.S. 134, 157; and *Codd* v. *Velger* (1977) 429 U.S. 624, 627.

[25] In the Claimant's comments to the Draft Staff Analysis, the claimant recited Government Code section 3304, *as amended in 1997 (Stats. 1997, c. 148) and 1998 (Stats. 1998, c. 786)*. These amendments made substantive changes to Government Code section 3304 by adding subdivisions (c) through (g). These changes include a statute of limitations concerning how long the agency can use acts as a basis for discipline, a provision prohibiting the removal

Punitive action is defined in Government Code section 3303 as follows:

> "For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary[26], written reprimand, or transfer for purposes of punishment."

The California Supreme Court determined that the phrase "for purposes of punishment" in the foregoing section relates only to a transfer and not to other personnel actions.[27] Thus, in transfer cases, the peace officer is required to prove that the transfer was intended for purposes of punishment in order to be entitled to an administrative appeal. If the transfer is to "compensate for a deficiency in performance," however, an appeal is not required.[28, 29]

In addition, at least one California appellate court determined that employers must extend the right to an administrative appeal under the test claim legislation to peace officers for other actions taken by the employer that result in "disadvantage, harm, loss or hardship" and impact the peace officer's career.[30] In *Hopson*, the court found that an officer who received a report in his personnel file by the police chief regarding a shooting in violation of policies and procedures was entitled to an administrative appeal under Government Code section 3304. The court held that the report constituted "punitive action" under the test claim legislation based on the source of the report, its contents, and its potential impact on the career of the officer.[31]

The Commission recognized that the test claim legislation does not specifically set forth the hearing procedures required for the administrative appeal. Rather, the type of administrative appeal is left up to the discretion of each local agency and school district.[32] The courts have determined, however, that the type of hearing required under Government Code section 3304 must comport with standards of fair play and due process.[33, 34]

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of a chief of police without providing written notice describing the reasons for the removal and an administrative hearing, and a provision limiting the right to an administrative appeal to officers who successfully complete the probationary period. The Commission noted that ***neither the 1997 nor 1998 statutes are alleged in this test claim***.

[26] The courts have held that "reduction in salary" includes loss of skill pay (*McManigal* v. *City of Seal Beach* (1985) 166 Cal.App.3d 975, pay grade (*Baggett* v. *Gates* (1982) 32 Cal.3d 128, rank (*White* v. *County of Sacramento* (1982) 31 Cal.3d 676, and probationary rank (*Henneberque* v. *City of Culver City* (1983) 147 Cal.App.3d 250.

[27] *White* v. *County of Sacramento* (1982) 31 Cal.3d 676.

[28] *Holcomb* v. *City of Los Angeles* (1989) 210 Cal.App.3d 1560; *Heyenga* v. *City of San Diego* (1979) 94 Cal.App.3d 756; *Orange County Employees Assn., Inc.* v. *County of Orange* (1988) 205 Cal.App.3d 1289.

[29] The claimant testified that what constitutes a transfer for purposes of punishment is in the eyes of the employee. The claimant stated that in the field if labor relations, peace officers will often request a full POBOR hearing and procedure on a transfer which is not acceptable to the officer in question, even though the transfer is not accompanied by a reduction in pay or benefits and no disciplinary action has been taken.

[30] *Hopson* v. *City of Los Angeles* (1983) 139 Cal.App.3d 347, 354, relying on *White* v. *County of Sacramento* (1982) 31 Cal.3d 676, 683.

[31] *Id* at p. 353-354.

[32] *Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795, 1806; *Runyan, supra*, 40 Cal.App.4th 961, 965.

[33] *Doyle* v. *City of Chino* (1981) 117 Cal.App.3d 673, 684. In addition, the court in *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1442, held that the employee's due process rights were protected by the administrative appeals process mandated by Government Code section 3304. Furthermore, in cases involving "misconduct", the officer is entitled to a liberty interest name-clearing hearing under Government section 3304. *(Lubey* v. *City and County of San Francisco* (1979) 98 Cal.App.3d 340; *Murden, supra).*

The Department of Finance and the State Personnel Board contended that Government Code section 3304 does not require an administrative appeal for probationary and at-will employees. They cited Government Code section 3304, subdivision (b), as it is *currently* drafted, which provides the following: "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer *who has successfully completed the probationary period that may be required by his or her employing agency* without providing the public safety officer with an opportunity for administrative appeal."

However, the Commission determined that the italicized language in section 3304, subdivision (b), was added by the Legislature in 1998 and became effective on January 1, 1999. (Stats. 1998, c. 768). When Government Code section 3304, subdivision (b), was originally enacted in 1976, it did not limit the right to an administrative appeal to permanent employees only. Rather, that section stated the following:

> "(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

Accordingly, the Commission found that an administrative appeal under Government Code section 3304, subdivision (b), was required to be provided to probationary and at-will employees faced with punitive action or a denial of promotion until December 31, 1998.

The Department of Finance also contended that the cost of conducting an administrative hearing is already required under the due process clause and the *Skelly* case, which predate the test claim legislation.

The Commission agreed that in some circumstances, the due process clause requires the same administrative hearing as the test claim legislation. However, as reflected by the table below, the Commission found that test claim legislation is broader than the due process clause and applies to additional employer actions that have not previously enjoyed the protections of the due process clause.

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[34] The Commission noted that at least two cases have referred to the need for an administrative appeals procedure that would enable the officer to obtain court review pursuant to Code of Civil Procedure section 1094.5. Such a review implies that an evidentiary hearing be held from which a record and findings may be prepared for review by the court. (*Doyle, supra*, 117 Cal.App. 3d 673; *Henneberque, supra*, 147 Cal.App.3d 250.) In addition, the California Supreme Court uses the words "administrative appeal" of section 3304 interchangeably with the word "hearing." (*White, supra*, 31 Cal.3d 676.)

Due Process	Test Claim Legislation
Dismissal of a permanent employee	Dismissal of permanent, *probationary* or *at-will employees*
Demotion of a permanent employee	Demotion of permanent, *probationary* or *at-will employees*
Suspension of a permanent employee	Suspension of permanent, *probationary* or *at-will employees*
Reduction in salary for a permanent employee	Reduction in salary for permanent, *probationary* or *at-will employees*
Written reprimand of a permanent employee	Written reprimand of permanent, *probationary* or *at-will employees*
Dismissal of a probationary or at-will employee which harms the employee's reputation and ability to find future employment	Dismissal of a probationary or at-will employee which harms the employee's reputation and ability to find future employment
	Transfer of a permanent, probationary or at-will employee for purposes of punishment
	Denial of promotion for permanent, probationary or at-will employees on grounds other than merit
	Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee

Thus, the Commission found that the administrative appeal would be required in the absence of the test claim legislation when:

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal.

Under these circumstances, the Commission determined that the administrative appeal *does not* constitute a new program or higher level of service because prior law requires such an appeal under the due process clause. Moreover, the Commission recognized that pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing the administrative appeal in the above circumstances would not constitute "costs mandated by the state" since the administrative appeal merely implements the requirements of the United States Constitution.

The Commission found, however, that the due process clauses of the United States and California Constitutions do not require an administrative appeal in the following circumstances:

- Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e.; the charges do not harm the employee's reputation or ability to find future employment);
- Transfer of permanent, probationary and at-will employees for purposes of punishment;
- Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
- Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

Thus, in these situations, the Commission found that the administrative appeal required by Government Code section 3304 constitutes a new program or higher level of service and imposes "costs mandated by the state" under Government Code section 17514.

Compensation and Timing of an Interrogation

Government Code section 3303 describes the procedures for the interrogation of a peace officer. The procedures and rights given to peace officers under section 3303 do *not* apply to any interrogation in the normal course of duty, counseling, instruction, or informal verbal admonition by a supervisor. In addition, the requirements do not apply to an investigation concerned solely and directly with alleged criminal activities.[35]

Government Code section 3303, subdivision (a), establishes procedures for the timing and compensation of a peace officer subject to investigation and interrogation by an employer. This section requires that the interrogation be conducted at a reasonable hour, preferably at a time when the peace officer is on duty, or during the "normal waking hours" of the peace officer, unless the seriousness of the investigation requires otherwise. If the interrogation takes place during the off-duty time of the peace officer, the peace officer "shall" be compensated for the off-duty time in accordance with regular department procedures.

The claimant contended that Government Code section 3303, subdivision (a), results in the payment of overtime to the investigated employee and, thus, imposes reimbursable state mandated activities. The claimant stated the following:

> "If a typical police department works in three shifts, such as the Police Department for this City, two-thirds of the police force work hours [that are] not consistent with the work hours of Investigators in the Internal Affairs section. Even in a smaller department without such a section, hours conflict if command staff assigned to investigate works a shift different than the employees investigated. Payment of overtime occurs to the employees investigated or those performing the required investigation, or is at least a potential risk to an employer for the time an employee is interrogated pursuant to this section."

The Commission agreed. Conducting the investigation when the peace officer is on duty, and compensating the peace officer for off-duty time in accordance with regular department procedures are new requirements not previously imposed on local agencies and school districts.

Accordingly, the Commission found that Government Code section 3303, subdivision (a), constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution and imposes "costs mandated by the state" under Government Code section 17514.

Notice Prior to Interrogation

Government Code section 3303, subdivisions (b) and (c), require the employer, prior to interrogation, to inform and provide notice of the nature of the investigation and the identity of all officers participating in the interrogation to the employee.

[35] Gov. Code, § 3303, subd. (i).

The Commission recognized that under due process principles, an employee with a property interest is entitled to notice of the disciplinary action proposed by the employer.[36] Thus, an employee is required to receive notice when the employee receives a dismissal, suspension, demotion, reduction in salary or receipt of a written reprimand. Due process, however, *does not* require notice prior to an investigation or interrogation since the employee has not yet been charged and the employee's salary and employment position have not changed.

Accordingly, the Commission found that providing the employee with prior notice regarding the nature of the interrogation and identifying the investigating officers constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution and imposes "costs mandated by the state" under Government Code section 17514.

Tape Recording of Interrogation

Government Code section 3303, subdivision (g), provides, in relevant part the following:

> "The complete interrogation of a public safety officer *may* be recorded. *If* a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. . . . The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation." (Emphasis added.)

The claimant contended that the activity of tape recording the interrogation and providing the peace officer with the tape recording of the interrogation as specified in section 3303, subdivision (g), constitute reimbursable state mandated activities. The claimant stated the following:

> "As shown above, Government Code, section 3303 (g) allows the interrogation of a peace officer to be tape recorded. The section is silent as to whom may record the interrogation, and who may request that the session be recorded. In practice, the employee will almost always request to record the interrogation. As the employee desires to record same, the employer is faced with the requirement of also tape recording the interrogation in order to assure that the employee's tape is not edited, redacted, or changed in any manner, and to have a verbatim record of the proceedings."[37]

At the hearing, Ms. Dee Contreras, Director of Labor Relations for the City of Sacramento, testified as follows:

> "If the employee comes in and tapes, and, trust me, they all come in and tape, if they're sworn peace officers, their attorneys come in with tapes. You wind up with two tape recorders on a desk. If they tape and we do not, then they have a record that we do no have or we must rely on a tape created by the employee we are investigating. That would not be a wise choice, from the employer's perspective."

[36] *Skelly, supra,* 15 Cal.3d 194.

[37] Claimant's comments to Draft Staff Analysis.

> "If we take notes and they tape, our notes are never going to be exactly the same as the tape is going to be if it's transcribed, so we wind up with what is arguably an inferior record to the record that they have."
>
> "So it is essentially - - it says they may tape but the practical application of that is: For everybody who comes in with a tape recorder to tape, which is virtually every peace officer, we then must tape."[38]

The Department of Finance disagreed and contended that the test claim statute does not require local agencies to tape the interrogation. The Department further contended that if the local agency decides to tape the interrogation, the cost of providing the tape to the officer is required under the due process clause.

Based on the evidence presented at the hearing, the Commission recognized the reality faced by labor relations' professionals in their implementation of the test claim legislation. Accordingly, the Commission found that tape recording the interrogation when the employee records the interrogation is a mandatory activity to ensure that all parties have an accurate record. The Commission's finding is also consistent with the legislative intent to assure stable employer-employee relations are continued throughout the state and that effective services are provided to the people.[39]

The Commission also recognized that Government Code section 3303, subdivision (g), requires that the employee shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The Commission found that providing the employee with access to the tape *prior to a further interrogation at a subsequent time* is a new activity and, thus, constitutes a new program or higher level of service.

However, the Commission found that providing the employee with access to the tape *if further proceedings are contemplated* does not constitute a new program or higher level of service when the further proceeding is a disciplinary action protected by the due process clause. Under certain circumstances, due process already requires the employer to provide an employee who holds either a property or liberty interest in the job with the materials upon which the disciplinary action is based.

Accordingly, the Commission found that even in the absence of the test claim legislation, the due process clause requires employers to provide the tape recording of the interrogation to the employee when:

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal[40]; and when

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[38] August 26, 1999 Hearing Transcript, page 18, lines 7-21.

[39] This finding is consistent with one of the principles of statutory construction that "where statutes provide for performance of acts or the exercise of power or authority by public officers protecting private rights or in public interest, they are mandatory." (3 Sutherland, Statutory Construction (5th ed. 1992) § 57.14, p. 36.) See also section 1183.1 of the Commission's regulations, which provides that the parameters and guidelines adopted on a mandated program shall provide a description of the most reasonable methods of complying with the mandate.

[40] *Skelly, supra*; *Ng, supra*; *Civil Service Assn., supra*; *Stanton, supra; Murden, supra*.

- The disciplinary action is based, in whole or in part, on the interrogation of the employee.

Under these circumstances, the Commission found that the requirement to provide access to the tape recording of the interrogation under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause. Moreover, pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing access to the tape recording merely implements the requirements of the United States Constitution.

However, when the further proceeding does not constitute a disciplinary action protected by due process, the Commission found that providing the employee with access to the tape is a new activity and, thus, constitutes a new program or higher level of service.

In sum, the Commission found that the following activities constitute reimbursable state mandated activities:

- Tape recording the interrogation when the employee records the interrogation.
- Providing the employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories:

  (a) The further proceeding is not a disciplinary action;

  (b) The further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e., the charges supporting the dismissal doe not harm the employee's reputation or ability to find future employment);

  (c) The further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;

  (d) The further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;

  (e) The further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.

Documents Provided to the Employee

Government Code section 3303, subdivision (g), also provides that the peace officer "shall" be entitled to a transcribed copy of any interrogation notes made by a stenographer or any reports or complaints made by investigators or other persons, except those that are deemed to be confidential.

The Department of Finance and the SPB contended that the cost of providing copies of transcripts, reports and recordings of interrogations are required under the due process clause and, thus, do not constitute a reimbursable state mandated program.

In *Pasadena Police Officers Association*, the California Supreme Court analyzed Government Code section 3303, noting that it does not specify when an officer is entitled to receive the reports and complaints. The court also recognized that section 3303 does not specifically address an officer's due process entitlement to discovery in the event the officer is *charged* with

misconduct.[41] Nevertheless, the court determined that the Legislature intended to require law enforcement agencies to disclose the reports and complaints to an officer under investigation only *after* the officer's interrogation.[42]

The Commission recognized that the court's decision in *Pasadena Police Officers Association* is consistent with due process principles. Due process requires the employer to provide an employee who holds either a property or liberty interest in the job with a copy of the charges and materials upon which the disciplinary action is based when the officer is charged with misconduct.[43]

Accordingly, even in the absence of the test claim legislation, the Commission found that the due process clause requires the employer to provide a copy of all investigative materials, including non-confidential complaints, reports and charges when, as a result of the interrogation,

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal.

Under these circumstances, the requirement to produce documents under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause. Moreover, the Commission recognized that pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing the investigative materials in the above circumstances would not constitute "costs mandated by the state" since producing such documentation merely implements the requirements of the United States constitution.

However, the Commission found that the due process clause does not require employers to produce the charging documents and reports when requested by the officer in the following circumstances:

(a) When the investigation *does not* result in disciplinary action; and

(b) When the investigation results in:

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
- A transfer of a permanent, probationary or at-will employee for purposes of punishment;
- A denial of promotion for a permanent, probationary or at-will employees for reasons other than merit; or

[41] *Pasadena Police Officers Assn*. v. *City of Pasadena* (1990) 51 Cal.3d 564, 575 (Exhibit A, Bates page 0135).

[42] *Id*. at 579.

[43] *Skelly, supra.*

- Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

The Department of Finance and the State Personnel Board disagreed with this conclusion. They contended that "*State civil service* probationary or at-will employees are entitled to [the due process rights prescribed by] *Skelly* . . . . by the State Personnel Board" to the charging documents and reports and, thus, Government Code section 3303, subdivision (g), does not constitute a reimbursable state mandated program with respect to these employees. However, they cited no authority for this proposition.

The Department of Finance and the State Personnel Board also contended that Government Code section 3303, subdivision (g), does not constitute a reimbursable state mandated program when a permanent employee is transferred based on their assertion that a transfer is covered by the due process clause. As noted earlier, the Commission disagreed with this contention and found that a permanent employee does *not* enjoy the rights prescribed by the due process clause when the employee is transferred.

Accordingly, in the circumstances described above, the Commission found that producing the documents required by Government Code section 3303, subdivision (g), constitutes a new program or higher level of service and imposes "costs mandated by the state" under Government Code section 17514.

Representation at Interrogation

Government Code section 3303, subdivision (i), provides that the peace officer "shall" have the right to be represented during the interrogation when a formal written statement of charges has been filed or whenever the interrogation focuses on matters that are likely to result in punitive action.

The claimant contended that Government Code section 3303, subdivision (i), results in reimbursable state mandated activities since additional professional and clerical time is needed to schedule the interview when the peace officer asserts the right to representation.

The Commission disagreed with the claimant's contention. Before the enactment of the test claim legislation, peace officers had the same right to representation under Government Code sections 3500 to 3510, also known as the Meyers-Milias-Brown Act (MMBA). The MMBA governs labor management relations in California local governments, including labor relations between peace officers and employers.[44]

Government Code section 3503, which was enacted in 1961, provides that employee organizations have the right to represent their members in their employment relations with public agencies. The California Supreme Court analyzed section 3503 in *Civil Service Association* v. *City and County of San Francisco*, a case involving the suspension of eight civil service employees. The court recognized an employee's right to representation under the MMBA in disciplinary actions.

> "We have long recognized the right of a public employee to have his counsel represent him at disciplinary hearings. (*Steen* v. *Board of Civil Service Commr*.

[44] *Santa Clara County Dist. Attorney Investigators Assn.* v. *County of Santa Clara* (1975) 51 Cal.App.3d 255.

(1945) 26 Cal.2d 716, 727; [Citations omitted.]) While *Steen* may have dealt with representation by a licensed attorney, the right to representation by a labor organization in the informal process here involved seems to follow from the right to representation contained in the Meyers-Milias-Brown Act and the right to representation recognized in *Steen*."[45]

Peace officers employed by school districts have similar rights under the Educational Employment Relations Act, beginning with Government Code section 3540.[46]

Based on the foregoing, the Commission found that the right to representation at the interrogation under Government Code section 3303, subdivision (i), *does not* constitute a new program or higher level of service under article XIII B, section 6 of the California Constitution.

Adverse Comments in Personnel File

Government Code sections 3305 and 3306 provide that no peace officer "shall" have any adverse comment entered in the officer's personnel file without the peace officer having first read and signed the adverse comment.[47] If the peace officer refuses to sign the adverse comment, that fact "shall" be noted on the document and signed or initialed by the peace officer. In addition, the peace officer "shall" have 30 days to file a written response to any adverse comment entered in the personnel file. The response "shall" be attached to the adverse comment.

Thus, the Commission determined that Government Code sections 3305 and 3306 impose the following requirements on employers:

- To provide notice of the adverse comment;[48]
- To provide an opportunity to review and sign the adverse comment;
- To provide an opportunity to respond to the adverse comment within 30 days; and
- To note on the document that the peace officer refused to sign the adverse comment and to obtain the peace officer's signature or initials under such circumstances.

The claimant contended that county employees have a pre-existing statutory right to inspect and respond to adverse comments contained in the officer's personnel file pursuant to Government Code section 31011. The claimant further stated that Labor Code section 1198.5 provides city employees with a pre-existing right to review, but not respond to, adverse comments. Thus, the claimant contended that Government Code sections 3305 and 3306 constitute a new program or higher level of service under article XIII B, section 6 of the California Constitution.

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[45] *Civil Service Assn., supra*, 22 Cal.3d 552, 568.

[46] Government Code section 3543.2, which was added in 1975 (Stats. 1975, c. 961) provides that school district employees are entitled to representation relating to wages, hours of employment, and other terms and conditions of employment.

[47] The court in *Aguilar* v. *Johnson* (1988) 202 Cal.App.3d 241, 249-252, held that an adverse comment under Government Code sections 3305 and 3306 include comments from law enforcement personnel and citizen complaints.

[48] The Commission found that notice is required since the test claim legislation states that "no peace officer shall have any adverse comment entered in the officer's personnel file *without the peace officer having first read and signed the adverse comment*." Thus, the Commission found that the officer must receive notice of the comment before he or she can read or sign the document.

As described below, the Commission found that Government Code sections 3305 and 3306 constitute a *partial* reimbursable state mandated program.

Due Process

Under due process principles, an employee with a property or liberty interest is entitled to notice and an opportunity to respond, either orally or in writing, prior to the disciplinary action proposed by the employer.[49] If the adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer or harms the officer's reputation and opportunity to find future employment, then the provisions of the test claim legislation which require notice and an opportunity to review and file a written response are already guaranteed under the due process clause.[50] Under such circumstances, the Commission found that the notice, review and response requirements of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution. Moreover, the Commission recognized that pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing notice and an opportunity to respond do not impose "costs mandated by the state".

However, the Commission found that under circumstances where the adverse comment affects the officer's property or liberty interest as described above, the following requirements imposed by the test claim legislation *are not* required by the due process clause:

- Obtaining the signature of the peace officer on the adverse comment, or
- Noting the peace officer's refusal to sign the adverse comment and obtain the peace officer's signature or initials under such circumstances.

The Department of Finance and the State Personnel Board stated the following: "If the adverse comment can be considered a 'written reprimand,' however, the POBOR required 'notice' and the 'opportunity to respond' may already be required by due process. The extent of due process due an employee who suffers an official reprimand is not entirely clear."

The Commission agreed that if the adverse comment results in, or is considered a written reprimand, then notice and an opportunity to respond is already required by the due process clause and are not reimbursable state mandated activities. However, due process does not require the local agency to obtain the signature of the peace officer on the adverse comment, or note the peace officer's refusal to sign the adverse comment and obtain the peace officer's signature or initials under such circumstances. Accordingly, the Commission found that these two activities required by the test claim legislation when an adverse comment is received constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514 even where there is due process protection.

The Legislature has also established protections for local public employees similar to the protections required by Government Code sections 3305 and 3306 in statutes enacted prior to the test claim legislation. These statutes are discussed below.

[49] *Skelly, supra,* 15 Cal.3d 194.

[50] *Hopson, supra,* 139 Cal.App.3d 347.

Existing Statutory Law Relating to Counties

Government Code section 31011, enacted in 1974,[51] established review and response protections for county employees. That section provides the following:

> "Every county employee shall have the *right to inspect and review* any official record relating to his or her performance as an employee or to a grievance concerning the employee which is kept or maintained by the county; provided, however, that the board of supervisors of any county may exempt letters of reference from the provisions of this section.
>
> The contents of such records shall be made available to the employee for inspection and review at reasonable intervals during the regular business hours of the county.
>
> The county shall provide an opportunity for the employee to *respond* in writing, or personal interview, to any information about which he or she disagrees. Such response shall become a permanent part of the employee's personnel record. The employee shall be responsible for providing the written responses to be included as part of the employee's permanent personnel record.
>
> *This section does not apply to the records of an employee relating to the investigation of a possible criminal offense*." (Emphasis added.)

Therefore, the Commission determined that under existing law, counties are required to provide a peace officer with the opportunity to review and respond to an adverse comment *if* the comment *does not* relate to the investigation of a possible criminal offense.[52] Under such circumstances, the Commission found that the review and response provisions of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service.

However, even if the adverse comment *does not* relate to the investigation of a possible criminal offense, the Commission found that the following activities required by the test claim legislation were not required under existing law:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, the Commission found that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, the Commission found that when the adverse comment *does* relate to the investigation of a possible criminal offense, the following activities constitute a new program or

[51] Stats. 1974, c. 315.

[52] The Commission found that Government Code section 31011 does *not* impose a notice requirement on counties since section 31011 does not require the county employee to review the comment *before* the comment is placed in the personnel file.

higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Existing Statutory Law Relating to Cities and Special Districts

Labor Code section 1198.5, enacted in 1975,[53] established review procedures for public employees, including peace officers employed by a city or special district. At the time the test claim legislation was enacted, Labor Code section 1198.5 provided the following:

> "(a) Every employer shall at reasonable times, and at reasonable intervals as determined by the Labor Commissioner, upon the request of an employee, permit that employee to inspect such personnel files which are used or have been used to determine that employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.
>
> (b) Each employer subject to this section shall keep a copy of each employee's personnel file at the place the employee reports to work, or shall make such file available at such place within a reasonable period of time after a request therefor by the employee. *A public employer shall, at the request of a public employee, permit the employee to inspect the original personnel files* at the location where they are stored at no loss of compensation to the employee.
>
> (c) *This section does not apply to the records of an employee relating to the investigation of a possible criminal offense*. It shall not apply to letters of reference.
>
> (d) If a local agency has established an independent employee relations board or commission, any matter or dispute pertaining to this section shall be under the jurisdiction of that board or commission, but an employee shall not be prohibited from pursuing any available judicial remedy, whether or not relief has first been sought from a board or commission.
>
> (e) This section shall apply to public employers, including, but not limited to, every city, county, city and county, district, and every public and quasi-public agency. This section shall not apply to the state or any state agency, and shall not apply to public school districts with respect to employees covered by Section 44031 of the Education Code. Nothing in this section shall be construed to limit the rights of employees pursuant to Section 31011 of the Government Code or

[53] Stats. 1975, c. 908, § 1.

Section 87031 of the Education Code, or to provide access by a public safety employee to confidential preemployment information."[54] (Emphasis added.)

Therefore, the Commission determined that under existing law, cities and special districts are required to provide a peace officer the opportunity to review the adverse comment *if* the comment *does not* relate to the investigation of a possible criminal offense.[55] Under such circumstances, the Commission found that the review provisions of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service.

However, even if the adverse comment *does not* relate to the investigation of a possible criminal offense, the Commission found that the following activities required by the test claim legislation were not required under existing law:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, the Commission found that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, the Commission found that when the adverse comment *does* relate to the investigation of a possible criminal offense, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Existing Statutory Law Relating to School Districts

Education Code section 44031 establishes notice, review and response protections to peace officers employed by school districts. Section 44031 provides in relevant part the following:

[54] Labor Code section 1198.5 was amended in 1993 to delete all provisions relating to local public employers (Stats. 1993, c. 59.) The Legislature expressed its intent when enacting the 1993 amendment "to relieve local entities of the duty to incur unnecessary expenses…"

[55] The Commission found that Labor Code section 1198.5 does *not* impose a notice requirement on counties since section 1198.5 does not require the city or special district employee to review the comment *before* the comment is placed in the personnel file.

> "(a) Materials in personnel files of employees that may serve as a basis for affecting the status of their employment are to be made available for the inspection of the person involved.
>
> "(d) *Information of a derogatory nature, except [ratings, reports, or records that were obtained in connection with a promotional examination], shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon*. An employee shall have the right to enter, and have attached to any derogatory statement, his own comments thereon…." (Emphasis added.)

Education Code section 87031 provides the same protections to community college district employees.[56]

Therefore, the Commission determined that existing law, codified in Education Code sections 44031 and 87031, requires school districts and community college districts to provide a peace officer with notice and the opportunity to review and respond to an adverse comment *if* the comment *was not* obtained in connection with a promotional examination. Under such circumstances, the Commission found that the notice, review and response provisions of Government Code sections 3305 and 3306 do *not* constitute a new program or higher level of service.

However, even when Education Code sections 44031 and 87031 apply, if the adverse comment *was not* obtained in connection with a promotional examination, the Commission found that the following activities required by the test claim legislation were not required under existing law:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, the Commission found that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, the Commission found that when the adverse comment is obtained in connection with a promotional examination, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

[56] Education Code sections 44031 and 87031 were derived from Education Code section 13001.5, which was originally added by Statutes of 1968, Chapter 433.

CONCLUSION

Based on the foregoing analysis, the Commission concluded that the test claim legislation constitutes a partial reimbursable state mandated program pursuant to article XIII B, section 6 of the California Constitution for the following reimbursable activities:

1. Providing the opportunity for an administrative appeal for the following disciplinary actions (Gov. Code, § 3304, subd. (b)):

    - Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e.; the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
    - Transfer of permanent, probationary and at-will employees for purposes of punishment;
    - Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
    - Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

2. Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
3. Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)
4. Tape recording the interrogation when the employee records the interrogation. (Gov. Code, § 3303, subd. (g).)
5. Providing the employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories (Gov. Code, § 3303, subd. (g)):

    (a) The further proceeding is not a disciplinary action;

    (b) The further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e., the charges supporting the dismissal doe not harm the employee's reputation or ability to find future employment);

    (c) The further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;

    (d) The further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;

    (e) The further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.

6. Producing transcribed copies of any notes made by a stenographer at an interrogation, and reports or complaints made by investigators or other persons, except those that are deemed

confidential, when requested by the officer in the following circumstances (Gov. Code, § 3303, subd. (g)):

(a) When the investigation *does not* result in disciplinary action; and

(b) When the investigation results in:

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
- A transfer of a permanent, probationary or at-will employee for purposes of punishment;
- A denial of promotion for a permanent, probationary or at-will employee for reasons other than merit; or
- Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career of the employee.

6. Performing the following activities upon receipt of an adverse comment (Gov. Code, §§ 3305 and 3306):

School Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then schools are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Counties

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then counties are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Cities and Special Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then cities and special districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

1100 K Street
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October 29, 2009

Paula Higashi
Executive Director
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA 95814

RE: **Revised Notice**
Legislatively-Determined Mandate
Post Election Manual Tally (PEMT)

Dear Executive Director Higashi:

It is the intent of the California State Association of Counties (CSAC) to work with the Department of Finance in following the process set forth in Government Code section 17573 to develop a Legislatively Determined Mandate (LDM) for the both sets of Post Election Manual Tally emergency regulations, the first, issued October 21, 2008, referred to by the Secretary of State as CCROV #08304 and the second, issued on March 24, 2009, referred to by the Secretary of State as CCROV #009048.

By copy of this letter to Carla Castañeda, Department of Finance, we are providing notice of our intent. CSAC requests that the statute of limitation for the filing of a test claim be tolled as of the date of the first notice, October 22, 2009, pursuant to Government Code section 17573, subdivision (b).

While the joint request is pending, the DOF or CSAC shall notify the CSM of actions taken as set forth below, in accordance with Government Code section 17573, subdivision (g):

- Provide the CSM with a copy of any communications re development of a joint request, and a copy of a joint request when it is submitted to the Legislature.
- Notify the CSM of the date of (A) the Legislature's action on a joint request in the Budget Act, or (B) the Department of Finance's decision not to submit a joint request.

The principal contact person for the RRM shall be Carla Castañeda, Department of Finance, (916) 327-0103, extension 3090 or Jean Kinney Hurst, CSAC, (916) 327-7500, extension 515.

Sincerely,

Jean Kinney Hurst
Legislative Representative

cc: Carla Castañeda, Department of Finance

From: Carosone, Jeff [Jeff.Carosone@dof.ca.gov]
Sent: Tuesday, April 05, 2011 1:50 PM
To: Allan Burdick
Cc: Shelton, Carla; Heidi Palchik; Nancy Patton
Subject: RE: Mandate Issues for Possible Discussion the March 23rd Meeting

Hi, Allan.
As we discussed on the phone a couple of weeks ago, due to being short-staffed, competing priorities and workload, and our Unit's reorganization, I suggest you proceed on your own in terms of proposing RRMs because I am not sure when we will have the time to work on LDMs with your group.
Thanks,
Jeff

From: Allan Burdick [mailto:Allan_Burdick@mgtamer.com]
Sent: Thursday, March 10, 2011 10:24 AM
To: Carosone, Jeff; Shelton, Carla
Cc: Geoffrey Neill
Subject: Mandate Issues for Possible Discussion the March 23rd Meeting

Jeff and Carla,

Thanks you again for participating in the CSAC-League of Cities Advisory Committee on State Mandates meeting in January. Based on that meeting, I think you concluded we should discontinue joint efforts to pursue any legislative determined mandates at this time and that the Committee should proceed on our own to propose RRM's for selected parameters and guidelines to the Commission. If that is the case, I will initiate the process to notify the Commission that we are not proceeding with the Firefighter Bill of Rights (FBOR) or Post Election Manual Talley (PEMT) LDM's. Could you confirm my understanding? No hurry, but we need to notify the Commission.

For our meeting on Wednesday afternoon, March 23rd, the members would like to discuss the Budget and Program Realignment as it relates to mandates and also if the Administration has changed its position on the Open Meeting Act mandate for FY 2010-11. Based on the Second Appellate District decision on the CSBA AB 3632 lawsuit (attached), the court appears to have clarified that OMA was not suspended. Page 24 and 25 of that decision discuss the matter and concluded that a mandate is only suspended if it has specifically been identified by the Legislature in the Budget Act. It states "In other words, a local agency is not exempted from implementing a mandate if the mandate is simply omitted from the Budget Act. Instead, the mandate must be "specifically identified" in the schedule of reimbursable mandates that have an appropriation of zero."

The Committee is meeting in the CSAC first floor conference room from 1:30 p.m. to 4:30 p.m. The Controller is joining the Committee at 1:30 p.m., but I am sure they are interested in your comments if that time is best for you. If you could take 20 to 30 minutes to meet with the Committee, that should be enough with only those three topics. Do you think you will be able to join us?

I hope things are a little better for you now that the conference committee has finished it business. Let's just not hope they open everything up to be rehashed.

Allan
Allan Burdick
CSAC SB 90 Service
2001 P Street, Suite 200
Sacramento, CA 95811
Office: (916) 443-9236 x 4513

BILL ANALYSIS

Date of Hearing: May 5, 2010

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Felipe Fuentes, Chair

AB 2023 (Saldana) - As Amended: April 27, 2010

Policy Committee: ElectionsVote:7-0

Urgency: No State Mandated Local Program: No Reimbursable:

SUMMARY

This bill authorizes the Secretary of State (SOS) to conduct a voluntary pilot program in five or more counties evaluating the use of post-canvas "risk-limiting" audits of election results. Specifically, this bill:

1) Defines "risk-limiting audit" as a hand tally of votes in one or more "audit units" (precinct, set of ballots, or a single ballot) that continues in additional audit units until there is strong statistical evidence that the electoral outcome is correct. If counting additional audit units does not provide strong statistical evidence the electoral outcome is correct, the audit continues until there has been a full manual tally to determine the correct electoral outcome of the audited contest.

2) Requires each county that wishes to participate in the pilot program to conduct a post-canvas risk-limiting audit, as specified, of one or more election contests during 2011.

3) Requires the SOS, by March 1, 2012, to report to the Legislature on the effectiveness and efficiency of the risk-limiting audits, including a comparison of costs with the one percent manual tallies required under current law.

FISCAL EFFECT

1) Minor absorbable costs to the SOS, which will utilize resources already devoted to the post election manual tally to oversee the pilot program and provide the evaluation report.

2) Any costs to counties would be non-reimbursable, as

participation in the pilot is voluntary. To the extent that risk-limiting audits are deemed cost-effective and replace the one percent tally, counties would realize ongoing savings.

COMMENTS

1)Background . California law requires elections officials in counties that use voting systems to tabulate ballots to manually tally the ballots cast in one percent of the precincts, as a check to ensure voting system accuracy. Although provisions governing the one percent manual tally have been updated to reflect changes in voting technology and to provide additional public notice and reporting requirements, the one percent requirement has not significantly changed since first enacted in 1965.

2)Purpose . In 2007, the SOS established a Post-Election Audit Standards Working Group, which published recommendations for how California can improve its elections auditing process. According to the author, the pilot program proposed in AB 2023, which is sponsored by the Secretary, implements many of the working group's recommendations.

Analysis Prepared by : Chuck Nicol / APPR. / (916) 319-2081

THE UNITED STATES DEPARTMENT of JUSTICE

THE COMMON LAW IS THE WILL OF Mankind ISSUING FROM THE Life OF THE People

SEARCH THE SITE

SEARCH

U.S. Department of Justice
Civil Rights Division
Voting Section

Frequently Asked Questions

What federal law protects me from discrimination in voting?

The Voting Rights Act of 1965 protects every American against racial discrimination in voting. This law also protects the voting rights of many people who have limited English skills. It stands for the principle that everyone's vote is equal, and that neither race nor language should shut any of us out of the political process. You can find the Voting Rights Act in the United States Code at 42 U.S.C. 1973 to 1973.

Where did the Voting Rights Act come from?

Congress passed the Voting Rights Act in 1965, at the height of the civil rights movement in the South, a movement committed to securing equal voting rights for African Americans. The action came immediately after one of the most important events of that movement, a clash between black civil rights marchers and white police in Selma, Alabama. The marchers were starting a 50-mile walk to the state capital, Montgomery, to demand equal rights in voting, when police used violence to disperse them. What happened that day in Selma shocked the nation, and led President Johnson to call for immediate passage of a strong federal voting rights law.

GENERAL INFORMATION
CIVIL RIGHTS DIVISION
VOTING SECTION

CONTACT

Toll-free - (800) 253-3931
Telephone - (202) 307-2767
Fax - (202) 307-3961
Email - voting.section@usdoj.gov

By letter to the addresses below:

MAILING ADDRESS

United States Postal Service mail (including certified mail and express mail) should be addressed to:

Voting Section
Civil Rights Division
U.S. Department of Justice
Room 7254 - NWB
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Deliveries by overnight express service (such as Airborne, DHL, Federal Express or UPS) should be addressed to:

Voting Section
Civil Rights Division
U.S. Department of Justice
Room 7254 - NWB
1800 G St., N.W.
Washington, DC 20006

DEPARTMENT of JUSTICE
ACTION CENTER

What does the Voting Rights Act do?

The Voting Rights Act bans all kinds of racial discrimination in voting. For years, many states had laws on their books that served only to prevent minority citizens from voting. Some of these laws required people to take a reading test or interpret some passage out of the Constitution in order to vote, or required people registering to vote to bring someone already registered who would vouch for their "good character." The Voting Rights Act made these and other discriminatory practices illegal, and gave private citizens the right to sue in federal court to stop them. In recent times, courts have applied the Act to end race discrimination in the method of electing state and local legislative bodies and in the choosing of poll officials.

What does the Justice Department do to enforce the Voting Rights Act?

Under Section 2 of the Act the Department may sue in federal court to challenge those practices that it has determined are racially discriminatory. The Department has a description of the lawsuits of this nature that it has filed.Several of this nature are filed every year. The Department also works with states and localities to help them understand the Voting Rights Act and avoid discrimination in voting, and may send federal observers to monitor elections when such monitoring is deemed necessary.

Will the Voting Rights Act expire?

No. The Voting Rights Act is a permanent federal law. Moreover, the equal right to vote regardless of race or color is protected by the Fifteenth Amendment to the U.S. Constitution, which has been part of our law since the end of the Civil War. And in case after case, our courts have held that the right to vote is fundamental. Voting rights will not expire.

However, some sections of the Voting Rights Act needed to be renewed to remain in effect. In 2006, Congress passed the Voting Rights and Reauthorization and Amendments Act of 2006 which renews nearly all of the temporary provisions of the Voting Rights Act. The rest of the Voting Rights Act also will continue to prohibit discrimination in voting.

What kinds of racial discrimination in voting are there, and what does the Voting Rights Act do about them?

The Voting Rights Act is not limited to discrimination that literally excludes voters from the polls based on race. Section 2 of the Act (42 U.S.C. 1973) makes it illegal for any state or local government to use election processes that are not equally open to voters based on race, or that give voters less opportunity than other voters to participate in the political process and elect representatives of their choice to public office based on race.

Is it prohibited to draw majority-minority districts?

No. Over 30 years ago the Supreme Court held that jurisdictions are free to draw majority-minority election districts that follow traditional, non-racial districting considerations, such as geographic compactness and keeping communities of interest together. Later Supreme Court decisions have held that drawing majority-minority districts may be required to ensure compliance with the Voting Rights Act.

While it remains legally permissible for jurisdictions to take race into account when drawing election districts, the Supreme Court has held that the Constitution requires a strong justification if racial considerations predominate over traditional districting principles. One such justification may be the need to remedy a violation of Section 2 of the Voting Rights Act. While such a remedy may include election district boundaries that compromise traditional districting principles, such districts must be drawn where the Section 2 violation occurs and must not compromise traditional principles more than is necessary to remedy the violation.

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What other voting rights laws does the Justice Department enforce?

The National Voter Registration Act of 1993 42 U.S.C. 1973gg to 1073gg-1 requires states to make voter registration opportunities for federal elections available through the mail and when people apply for or receive services at a driver's license, public assistance or disability services. The NVRA also provides rules regarding maintenance of voter registration lists for federal elections.

The Uniformed and Overseas Citizens Absentee Voting Act of 1986 (42 U.S.C. 1973ff to 1973ff-7) requires states to make sure that members of our uniformed forces who are stationed away from home, their families, and U.S. citizens who are overseas, can register and vote absentee in federal elections.

The Voting Accessibility for the Elderly and Handicapped Act of 1984 (42 U.S.C. 1973ee to 1973ee-6) requires states to take certain steps to make the voting process accessible to people with disabilities.

The Help America Vote Act of 2002 (42 U.S.C. 15301 to 15545) is designed to improve the administration of elections in the United States by establishing minimum standards for states to follow in several key aspects of election administraiton in federal elections.

Does the Voting Rights Act protect language minorities?

Yes. The Voting Rights Act makes it illegal to discriminate in voting based on someone's membership in a language minority group. The idea behind the Voting Rights Act's minority language provisions is to remove language as a barrier to political participation, and to prevent voting discrimination against people who speak minority languages. The Justice Department enforces these protections by bringing lawsuits in federal court, by sending federal observers to monitor elections, and by working with local jurisdictions to improve their minority language election procedures.

The Voting Rights Act further protects minority language group members by requiring particular jurisdictions to print ballots and other election materials in the minority language as well as in English, and to have oral translation help available at the polls where the need exists. The formulas for determining which jurisdictions must do this are based on the share of the local population in need, and can be found in Sections 4(f) and 203 of the Voting Rights Act (42 U.S.C. 1973b(f) and 1973aa-1a). The Act requires bilingual election procedures in various states and counties for voters who speak Spanish, Chinese, Filipino, Japanese, Vietnamese, and more than a dozen Native American and Alaskan Native languages.

The list of jurisdictions covered by the Act's minority language requirements is printed in the Code of Federal Regulations at the end of 28 C.F.R. Part 55. These are the Justice Department's minority language guidelines; they set out the Department's interpretations of the law in detail, and explain how jurisdictions can best comply with it.

The guidelines start by saying jurisdictions should take "all reasonable steps" to enable language minority voters "to be effectively informed of and participate effectively in voting-connected activities." The guidelines also say that "a jurisdiction is more likely to achieve compliance . . . if it has worked with the cooperation . . . and to the satisfaction of organizations representing members of the applicable language minority group."

What are federal observers?

Federal observers are authorized by Section 8 of the Voting Rights Act to attend and observe voting and vote-counting procedures during elections. They are non-lawyers, hired and supervised by the federal Office of Personnel Management (OPM). They are trained by OPM and by the Justice Department to watch, listen, and take careful notes of everything that happens inside the polling place during an election, and are also trained not to interfere with the election in any way. They prepare reports that may be filed in court, and they can serve as witnesses in court if the need arises.

How do I get federal observers to monitor an election?

You can contact the Voting Section and explain where the need exists, what needs to be observed, and which minority voters are affected. We consider many such requests each year from organizations and individuals.

What responsibilities does the Justice Department have with regard to voter fraud or intimidation?

The administration of elections is chiefly a function of state government. However, federal authorities may become involved where there are possible violations of federal law. In cases where intimidation, coercion, or threats are made or attempts to intimidate, threaten or coerce are made to any person for voting or attempting to vote, the Department of Justice can consider whether there is federal jurisdiction to bring civil claims or criminal charges under federal law. Depending on the nature of the allegations, they may fall into the jurisdiction of different parts of the Department. If you have information about allegations of intimidation, please contact us.

If you have information about voter fraud in federal elections, please contact the nearest office of the FBI or your local U.S. Attorney's office or the Public Integrity Section of the Criminal Division.

What responsibilities does the Justice Department have with regard to campaign finance?

Generally, the Justice Department is not directly involved with campaign finance matters. Federal election campaign finance is the subject of a separate federal statute, the Federal Election Campaign Act of 1974. FECA matters are handled by the Federal Election Commission, 999 E Street, N.W., Washington,

D.C. 20463. Intentional violations of federal campaign finance laws are federal crimes, and are handled by the FBI. If you have a question about campaign finance in state elections, contact your state elections office.

Can the Justice Department run elections to make sure they are fair?

The Justice Department does not administer elections; that is the responsibility of state and local election officials. The Department sometimes sends observers to monitor elections for compliance with federal voting rights laws. If you have a question about election practices, candidate qualifying rules, the location of polling places, or other voting procedures in your jurisdiction, contact your local or state election officials. If you have information about possible violations of federal voting rights law, please call or write us.

If I lost my right to vote because I was convicted of a felony, how can I get it restored?

Each state has different rules on the rights of convicted felons to vote and on restoration of those rights once it has been lost. Contact your state election board for the most current law.

How can I make a complaint regarding possible violations of the federal voting rights laws?

We encourage anyone with a complaint about possible violations of the federal voting rights law to contact us. There are no special forms to use or procedures to follow--just call us toll-free at (800) 253-3931, or write to us.

What is the role of the Civil Rights Division in enforcing HAVA?

Under Section 401 of HAVA, the Attorney General enforces the uniform and nondiscriminatory election technology and administration requirements that apply to the States under Sections 301, 302, and 303 of Title III.

Does the Civil Rights Division distribute federal

funds under HAVA?

The Civil Rights Division has no role in distributing federal funds under HAVA. Any questions regarding funding should be directed to the federal agencies with responsibility for those programs.

To what elections does Title III of HAVA apply?

Title III of HAVA applies only to elections for federal office. HAVA does not contain a definition of the term "election for federal office." However, Section 3 of the National Voter Registration Act of 1993, 42 U.S.C. 1973gg-1(1)&(2), defines

"election" and "federal office" as those terms appear in the Federal Election Campaign Act of 1971 (2 U.S.C. 431(1) & (3)). Other definitions or descriptions of the scope of elections for federal office appear in the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 42 U.S.C. 1973ff-1(a)(1) & 1973ff-6(3); the Voting Accessibility for the Elderly and Handicapped Act of 1984, 42 U.S.C. 1973ee-6(3); and the Civil Rights Act of 1960, 42 U.S.C. 1974. It is the Department's view that the requirements of Title III of HAVA were intended to apply in any general, special, primary, or runoff election for the office of President or Vice President, including presidential preference primaries, and any general, special, primary, or runoff election for the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress from the 50 states, the District of Columbia, and the four Territories.

Does Title III of HAVA apply to all States?

Section 901 of HAVA defines the term "State" to include all 50 States as well as the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, and the United States Virgin Islands. However, some parts of Title III do apply differently depending on the State in question.

Does a State have to comply with Title III of HAVA if it does not seek or accept federal funding?

Unless a State is specifically excluded from one of HAVA's requirements, each State must comply with Sections 301, 302, and 303 of Title III of HAVA as of the effective dates in those sections. This is true regardless of whether that State chooses to accept federal funding under Title I or Title II.

National Voter Registration Act (NVRA) - Questions and Answers about Sections 5, 6, 7, and 8

Go to the Civil Rights Division Home Page
Go to the Department of Justice Home Page

--- F.Supp.2d ----, 2013 WL 5770560 (N.D.Cal.)
(Cite as: 2013 WL 5770560 (N.D.Cal.))

Only the Westlaw citation is currently available.

United States District Court, N.D. California.
California Council of the Blind, et al., Plaintiffs,
v.
County of Alameda, et al., Defendants.

Case No. 13–cv–03443–JCS
3:13–cv–03443October 16, 2013
Filed October 24, 2013

Background: Five blind registered voters, together with membership organization of blind and visually impaired individuals, brought action against county and its Interim Registrar of Voters, alleging that defendants, by failing to ensure that voting machines accessible to the blind and visually impaired could be activated and operated by poll workers, required these individuals to vote with the assistance of third parties in violation of the Americans with Disabilities Act (ADA), the Rehabilitation Act, and California's Election Code and Government Code. Defendants filed motion to dismiss.

Holdings: The District Court, Joseph C. Spero, United States Magistrate Judge, held that:
(1) the ADA and the Rehabilitation Act provide the blind and visually impaired a right to independent and private voting;
(2) plaintiffs stated a claim under the ADA and the Rehabilitation Act;
(3) plaintiffs stated a claim under the California statute providing that no individual shall, on the basis of disability, be denied full and equal access to benefits of program administered by state or state agency; but
(4) plaintiffs failed to state a claim under the provision of the California Election Code requiring at least one accessible voting system per polling place for the blind and visually impaired.

Motion granted in part and denied in part.

West Headnotes

[1] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by reason of handicap, disability, or illness. Most Cited Cases

Section 504 of the Rehabilitation Act and Title II of the ADA are similar in purpose and scope. Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[2] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by reason of handicap, disability, or illness. Most Cited Cases

To plead a cause of action under Title II of the ADA and § 504 of the Rehabilitation Act, a plaintiff must allege three elements: (1) that he or she is a qualified individual with a disability, (2) that he or she was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity, and (3) that such exclusion, denial of benefits, or discrimination was by reason of his or her disability. Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[3] Civil Rights 78 1017

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1017 k. In general. Most Cited Cases

Ninth Circuit broadly construes the scope of both the Rehabilitation Act and the ADA based on the text of the statute and legislative history. Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[4] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by reason of handicap, disability, or illness. Most Cited Cases

Ninth Circuit construes the ADA's broad language as bringing within its scope anything a public entity does. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[5] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by reason of handicap, disability, or illness. Most Cited Cases

To determine whether plaintiffs stated a claim under the ADA and Rehabilitation Act, the court had to consider whether plaintiffs' allegations showed that they had been denied "meaningful access" to county's services, programs, or activities. Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[6] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by reason of handicap, disability, or illness. Most Cited Cases

To challenge a facially neutral government policy on the ground that it has a disparate impact on people with disabilities, the policy must have the effect of denying meaningful access to public services. Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[7] Civil Rights 78 1302

78 Civil Rights
78III Federal Remedies in General
78k1302 k. Administrative agencies and proceedings. Most Cited Cases

When considering the "meaningful access" requirement of ADA, courts in the Ninth Circuit are guided by the statute's specific implementing regulations. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[8] Civil Rights 78 1302

78 Civil Rights
78III Federal Remedies in General
78k1302 k. Administrative agencies and proceedings. Most Cited Cases

In considering a claim under the ADA, pursuant to the principles of deference established in *Chevron*, the Department of Justice's (DOJ) Title II-implementing regulations should be given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Americans with Disabilities Act of 1990 §§ 202, 204, 42 U.S.C.A. §§ 12132, 12134.

[9] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by reason of handicap, disability, or illness. Most Cited Cases

Title II of the ADA and its implementing regulations, taken together, require public entities to take steps towards making existing services not just accessible, but equally accessible to people with communication disabilities, but only insofar as doing so does not pose an undue burden or require a fundamental alteration of their programs. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[10] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by reason of handicap, disability, or illness. Most Cited Cases

Under the terms of the ADA and the Rehabilitation Act, the covered entity must provide the blind and visually impaired meaningful access to private and independent voting. Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[11] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by reason of handicap, disability, or illness. Most Cited Cases

Allegations that, in the last two elections, county and election official failed to take affirmative steps to ensure that voting machines accessible to the blind and visually impaired could be activated and operated by poll workers, that technological developments made accessible voting machines at every polling site a feasible reality, that due to the lack of functioning accessible voting machines blind and visually impaired individuals were required to vote with the assistance of third parties, and that county and election official thus failed to provide meaningful access to private and independent voting stated claims for violation of Title II of the ADA and § 504 of the Rehabilitation Act. Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990 §§ 2, 202, 42 U.S.C.A. §§ 12101, 12132; 28 C.F.R. §§ 35.130(b)(1)(ii), 35.130(b)(7), 35.133(a), 35.160(b)(1), 35.160(b)(2).

[12] Civil Rights 78 1020

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1020 k. Accommodations in general. Most Cited Cases

In enacting the ADA, Congress intended for accommodations provided to individuals with disabilities to keep pace with the rapidly changing technology of the times. Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132.

[13] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by reason of handicap, disability, or illness. Most Cited Cases

Rather than providing a set of freestanding

rights or purporting to name the various rights of individuals with disabilities in an exhaustive list, Title II of the ADA and § 504 of the Rehabilitation Act grant individuals with disabilities the right to reasonable modifications to have meaningful access to a covered entity's services, programs, and activities, so long as that modification will not constitute an undue burden or fundamentally alter the nature of such program or activity. Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990 § 202, 42 U.S.C.A. § 12132

[14] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by reason of handicap, disability, or illness. Most Cited Cases

Allegations that, in the last two elections, county and election official failed to take affirmative steps to ensure that voting machines accessible to the blind and visually impaired could be activated and operated by poll workers, that technological developments made accessible voting machines at every polling site a feasible reality, that due to the lack of functioning accessible voting machines blind and visually impaired individuals were required to vote with the assistance of third parties, and that county and election official thus failed to provide meaningful access to private and independent voting stated a claim under the California statute providing that no individual shall, on the basis of disability, be denied full and equal access to benefits of program administered by state or state agency. Cal. Gov't Code § 11135.

[15] Election Law 142T 390

142T Election Law
142TVII Conduct of Election
142TVII(D) Time, Place, and Manner of Voting
142Tk385 Voting by Ballot
142Tk390 k. Assistance to voters. Most Cited Cases

Absent allegations that sufficient funds were available to implement objectives of statutory provision requiring at least one voting unit accessible to the blind and visually impaired and that pertinent "rules or regulations" had been adopted by the Secretary of State, blind registered voters and membership organization of blind and visually impaired individuals failed to state a claim under the provision of the California Election Code requiring at least one accessible voting system per polling place for the blind and visually impaired. Cal. Elec. Code § 19227.

[16] Election Law 142T 393

142T Election Law
142TVII Conduct of Election
142TVII(D) Time, Place, and Manner of Voting
142Tk392 Use of Voting Machines
142Tk393 k. In general. Most Cited Cases

Accessible voting machine that, on a systemic level, cannot be activated by poll workers does not "provide access" to individuals who are blind or visually impaired, as required by provision of the California Election Code requiring at least one accessible voting system per polling place for the blind and visually impaired. Cal. Elec. Code § 19227(b).

Christine Chuang, Laurence Wayne Paradis, Michael S. Nunez, Stuart John Seaborn, Disability Rights Advocates, Berkeley, CA, for Plaintiffs.

Raymond S. Lara, Oakland, CA, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

Dkt. No. 8

JOSEPH C. SPERO, United States Magistrate Judge

I. INTRODUCTION

***1** This action is brought by five blind registered voters of the County of Alameda, as well as California Council of the Blind, a membership organization of blind and visually impaired individuals (collectively, "Plaintiffs"). Defendants are the County of Alameda and Tim Dupuis, in his official capacity as the Interim Registrar of Voters for the County of Alameda ("Defendants"). Plaintiffs allege that in the last two elections, Defendants failed to ensure that voting machines accessible to the blind and visually impaired could be activated and operated by poll workers, and therefore required these individuals to vote with the assistance of third parties in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213, § 504 of the Rehabilitation Act, 29 U.S.C. § 794, as well as California Election Code § 19227 and California Government Code § 11135. Defendants filed a Motion to Dismiss ("Motion") under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. The Court held a hearing on the Motion on October 11, 2013, at 1:30 p.m. For the reasons stated below, the Motion to Dismiss is GRANTED in part and DENIED in part.[FN1]

FN1. The parties have consented to the jurisdiction of the undersigned magistrate judge pursuant to 28 U.S.C. § 636(c).

II. BACKGROUND

A. Factual Allegations

Plaintiffs allege that advancements in technology make it possible for blind and visually impaired individuals to vote privately and independently just as sighted voters do. Complaint ("Compl.") ¶ 4. Sequoia AVC Edge electronic voting machines ("accessible voting machines") utilize electronic ballots and possess an audio ballot feature that can read aloud instructions and voting options. *Id.* ¶ 3 1. When a tactile keyboard and headphones are connected to an accessible voting machine and the audio ballot is functioning properly, a blind voter can use the audio ballot feature and the tactile keypad to privately and independently complete and submit a ballot. *Id.*

In the past several public elections, the County of Alameda has provided at least one of these accessible voting machines at each of its polling sites. *Id.* ¶ 31. In fact, it is required to do so by California and federal law. *Id.* ¶¶ 4, 7. The Help America Vote Act ("HAVA"), 42 U.S.C. § 15301 *et seq.*, which came into effect January 1, 2006, requires every voting site in federal elections to provide at least one accessible voting machine that includes "nonvisual accessibility for the blind and visually impaired in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters[.]" *Id.* § 15481(a)(3)(A)(B). Similarly, California Elections Code § 19227 requires, subject to available funds, the provision of at least one voting machine at each polling site that enables the blind and visually impaired "to cast and verify all selections made by both visual and nonvisual means." Cal. Elec.Code § 19227.

According the Plaintiffs, the fact County of Alameda has provided accessible voting machines during the last two election cycles is insufficient. Plaintiffs allege that counties must take affirmative steps to ensure that accessible voting machines are fully operational at all polling sites from the moment the sites open on Election Day to the moment they are closed. *Id.* ¶ 6. Such affirmative steps, according to Plaintiffs, require counties to provide adequate training of poll workers on the appropriate set up and use of the machines, conduct adequate testing of each machine and the accessible features prior to opening the polling site, provide timely and skilled technical support services to poll-site staff, deploy replacement machines as needed in a timely manner, investigate non-functioning machines to determine the cause of the problems that arise, and identify and implement

solutions to such problems. *Id.*

***2** Plaintiffs allege that the County of Alameda has failed to take such affirmative steps to ensure that accessible voting machines functioned properly during the November 6, 2012 Election. As a result, multiple blind voters were denied their right to vote privately and independently at multiple poll sites. *Id.* ¶ 32. On November 6, 2012, the five Plaintiffs in this action each tried to vote privately and independently at four different polling sites using an accessible voting machine. *Id.* ¶¶ 11, 17–21. At each site, however, poll workers were unable to make the audio ballot feature, tactile keypads, and/or other accessible features of the machines function properly. *Id.* In the end, each of the five Plaintiffs was required to vote with the assistance of a third party, either a poll worker or a family member, if they were to vote at all. *Id.* ¶¶ 17–21.

Before voting with the assistance of a third party, three of the Plaintiffs attempted to use an accessible voting machine at another polling site. Plaintiff Martinez's designated polling site was the Kennedy Community Center in Union City. *Id.* ¶ 18. Plaintiff Martinez was sent to use the accessible voting machine at the Union City Library when the audio ballot feature and tactile keypad could not be activated for the Kennedy Community Center's accessible voting machine. Plaintiff Martinez returned to the Kennedy Community Center when the same problem arose at the Union City Library. *Id.*

Plaintiffs Rueda and Bunn had designated polling sites at the Ceasar Chavez Middle School in Union City. *Id.*¶¶ 20–21. When poll workers were unable to activate the audio ballot feature on either of the two accessible machines, Plaintiffs Rueda and Bunn were driven together to another polling site at a private home one mile away. However, they returned to Ceasar Chavez Middle School when the poll workers at the private home were also unable to activate the audio ballot feature for that site's accessible voting machine. *Id.*

Plaintiffs further allege that Defendants did not adequately respond when the accessible voting machines at various polling sites malfunctioned. For instance, a poll worker at The Bridge of Faith Fellowship Hall polling site in Hayward called the County Registrar's troubleshooting line after trying to activate the audio ballot feature of the accessible voting machine so Plaintiff Gardner could vote privately and independently. *Id.* ¶ 19. After some difficulty getting through to the troubleshooting line, someone from the County Registrar's office informed Plaintiff Gardner that she would have to wait for two hours for a replacement voting machine, with no guarantee that the accessible features would be able to function properly in the end. *Id.*

The Complaint alleges that the County's failure to ensure that the accessible features of its voting machines are functioning on Election Day is a result of its failure to: (1) develop and implement policies to ensure that its staff are trained on appropriate use and setup of its accessible voting machines; (2) ensure that its staff properly maintain and test the accessible features of such machines; and (3) maintain an adequate troubleshooting, maintenance, and replacement machine deployment system to ensure the functionality of its machines on Election Day. *Id.* ¶ 36.

B. Causes of Action

Plaintiffs assert four causes of action in the Complaint. Plaintiffs allege that the foregoing constitutes a violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131, *et seq.*, as well as § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Rehabilitation Act"). Plaintiffs also assert two state law claims under California Election Code § 19227 and California Government Code § 11135.

C. Motion to Dismiss

Defendants argue that Plaintiffs fail to state a claim under Title II of the ADA or § 504 of the Rehabilitation Act. Defendants' Notice of Motion and Motion to Dismiss Plaintiffs' Complaint

Pursuant to Rule 12(b)(1), (6) ("Motion"). Defendants contend that nothing in the ADA or the Rehabilitation Act create a right to vote privately and independently, and because Plaintiffs allege that they were able to vote with the assistance of a third party, they fail to state a claim under the ADA or the Rehabilitation Act as a matter of law. Defendants urge the Court to decline to exercise supplemental jurisdiction over the state law claims, and argue that in any event, Plaintiffs fail to state a claim under California Election Code § 19227 and California Government Code § 11135.

***3** Plaintiffs oppose Defendants' Motion on all grounds. Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' Complaint Pursuant to Rule 12(b)(1), (6) ("Opposition").

III. LEGAL STANDARD

A complaint may be dismissed for failure to state a claim for which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed.R.Civ.P. 12(b)(6). "The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint." *N. Star. Int'l v. Ariz. Corp. Comm'n,* 720 F.2d 578, 581 (9th Cir.1983). In ruling on a motion to dismiss under Rule 12(b)(6), the Court takes "all allegations of material fact as true and construe(s) them in the lights most favorable to the non-moving party." *Parks Sch. of Bus. v. Symington,* 51 F.3d 1480, 1484 (9th Cir.1990). The complaint need not contain "detailed factual allegations," but must allege facts sufficient to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 663, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 547, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

IV. DISCUSSION

A. Legal Standard—Discrimination under the ADA and Rehabilitation Act

[1]Section 504 of the Rehabilitation Act and Title II of the ADA are similar in purpose and scope. Title II of the ADA provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Section 504 of the Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

29 U.S.C. § 794(a). For purposes of this Motion, Plaintiffs' claims under § 504 of the Rehabilitation Act and Title II of the ADA may appropriately be considered together.[FN2]

> FN2. The Ninth Circuit has observed that, "on occasion ... 'there is no significant difference in the analysis of rights and obligations created by the two Acts.' " *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.,* 725 F.3d 1088, 1098 (9th Cir.2013) (quoting *Vinson v. Thomas,* 288 F.3d 1145, 1152 n. 7 (9th Cir.2002)). Indeed, "Congress used the earlier-enacted Section 504 as a model when drafting Title II." *K.M.,* 725 F.3d at 1098 (citing *Duvall v. Cnty. of Kitsap,* 260 F.3d 1124, 1135 (9th Cir.2001)). In *K.M.,* the Ninth Circuit identified the two main "material differences between the statutes" as: (1) non-coextensive jurisdictions, as "Section 504 governs all entities receiving federal funds (public or private), while Title II governs all public entities (federally funded or not)"; and (2) a stricter causal standard in the Rehabilitation Act, which

> requires a plaintiff "to show a denial of services '*solely by reason of*' disability, whereas for Title II, "a plaintiff need show only that discrimination on the basis of disability was a '*motivating factor*' for the decision." *K.M.*, 725 F.3d at 1099 (quotations omitted) (emphasis added). Neither party raises either of these differences in their substantive briefing for the Motion. Accordingly, the Court undertakes one analysis to consider whether Plaintiffs state a claim under both the ADA and the Rehabilitation Act.

***4** [2]To plead a cause of action under Title II of the ADA and § 504 of the Rehabilitation Act, a plaintiff must allege three elements: (1) that he or she is a "qualified individual with a disability"; (2) that he or she was "excluded from participation in or denied the benefits of a public entity's services, programs or activities, or was otherwise discriminated against by the public entity"; and (3) that "such exclusion, denial of benefits, or discrimination was by reason of his [or her] disability." *Weinreich v. Los Angeles Cnty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir.1997). In the Motion to Dismiss, Defendants only argue that Plaintiffs fail to establish the second element–that they were "excluded from participation in or denied the benefits of a public entity's services, programs or activities, or [were] otherwise discriminated against by the public entity." *Id.*; *see* Motion at 5.

[3][4]The Ninth Circuit has broadly construed the scope of both the Rehabilitation Act and the ADA based on the text of the statute and legislative history. The Rehabilitation Act covers "any program or activity receiving Federal financial assistance," and "defines 'program or activity' as 'all of the operations of' a qualifying local government." 29 U.S.C. § 794(a); *Barden v. City of Sacramento*, 292 F.3d 1073, 1076–77 (9th Cir.2002) (quoting 29 U.S.C. § 794(b)(1)(A)). "The legislative history of the ADA similarly supports construing the language generously, providing that Title II ... 'simply extends the anti-discrimination prohibition embodied in section 504 [of the Rehabilitation Act] *to all actions of state and local governments.*' " *Barden*, 292 F.3d at 1077 (quoting H.R.Rep. No. 101–485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367) (emphasis added in *Barden*). Therefore, the Ninth Circuit construes "the ADA's broad language as bringing within its scope anything a public entity does." *Barden*, 292 F.3d at 1076 (quotations and alterations omitted).

[5][6][7]Both parties note that to determine whether Plaintiffs state a claim under the ADA and Rehabilitation Act, the Court must consider whether Plaintiffs' allegations show they have been denied "meaningful access" to the County's services, programs or activities. Opposition at 4:1; Reply at 4:19; *Alexander v. Choate*, 469 U.S. 287, 301, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985) (holding that under § 504 of the Rehabilitation Act, "an otherwise qualified handicapped individual must be provided with *meaningful access* to the benefit that the grantee offers.") (emphasis added). Indeed, the Ninth Circuit has "relied on *Choate's* construction of Section 504 in ADA Title II cases, and [has] held that to challenge a facially neutral government policy on the ground that it has a disparate impact on people with disabilities, the policy must have the effect of denying meaningful access to public services." *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir.2013) ("*K.M.*"). However, when considering the "meaningful access requirement," courts in the Ninth Circuit are guided by the specific implementing regulations of the ADA. *Id.*

[8]The Department of Justice ("DOJ") was required under the ADA to promulgate regulations implementing the ADA. 42 U.S.C. § 12134. The Ninth Circuit has held that, "under the principles of deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the DOJ's Title II-implementing regulations should be given controlling weight unless they are arbitrary,

capricious, or manifestly contrary to the statute." *K.M.*, 725 F.3d at 1096. The ADA also mandates that its implementing regulations be "consistent" with certain regulations of the Rehabilitation Act, 42 U.S.C. § 12134, which are not promulgated by the DOJ, but rather the head of each executive agency "as may be necessary[.]" *See* 29 U.S.C. § 794(a).

***5** Several regulations promulgated under the ADA are relevant to this case. For instance, under the regulation governing "[g]eneral prohibitions against discrimination," public entities are prohibited from "providing any aid, benefit, or service" that "afford[s] a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is *not equal* to that afforded others." 28 C.F.R. § 35.130(b)(1)(ii) (emphasis added); see also 28 C.F.R. § 41.51 (Rehabilitation Act regulations). Public entities are also prohibited from utilizing "methods of administration ... [t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities [.]" 28 C.F.R. § 35.130(b)(3)(ii). Public entities are required to "make *reasonable modifications* in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *Id.* § 35.130(b)(7) (emphasis added).

Another regulation implementing the ADA, "the so-called 'effective communications regulation,' " *K.M.*, 725 F.3d at 1096, requires public entities to "take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are *as effective* as communications with others." 28 C.F.R. § 35.160(a)(1) (emphasis added). Under this regulation, public entities are required to "furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities ....*an equal opportunity to participate in, and enjoy the benefits of,* a service, program, or activity of a public entity." 28 C.F.R. § 35.160(b)(1). This regulation further specifies that "[i]n determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities." 28 C.F.R. § 35.160(b)(2). It also specifies that "[i]n order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as *to protect the privacy and independence* of the individual with a disability." *Id.*(emphasis added). FN3

FN3. The Ninth Circuit has held that "[i]nsofar as the Title II effective communications regulation has a Section 504 analog, ... it is the Section 504 communications regulation at 28 C.F.R. § 39.160, as that is the regulation with which Congress has specified that Title II communications regulations must be consistent." *K.M.*, 725 F.3d at 1100 (citing 42 U.C.S. § 12134(b)).

Furthermore, another Title II regulation governs the "[m]aintenance of accessible features." *See* 28 C.F.R. § 35.133. Under this regulation, public entities are required to "maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part." *Id.* § 35.133(a). Of course, the regulation further specifies that this requirement "does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs." *Id.* § 35.133(b).

[9]The Ninth Circuit has interpreted a separate Title II regulation to limit the scope of the other Title II regulations. *K.M.*, 725 F.3d at 1096 (noting that 28 C.F.R. § 135.164 "limits the application of" the requirements under the effective communications regulation). Under 28 C.F.R. §

135.164, public entities are not required "to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." *See id.* "The public entity has the burden to prove that a proposed action would result in undue burden or fundamental alteration...." *K.M.*, 725 F.3d at 1096 (citing 28 C.F.R. § 135.164). Thus, the Ninth Circuit has recently summarized the obligation of public entities under Title II as follows:

> ***6** Title II and its implementing regulations, taken together, require public entities to take steps towards making existing services not just accessible, but equally accessible to people with communication disabilities, but only insofar as doing so does not pose an undue burden or require a fundamental alteration of their programs.
>
> *K.M.*, 725 F.3d at 1097.

B. Whether Plaintiffs State a Claim under the ADA and Rehabilitation Act

[10]The Court first considers the parameters of the "service, program, or activity" at issue. 42 U.S.C. § 12132. While Defendants seek to narrowly frame the public service offered by the County of Alameda as "voting," Plaintiffs contend that the County of Alameda provides a broader service for sighted individuals to "vote privately and independently." This is the underlying issue in Defendants' Motion, as their principal argument is that the ADA and Rehabilitation Act do not provide a right to vote independently and privately.

In the preamble to the ADA, Congress wrote that it finds that "discrimination against individuals with disabilities persists in such critical areas as ... voting, and access to public service." 42 U.S.C. § 12101 (Findings and Purpose). Congress never specified that individuals with disabilities face discrimination with regard to voting *privately and independently*. Nor do the regulations implementing the ADA mention voting at all. Nevertheless, the Ninth Circuit has instructed that the scope of both the Rehabilitation Act and the ADA should be construed broadly. *Barden*, 292 F.3d at 1076 (construing "the ADA's broad language as bringing within its scope anything a public entity does.") (quotations omitted); *see also* 29 U.S.C. § 794(b)(1)(A) ("any program or activity receiving Federal financial assistance" is defined by the statute as "all of the operations of" a qualifying local government).

In *Barden*, the Ninth Circuit reversed the district court's determination that sidewalks are not a "service, program, or activity," and therefore not subject to the ADA's requirements. *Id.*The court reasoned that even though an ADA regulation did "not specifically address the accessibility of sidewalks, it does address curb ramps[,] ... [which] could not be covered unless the sidewalks themselves are covered." *Id.* at 1076. The Ninth Circuit found support in other circuit court decisions which broadly construed the ADA's coverage of a "service, program, or activity." *Id.* (citing *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir.1998) (finding that "the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does" and "include[s] all of the activities of a public entity."); *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 (2d Cir.1997) (finding that the phrase "programs, services, or activities" is "a catch-all phrase that prohibits discrimination by a public entity, regardless of the context"), *superseded on other grounds, Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 171 n. 7 (2d Cir.2001). The *Barden* court wrote that "[t]he focus of the inquiry, therefore, is not so much on whether a particular public function can technically be characterized as a service, program, or activity, but whether it is " 'a normal function of a governmental entity.' " *Barden*, 292 F.3d at 1076 (quoting *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731 (9th Cir.1999)).

***7** The Court need not decide this issue: even if

the service is "voting," one of the central features of voting, and one of its benefits, is voting privately and independently. Defendants do not dispute that on any given election day in the United States, most voters at the polls cast their ballots in private, without threat of interference by poll workers, the government, or curious onlookers. The provision and maintenance of voting systems that allow for such privacy is "a normal function of a government entity." *Barden*, 292 F.3d at 1076. Indeed, since the early part of the Twentieth Century, every State in this country has employed use of the secret ballot, also known as the "Australian ballot," for the majority of voters at the polls. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform,* 36 U. MICH. J.L. REFORM 483, 490 (2003) (citing L.E. Fredman, *The Australian Ballot: The Story of an American Reform*, MICHIGAN STATE UNIVERSITY PRESS, 30–31 (1968)).

Accordingly, under the terms of the ADA or the Rehabilitation Act, the covered entity must provide meaningful access to private and independent voting. Thus conclusion is buttressed by an analysis of the implementing regulations of the ADA. The DOJ's regulations implementing the ADA must be accorded *Chevron* deference "unless they are arbitrary, capricious, or manifestly contrary to the statute." *K.M.*, 725 F.3d at 1096.

[11]Under the effective communication regulation, Defendants are required to provide auxiliary aids "where necessary to afford individuals with disabilities ...*an equal opportunity to participate in, and enjoy the benefits of,* a service, program, or activity of a public entity." 28 C.F.R. § 35.160(b)(1) (emphasis added). Thus, even if the "service, program, or activity" provided by the County of Alameda is narrowly defined as "voting," the County has allegedly failed to provide Plaintiffs with the auxiliary aid necessary to provide them with "an equal opportunity to participate in, and enjoy the benefits of" voting. *Id.; see also* 28 C.F.R. § 35.130(b)(1)(ii) (prohibiting a public entity from providing any "aid benefit, or service that is *not equal* to that afforded others") (emphasis added).

Defendants argue that, with the assistance of a third party, Plaintiffs were provided an equal opportunity to vote at the November 6, 2012 Election. However, requiring blind and visually impaired individuals to vote with the assistance of a third party, if they are to vote at all, at best provides these individuals with an inferior voting experience "not equal to that afforded others." 28 C.F.R. § 35.130(b)(1)(ii). Blind and visually impaired voters are forced to reveal a political opinion that others are not required to disclose. Thus, the County cannot fulfill its obligation to ensure effective communication by providing third party assistants to blind and visually impaired voters, because "[i]n order to be effective, auxiliary aids and services must be provided ... in such a way as to protect the *privacy and independence* of the individual with a disability." 28 C.F.R. § 35.160(b)(2) (emphasis added).

An express purpose of the Rehabilitation Act is "to empower individuals with disabilities to maximize ... independence, and inclusion ... into society, through ... the guarantee of equal opportunity." 29 U.S.C. § 701(b)(1)(F). In *American Council of the Blind v. Paulson*, the D.C. Circuit held that this purpose of the Rehabilitation Act was frustrated by the fact various denominations of United States currency are not readily identifiable by the blind and visually impaired. 525 F.3d 1256 (D.C.Cir.2008). The court found that requiring blind and visually impaired individuals to either buy an expensive currency counter or rely on the kindness of strangers was in violation of the Rehabilitation Act. The court wrote that "the Rehabilitation Act's emphasis on independent living and self-sufficiency ensures that, for the disabled, the enjoyment of a public benefit is *not contingent* upon the cooperation of third persons." *Id.* at 1267–68 (emphasis added). The same reasoning applies here.

***8** Moreover, the regulations require auxiliary aids so that individuals with disabilities may "enjoy the benefits of" a government service. 28 C.F.R. § 35.160(b)(1). In Title III cases, Ninth Circuit has not lightly construed the regulations' mandate that individuals be able to "enjoy" the experience. In interpreting Title III's requirement that individuals with disabilities be allowed "the full and equal enjoyment" of a public accommodation, the Ninth Circuit has required movie theaters to offer seating not only in the front row of a theater, *see Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1133 (9th Cir.2003), and further required a movie theater to provide seating adjacent to wheelchair seating so a disabled individual may "enjoy" the company of his wife, *Fortyune v. American Multi–Cinema, Inc.*, 364 F.3d 1075, 1083 (9th Cir.2004). Even if blind and visually impaired voters can communicate their votes with the assistance of third parties, they certainly cannot "enjoy the benefits of" the secret ballot afforded to most other voters.

Even if Plaintiffs are entitled to vote privately and independently under the ADA and Rehabilitation Act, Defendants argue there was no discrimination because, according to the Complaint, Defendants provided at least one accessible voting machine at each polling site during the last two election cycles. Compl. ¶ 3 1. Plaintiffs also, however, plausibly allege that the County failed to properly train poll workers on how to operate the accessible features of the voting machines, failed to provide technical assistance when needed, and failed to provide adequate maintenance or replacement machines. *See* id.36. The ADA's implementing regulations require public entities to "maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities." 28 C.F.R. § 35.133(a). While this requirement "does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs," *see id.* § 35.133(b), the duration of, frequency of, and reason for the failure of accessible voting machines to operate properly is a question of fact. Assuming Plaintiff's allegations to be true, the accessible voting machines were not inoperable due to an "isolated or temporary interruption ... due to maintenance or repairs." *See id.*

Having found that Plaintiffs sufficiently allege they were excluded from the County's service of providing a private and independent voting system for voters at the polls, the next question is whether providing fully operable accessible voting machines at every polling site on Election Day is a "reasonable modification ... necessary to avoid discrimination on the basis of disability...." 28 C.F.R. § 35.130(b)(7). A proposed modification is unreasonable, and the County need not undertake the action, if "it can demonstrate [that the modification] would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 135.164.

Defendants do not argue that providing a functional, accessible voting machine at every polling site on Election Day will be an undue burden or fundamental alteration. Nor should they on a motion to dismiss, in light of the fact they bear the burden of proof on this point. *K.M.*, 725 F.3d at 1096 (citing 28 C.F.R. § 135.164). However, Defendants do note that no other court has previously held that the ADA and Rehabilitation Act require the provision of accessible voting machines. While this much is true, and the Court discusses differing views below, it is not surprising in light of recent technological advancements. According to the Complaint, technological developments make accessible voting machines at every polling site a feasible reality, and not a fundamental alteration or an undue burden. *See* Compl. ¶¶ 4–5, 35.

***9** [12]The legislative history of the ADA reveals that Congress intended for accommodations provided to individuals with disabilities to "keep pace with the rapidly changing technology of the

times":

> The Committee wishes to make it clear that technology advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities. Such advances may require public accommodations to provide auxiliary aids and services in the future which today they would not be required because they would be held to impose undue burdens on such entities.
>
> Indeed, the Committee intends that the types of accommodations and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times.

H.R. Rep. 101–485(II), at 108 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 391.

Indeed, in the context of Title III of the ADA, the Ninth Circuit has twice held that accommodations provided to individuals with disabilities must change as technology progresses. In *Baughman v. Walt Disney World Company*, the Ninth Circuit considered whether Disneyland was required to allow an individual to use a standing "Segway" in the amusement park in light of the fact she was uncomfortable when sitting in a wheelchair. 685 F.3d 1131 (9th Cir.2012). The Ninth Circuit noted that "[a]s new devices become available, public accommodations must consider using or adapting them to help disabled guests have an experience more akin to that of non-disabled guests." *Id.* at 1135. Moreover, in *Enyart v. Nat'l Conference of Bar Examiners, Inc.*, the Ninth Circuit rejected the argument that the provision of auxiliary aids contemplated in the ADA's implementing regulations are sufficient because "assistive technology is not frozen in time: as technology advances, testing accommodations should advance as well." 630 F.3d 1153, 1163 (9th Cir.2011); *see also Am. Council of Blind v. Astrue*, No. 05–4696–WHA, 2009 WL 3400686, at *20 (N.D.Cal. Oct. 20, 2009) (holding that while the Social Security Administration's practice of reading notices to blind individual was once sufficient, reading letters over the phone no longer constituted meaningful access because "great strides have been made in computer-aided assistance for the blind....").

Defendants cite a handful of cases in support of their position. Not one of these cases, however, decided the same issue presently before this Court, and should be distinguished on their facts and/or distinct legal analyses. To the extent these cases do stand for the proposition that the ADA and Rehabilitation Act do not provide the blind and visually impaired a right to independent and private voting, the Court must disagree with the reasoning.

Defendants primarily rely on *American Association of People with Disabilities v. Shelley*, 324 F.Supp.2d 1120 (C.D.Cal.2004), a case in which blind and visually impaired voters sought a temporary restraining order against California's Secretary of State after the issuance of two directives decertifying direct recording electronic ("DRE") voting machines for use in the November 2004 election. Although a type of DRE was conditionally certified in 2003, its use in the March 2, 2004 primary revealed "problems in the areas of testing and certification of software, reliability, accuracy, training, and security." *Id.* at 1124. The court denied the temporary restraining order in part because the plaintiffs' interest in voting privately and independently was outweighed by the public interest in the accuracy of the 2004 election. *Id.* at 1131.

***10** Defendants also cite *Taylor v. Onorato*, 428 F.Supp.2d 384 (W.D.Pa.2006), a case in which plaintiffs sought a preliminary injunction enjoining the County of Allegheny from switching from lever voting machines to touch screen voting machines because blind and visually impaired individuals would not be able to vote independently with the touch screen voting machines. The plaintiffs primarily based the lawsuit on § 301 of HAVA, but the *Onorato* court found that HAVA contained no

private cause of action. *Onorato,* 428 F.Supp.2d at 386–87. The ADA and Rehabilitation Act claims in *Onorato* did not have a strong factual basis in light of the fact that "disabled persons cannot vote privately and independently on the lever machines either." *Id.* at 388. Here, the opposite is true—accessible voting machines do afford blind and visually impaired voters an opportunity to case a secret ballot.

Of course, Defendants cite the *Shelley* and *Onorato* decisions for the courts' additional holdings that the plaintiffs would not prevail on the merits of their ADA and Rehabilitation Act claims. The *Shelley* court wrote:

> [T]he ADA does not require accommodation that would enable disabled persons to vote in a manner that is comparable in every way with the voting rights enjoyed by persons without disabilities. Rather, it mandates that voting programs be made accessible, giving a disabled person the opportunity to vote. Nothing in the Americans with Disabilities Act or its Regulations reflects an intention on the part of Congress to require secret, independent voting. Nor does such a right arise from the fact that plaintiff counties attempted to provide such an accommodation.

Id. at 1126. In *Onorato,* the court used almost identical language to find that "[n]either the Americans With Disabilities Act nor the Rehabilitation Act require an accommodation that enables disabled persons to vote in a manner that is comparable in every way with the manner in which persons without disabilities vote. Rather, the statutes mandate only that disabled persons are given the opportunity to vote." *Onorato,* 428 F.Supp.2d at 388.

[13]The Court respectfully disagrees. Neither the ADA nor the Rehabilitation Act provides a set of freestanding rights, such as the right to vote, or the right to vote independently. Nor do the ADA and Rehabilitation Act purport to name the various rights of individuals with disabilities in an exhaustive list. Title II of the ADA and § 504 of the Rehabilitation Act grant individuals with disabilities the right to reasonable modifications to have meaningful access to a covered entity's services, programs and activities, so long as that modification will not constitute an undue burden or fundamentally alter the nature of such program or activity—all without naming a particular service in the statute. Moreover, as discussed above, this Court concludes that voting privately and independently is one of the central features of voting which must be accorded so long as the modification is not an undue burden or a fundamental alteration of the service.

Defendants also cite a case from the Sixth Circuit which appears to hold that blind and visually impaired individuals are not entitled to private and independent voting under the ADA and/or Rehabilitation Act. *See Nelson v. Miller,* 170 F.3d 641 (6th Cir.1999). The *Nelson* court, however, never specifically considered whether, standing alone, the ADA or Rehabilitation Act required private and independent voting because the plaintiffs in *Nelson* admitted that "Congress [never] intended the ADA or [Rehabilitation Act] to specifically impose a right to secret ballot voting for blind voters *in all states.*" *Id.* at 650 (quoting Plaintiff–Appellants' Brief) (emphasis added in opinion). Plaintiffs premised the entire ADA/Rehabilitation Act analysis on the provisions of the Michigan Constitution. Therefore, the Sixth Circuit narrowed the analysis to whether the Michigan Legislature violated the Michigan Constitution's mandate "to preserve the secrecy of the ballot," MICH. CONST. art. 2 § 4, and found that it did not. *Id.*

***11** Defendants also cite a case from the Eleventh Circuit which arose when Florida, after the 2000 elections, sought to implement the use of the optical scan voting machines to solve the problem of "hanging chads." *See American Association of People with Disabilities v. Harris,*

647 F.3d 1093 (11th Cir.2011). The plaintiffs, blind and visually impaired voters of Florida, argued that the optical scan voting machines, by not enabling them to vote privately, violated § 12132 of the ADA, as well as regulations governing the alteration of facilities (28 C.F.R. § 35.151) and the provision of auxiliary aids for effective communication (28 C.F.R. § 35.160).

The district court separately considered whether there were violations of the regulations governing the alteration of facilities and effective communication, and granted the plaintiffs their requested injunction solely on grounds that a voting machine is a "facility" under 28 C.F.R. § 35.151(b)(1). Having found that voting machines were a "facility," the district court reasoned that, when altered, a facility must be "readily accessible" to individuals with disabilities "to the maximum extent possible...." *See id.* The Eleventh Circuit reversed the district court and vacated the injunction, limiting its holding to its conclusion that voting machines are not "facilities" under 28 C.F.R. § 35.151(b)(1). *Harris,* 647 F.3d at 1100–1107; *see also id.* at 1095 ("This opinion ... bases [the] outcome exclusively on the ground that voting machines are not 'facilities' under 28 C.F.R. § 35.151(b)(1)."). In this case, Plaintiffs do not argue that voting machines are facilities, and do not base their ADA claim on § 35.151.

While the holding in *Harris* is limited to the conclusion that voting machines are not "facilities" under § 35.151(b)(1), the Eleventh Circuit agreed with the district court that there was no violation of § 35.160 when the defendants failed to provide accessible voting machines as an auxiliary aid. *Harris,* 647 F.3d at 1107. The district court reasoned that because all three individual plaintiffs had been able to vote with third party assistance, there was no evidence they were unable to communicate as effectively as other voters. *See Am. Ass'n of People With Disabilities v. Hood,* 310 F.Supp.2d 1226, 1238 (M.D.Fla.2004). The Eleventh Circuit believed the district court's reasoning was supported by the Technical Assistance Manual for Title II, issued by the DOJ, which provides an illustrative example endorsing the use of third party assistants in certain circumstances:

> The election procedures specify that an individual who requests assistance will be aided by two poll workers, or by one person selected by the voter. C, a voter who is blind, protests that this method does not allow a blind voter to cast a secret ballot, and requests that the County provide him with a Brailled ballot. *A Brailled ballot, however, would have to be counted separately and would be readily identifiable, and thus would not resolve the problem of ballot secrecy.* Because County X can demonstrate that its current system of providing assistance is an effective means of affording an individual with a disability an equal opportunity to vote, the County need not provide ballots in Braille.

U.S. Dep't of Justice, Title II Technical Assistance Manual 1994 Supplement § II–7.1100 (1994), http://www.ada.gov/taman2up.html (last visited October 6, 2013) (emphasis added). Interestingly, the Eleventh Circuit quoted almost the entire illustrative example from the Technical Assistance Manual, but omitted the sentence italicized above. The Eleventh Circuit then reasoned that providing an assistant to a blind voter was sufficient because "the Plaintiff could read the ballot and communicate their choice (i.e., vote)." *Harris,* 647 F.3d at 1107; *see also Shelley,* 324 F.Supp.2d at 1126 n. 3 (citing the Technical Assistance Manual's comment on Braille as evidence that the ADA only "mandates that voting programs be made accessible, giving a disabled person the opportunity to vote," and does not provide a right to vote privately).

***12** The Court disagrees with the Eleventh Circuit's interpretation of the effective communications regulation. The illustrative example in the Technical Assistance Manual does not lend any support to the argument that the ADA

creates no right for the blind and visually impaired to vote privately and independently. The sentence omitted in the Eleventh Circuit's *Harris* opinion shows *why* assistance from a third party is equivalent to providing a Brailled ballot: "A Brailled ballot ... would have to be counted separately and would be readily identifiable, *and thus would not resolve the problem of ballot secrecy.*"

Moreover, the example from the Technical Assistance Manual arises in a particular technological circumstance: the requested modification is a Brailled ballot. The instant case depends on the technological advances in voting and in the accessibility of voting. The Court does not read the Technical Assistance Manual to exclude all technological modifications that might provide a more secret and independent ballot.

There are also substantial differences between Brailled ballots and accessible voting machines. Indeed, Judge Alsup from this district, after presiding over a bench trial, wrote in his findings of fact that "[l]ess than ten percent of the blind and visually impaired can read Braille." *Am. Council of Blind v. Astrue*, No. 05–04696 WHA, 2009 WL 3400686, at *8 (N.D.Cal. Oct. 20, 2009). Judge Alsup explained:

> Some blind and visually impaired individuals, especially those who are blind early in life, learn Braille in school. Those who learn it early can read it very quickly, effectively at a rate of 200 or 300 words a minute, including tables and charts. Those who have lost their vision later in life are less likely to learn Braille or, if they do, they usually cannot read it as fast.

Id. at *9. Thus, not only do Brailled ballots, unlike accessible voting machines, fail to allow the blind and visually impaired to cast a secret ballot, Brailled ballots can also only be used by a fraction of the voters who would use an accessible voting machine.

The Court also believes that the *Harris* court's narrow interpretation of the effective communications regulation conflicts with the language of the regulation. As discussed above, the regulation specifies that "[i]n order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability." 28 C.F.R. § 35.160(b)(2). A "public entity shall give primary consideration to the requests of individuals with disabilities." 28 C.F.R. § 35.160(b)(2). Moreover, auxiliary aids must "afford individuals with disabilities .... an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity." 28 C.F.R. § 35.160(b)(1).

Finally, the Court addresses Defendants' argument that the ADA and Rehabilitation Act should be interpreted in conjunction with HAVA, which requires an accessible voting machine at each polling site, but lacks a private cause of action. *See* 42 U.S.C. § 15511 (providing that the "Attorney General may bring a civil action against any State...."); *Onorato*, 428 F.Supp.2d at 386–87 (holding that HAVA contains no private cause of action); *cf. Crowley v. Nevada ex rel. Nevada Sec'y of State*, 678 F.3d 730, 736 (9th Cir.2012) ("we need not decide whether Crowley has a private cause of action under HAVA."). Defendants contend that because HAVA expressly requires the provision of accessible voting machines, but the ADA and Rehabilitation Act do not, the Court should infer that Congress intended to exclude this requirement in the ADA and Rehabilitation Act.

***13** Defendants' argument assumes that the text of HAVA "conflicts" with that of the ADA and Rehabilitation Act. The Court finds no such conflict. The HAVA mandates the provision of accessible voting machines for use by blind and visually impaired voters. The ADA mandates that individuals with disabilities be provided "meaningful access" to public services, so long as

the modification providing such access does not "fundamentally alter" the nature of the service. 28 C.F.R. § 35.130(b)(7). While these statutory schemes certainly overlap, they do not conflict. At best, the ADA and Rehabilitation Act differ from HAVA in that they do not include a specific mandate for accessible voting machines. That should hardly be surprising, however, given that accessible voting machines were invented long after both the Rehabilitation Act and ADA became law.

Accordingly, the Court finds that Plaintiffs have sufficient stated a claim under the ADA and Rehabilitation Act.

C. State Law Claims

Defendants also contend that Plaintiffs fail to state a claim under California Elections Code § 19227 and California Government Code § 11135. The Court addresses Plaintiffs' allegations under each statute below.

1. California Government Code § 11135

Section 11135 of the California Government Code provides, in relevant part, as follows:

> (a) No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. Notwithstanding Section 11000, this section applies to the California State University.
>
> (b) With respect to discrimination on the basis of disability, programs and activities subject to subdivision (a) shall meet the protections and prohibitions contained in Section 202 of the federal Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof, except that if the laws of this state prescribe stronger protections and prohibitions, the programs and activities subject to subdivision (a) shall be subject to the stronger protections and prohibitions.

Cal. Gov't Code § 11135. Subdivision (b) of § 11135 states that a violation of Title II of the ADA is a violation of § 11135. Subdivision (b) also states that California law may provide greater protections than the ADA. *See id.*

[14]Defendants contend that Plaintiffs fail to state a claim under § 11135 because they fail to state claim under Title II of the ADA. Having found that Plaintiffs state a claim under the ADA, the Court also finds that Plaintiffs state a claim under § 11135, and Defendants' argument fails.

2. California Elections Code § 19227

Section 19227 of the California Elections Code provides as follows:

> (a) The Secretary of State shall adopt rules and regulations governing any voting technology and systems used by the state or any political subdivision that provide blind and visually impaired individuals with access that is equivalent to that provided to individuals who are not blind or visually impaired, including the ability for the voter to cast and verify all selections made by both visual and nonvisual means.
>
> (b) At each polling place, at least one voting unit approved pursuant to subdivision (a) by the Secretary of State shall provide access to individuals who are blind or visually impaired.
>
> (c) A local agency is not required to comply with subdivision (b) unless sufficient funds are available to implement that provision. Funds received from the proceeds of the Voting Modernization Bond Act of 2002 (Article 3

(commencing with Section 19230)), from federal funds made available to purchase new voting systems, or from any other source except the General Fund, shall be used for that purpose.

***14** Cal. Elec.Code § 19227.

Defendants argue that Plaintiffs must plead three elements to state a claim under § 19227:(1) rules and regulations adopted by the Secretary of State governing the relevant voting technology; (2) failure to provide a voting unit at each polling place; and (3) sufficient funds for the local entity to comply with provisions. Defendants contend that Plaintiffs fail to plead the first and third elements of their claim under § 19227.

[15]The Court agrees with Defendants. Plaintiffs have not alleged, as required by subdivision (c), that sufficient funds are available to implement the objectives of subdivision (b). Cal. Elec.Code § 19227(c). *See id.* § 19227(c). Plaintiffs have identified no "rules or regulations" adopted by the Secretary of State. *See id.* § 19227(a). Plaintiffs' failure to do so is fatal to the § 19227 claim because subdivision (b), which requires at least one voting unit accessible to the blind and visually impaired, also requires that the one voting unit be "approved pursuant to subdivision (a) by the Secretary of State[.]" *Id.* § 19227(b). This was, at least, the interpretation of California's Voting Modernization Board [FN4] in 2004:

> It should also be noted that until the Secretary of State's Office formally adopts the regulations outlining the requirements to make voting systems equally accessible to persons who are blind and visually impaired, as required by Elections Code § 19227(a), the requirements of sub-section (b), to have one accessible voting equipment in each polling place, would not be enforceable.

Voting Authorization Board, Meeting Staff Report, July 22, 2004, available at http://www.sos.ca.gov/elections/vma/pdf/vmb/documents/vmb_authority_report.pdf (last visited October 8, 2013).

> FN4. "The Voting Modernization Board (VMB) was established by the passage of Proposition 41—Voting Modernization Act of 2002 ("Act"), approved by the voters on March 5, 2002. The purpose of this Act was to allow the state to sell $200 million in general obligation bonds to assist counties in the purchase of updated voting systems." Voting Authorization Board, Meeting Staff Report, July 22, 2004, available at http://www.sos.ca.gov/elections/vma/pdf/vmb/documents/vmb_ authority_ report.pdf (last visited October 8.2013).

[16]Defendants also argue that Plaintiffs allegations show that Defendants provided accessible voting machines in compliance with subdivision (b). However, § 19227 does not merely require one accessible voting Machine at each polling state. Rather, subdivision (b) expressly requires that the voting unit " *provide access* to individuals who are blind or visually impaired." Cal. Elec. Code § 19227(b). An accessible voting machine that, on a systemic level, cannot be activated by poll workers does not "provide access to individuals who are blind or visually impaired." *Id.*

Nevertheless, because there are no implementing regulations, Plaintiffs' claim under California Elections Code § 19227 is dismissed with prejudice.

V. CONCLUSION

***15** For the reasons stated below, Defendants' Motion to Dismiss is GRANTED in DENIED in part. Defendants have twenty (20) days from the date of this Order to file to the complaint.

IT IS S O ORDERED.

N.D.Cal., 2013

California Council of the Blind v. County of Alameda
--- F.Supp.2d ----, 2013 WL 5770560 (N.D.Cal.)

END OF DOCUMENT

DEPARTMENT OF FINANCE

EDMUND G. BROWN JR. ▪ GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

RECEIVED
March 25, 2014
Commission on
State Mandates

March 24, 2014

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Request for Continuance of Agenda Item and Comments
Post-Election Manual Tally (PEMT), 10-TC-08

Dear Ms. Halsey:

The Department of Finance has had the opportunity to review and consider the Commission's Final Staff Analysis and Proposed Statement of Decision (Proposed Decision) dated March 14, 2014, and requests that the Commission consider the below.

First, the Proposed Decision states that the test claim regulation (California Code of Regulations, title 2, section 20121) imposes "a new requirement to document and disclose to the public any variances between the semifinal official canvass results and the manual tally results for *nine percent* of the precincts." (Proposed Decision, p. 34, emphasis in original.) But as staff acknowledges, pre-existing law has always imposed a duty on counties to perform post-election manual tallies in certain limited circumstances. (Proposed Decision, p. 33.) Here, while the subject regulation has increased the size of the actual manual tally from 1 percent to 10 percent in specific circumstances, this increase is not "new" or "a higher level of service." Rather, this increase results in additional costs (i.e., increased sample size). (See *Lucia Mar Unified Sch. Dist. v. Honig* (1988) 44 Cal. 3d 830.) Moreover, the Proposed Decision mistakenly concludes that the requirement is new because it increases "public confidence in the accuracy of election results." (Proposed Decision, p. 12.) As noted above, post-election manual tallies have always existed. The mere increase in the number of ballots counted by counties does not correspond with increased duties or increased "public confidence." Accordingly, Finance respectfully asks the Commission to reconsider this determination and find no mandate.

Second, the Proposed Decision seems to suggest that HAVA (Help America Vote Act) requires locals to have at least one "direct recording electronic voting system or other voting system" to assist the visually impaired. (42 U.S.C § 15481 (a)(3).) While it is true that most voting systems have an electronic or mechanical component, the relied on HAVA provision is an "access" statute, requiring that individuals with disabilities, including the visually impaired, have the opportunity to vote independently and in private. It does not mandate a mechanical or electronic system. HAVA states that while a voter must be able to verify his or her selection in a private and independent manner, the term "'verify' may not be defined in a manner that makes it impossible for a paper ballot voting system. . ." (42 U.S.C § 15481 (c)(2).) And HAVA

specifically states that the methods of complying with this relied on section is left to the discretion of the state. (42 U.S.C § 15485.) Last, other sources, including the Secretary of State's State Plan (2008) show that the relied on provision of HAVA is about access and not a specific type of voting system. Thus, Finance asks that the Commission reconsider its determination of federal law in the Proposed Decision.

Finance also requests this item be continued to a future hearing so that Commission members and staff have sufficient time to review and, if necessary, seek additional comment to the above concerns.

If you have any questions regarding this letter, please contact Michael Byrne, Principal Program Budget Analyst at (916) 445-3274, Ext. 3093.

Sincerely,

for Tom Dyer
Assistant Program Budget Manager

Enclosure

Enclosure A

DECLARATION OF MICHAEL BYRNE
DEPARTMENT OF FINANCE
TEST CLAIM NO. 10-TC-08

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.

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.

3/24/2014
at Sacramento, CA

Michael Byrne

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On March 26, 2014, I served the:

> **Department of Finance Comments and Request Postponement of Hearing; and Notice of Postponement Approval and Request for Comment from Claimant and the Secretary of State on the Requirements Imposed by HAVA**
>
> *Post Election Manual Tally (PEMT), 10-TC-08*
> *Former California Code of Regulations, Title 2, Sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127; Register 2008, No.43*
> *County of Santa Barbara, Claimant*

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

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 March 26, 2014 at Sacramento, California.

Heidi J. Palchik
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 1/22/14

Claim Number: 10-TC-08

Matter: Post Election Manual Tally (PEMT)

Claimant: County of Santa Barbara

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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.)

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Santa Maria Branch Office
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Santa Maria, CA 93455

JOSEPH E. HOLLAND
COUNTY CLERK, RECORDER AND ASSESSOR

Exhibit I

RECEIVED
April 25, 2014
Commission on State Mandates

April 25, 2014

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA 95814

Re: Claim No. 10-TC-08 "Post Election Manual Tally (PEMT)" Claimant's comments to Department of Finance comments on the Commission on State Mandates Final Staff Analysis and Statement of Decision

Dear Ms. Halsey,

This letter is the County of Santa Barbara's (Claimant's) comments on the Department of Finance letter submitted to the Commission on March 25, 2014.

In its letter, the Department of Finance (DOF) requested that the Commission on State Mandates (CSM) staff reconsider its proposed decision based on two points. First, they allege that the subject regulations resulted in an increased cost to the one percent manual tally that was already required, not a "new mandate" or "higher level of service". Secondly, that the Help America Vote Act (HAVA) does not require a mechanical or electronic voting system in order to meet the requirement that "individuals with disabilities, including the visually impaired, have the opportunity to vote independently and in private."

In response to the first allegation, Santa Barbara County disputes the Department of Finance's interpretation. DOF argues that this increase is not "new" or a "higher level of service", but rather this increase results in additional costs, citing *Lucia Mar Unified School District v. Honig, (1988) 44 Cal. 3d 830*. *Lucia Mar* does not support DOF's position. *Lucia Mar* states that "local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state." *Lucia Mar, at 835*. In that case, the commission denied a school district's claim, finding no reimbursable mandate because, although Education Code section 59300 increased plaintiff's costs for educating students at state-operated schools, it did not impose on the districts a new program or higher level of service. The trial court and Court of Appeal agreed, but the Supreme Court reversed the judgment of the Court of Appeal, holding that Section 59300 does impose a new program or higher level of service. The additional 9% manual tally is a new program or higher level of service because the Post Election Manual Tally Requirements in Close Contest (PEMT) exceed the requirements of the one percent manual tally required by California Elections Code Section 15360. The requirements impose and increase in the actual level and quality of governmental services provided.

Toll Free Number: 1-800-SBC-VOTE **Website Address:** www. SBCVOTE.com
Santa Barbara (805) 568-2200, Fax (805) 568-2209 • **Santa Maria** (805) 346-8374, Fax (805) 346-8342 • **Lompoc** (805) 737-7705, Fax (805) 737-7708

Elections Code Section 15360 requires elections officials to conduct a manual tally of 1% of randomly selected precincts for each contest on the ballot. The PEMT regulations did not merely increase the sample size to 10%, the addition of sections § 20121 - Increased manual tally in contests with narrow margins of victory, § 20122 - Contests voted upon in more than one jurisdiction, and § 20124 - Manual tally escalation requirements for variances went beyond the scope of E.C. 15360.

Determine the margin of victory

With the addition of § 20121 the elections officials were required to determine the margin of victory in each contest based on the results as reported in the semifinal official canvass of results and the type of contest; single-winner, multi-winner, or ballot measure contests. As defined in Elections Code 353.5 the "semifinal official canvass" is the public process of collecting, processing, and tallying ballots and, for state or statewide elections, reporting results to the Secretary of State on election night.

Contest in more than one jurisdiction

Prior to the adoption of § 20122, elections officials in other jurisdictions acted independently from one another in the conduct of the manual tally provisions set for in Elections Code Section 15360. With the addition of § 20122, for contests voted in more than one jurisdiction, the overall margin of victory in all jurisdictions in which votes were cast for that contest needed to be determined. If the combined margin of victory was more than one half of one percent, a ten percent manual tally was not required. If the combined margin of victory was less than one half of one percent, a ten percent manual tally was required to be completed.

Escalation requirements

With the addition of § 20124 when variances occurred between the semifinal results and the manual tally results the elections officials were required to do the following:

1. Calculate the variance for each contest.
2. Determine if additional precincts were required to be tallied, which occurred if the variance percentage represented at least 10% of the margin of victory for that contest.
3. Tally randomly selected precincts in 5% increments until the total number of variances recalculated was smaller than 10% of the margin of victory for that contest or until all ballots have been tallied, whichever came first.
4. Notify the Secretary of State's Office if any variances exist between manually tallied voter verifiable paper audit trail records and electronic vote results that could not be accounted for by an obvious mechanical problem. In this instance all VVPAT records, memory cards/devices, and direct recording electronic voting machines were required to be preserved for investigation by the Secretary of State.

As an alternative to the 10% manual tally with escalation requirements, the elections official had the option to conduct a 100% manual tally of the ballots in a given contest meeting the Post Election Manual Tally requirement.

PEMT regulations § 20123, § 20125 and § 20126 expanded the scope of requirements of E.C. section 15360 to account for the additional 9% of precincts. This is an increase to the actual level and quality of the governmental service provided, not just an increase in cost.

We agree with the Commission's staff findings and proposed statement of decision that California Code of Regulations, title, sections 20121-20126 impose a reimbursable state-mandated program (Proposed Decision, page 12).

Contrary to DOF's position, the increase in the number of ballots counted by the counties does correspond with increased duties, and it does increase public confidence in the accuracy of the election results.

In a memorandum from the Secretary of State's (SOS) Office to the County Clerk/Registrar of Voters dated October 9, 2008 (CCROV # 08298), advising of the proposed emergency regulations for the Post Election Manual Tally to be filed with the Office of Administrative Law, the SOS Office states,

> "The TTBR showed that voting systems in widespread use throughout California are vulnerable to error and tampering. Escalating post election hand counts of ballots cast in randomly selected precincts are essential to confirm the correctness of the results reported by these voting systems, particularly in contests in which the apparent margin of victory is quite small... Unless the PEMT are in effect as emergency regulations for the November 4, 2008, General Election, the accuracy and integrity of the results in close contests, as well as public confidence in those results, could be compromised.
>
> Accordingly, immediate action is required to implement these regulations on an emergency basis."

We respectfully request that the Commission reconsider its proposed Statement of Decision as to California Code of Regulations, title 2, section 20127, as the County believes this section represents a new program or higher level of service which resulted in increased costs to the County. Section 20127 requires that for any contest in which an increased manual tally is required, the elections official shall complete all tasks and make all reports required by this chapter within the canvass period established by Elections Code sections 10262 and 15372. Previously, the County was not required to complete such a large amount of tallying activity within the official canvass period. Also, the additional work was required to be done in such a short period of time so that the public could quickly receive the election results, which increases their value, and have confidence in those results. This timing requirement also increased the costs of such additional services.

We further dispute the second allegation, that the Help America Vote Act (HAVA) does not require a mechanical or electronic voting system in order to meet the requirement that "individuals with disabilities, including the visually impaired, have the opportunity to vote independently and in private." 42 U.S.C. § 15841 (a)(3)(B) requires the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place to satisfy the requirement for access for individuals with disabilities. HAVA defines a voting system as (emphasis added):

(b) Voting system defined
In this section, the term "voting system" means—
(1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used—
(A) to define ballots;

(B) to cast and count votes;
(C) to report or display election results; and
(D) to maintain and produce any audit trail information; and
(2) the practices and associated documentation used—
(A) to identify system components and versions of such components;
(B) to test the system during its development and maintenance;
(C) to maintain records of system errors and defects;
(D) to determine specific system changes to be made to a system after the initial qualification of the system; and
(E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

The type of voting system used must be accessible and furthermore, must be certified by the State of California for use in an election regardless of whether it uses a paper ballot or not. The use of a paper ballot voting system does not preclude the requirement to have one accessible unit at each polling location, nor does it preclude the requirement to conduct the Post Election Manual Tally in Close Contests.

The County of Santa Barbara appreciates the opportunity to comment on the Department of Finance's comments to the Commission on State Mandate's Final Staff Analysis and Proposed Statement of Decision and for your consideration of our comments in any revised analysis and proposed statement of decision.

If you have any questions regarding this letter, please contact Renee Bischof, Chief Deputy Register of Voters at (805) 696-8963.

Sincerely,

Renee Bischof

Renee Bischof
Chief Deputy Registrar of Voters
Santa Barbara County

Post Election Manual Tally (PEMT) 10-TC-08
Declaration Supporting Comments on
the Department of Finance Comments to the
Draft Analysis and Proposed Statement of Decision

I, Renee Bischof, Chief Deputy Registrar of Voters for the County of Santa Barbara, declare under penalty of perjury, that the information provided herein is true and complete to the best of my personal knowledge, information or belief and that this declaration is executed this 25th day of April, 2014, at Santa Barbara, California.

Renee Bischof
Chief Deputy Registrar of Voters
County of Santa Barbara