

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE MANDATE REDETERMINATION
ON REMAND:

Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608 as added or amended by: Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); and Statutes 1996, Chapter 4 (AB 1496)

Sexually Violent Predators (CSM-4509), As Alleged to be Modified by: Proposition 83, General Election, November 7, 2006

Filed on January 15, 2013

By the Department of Finance, Requester

Notice of Entry of Judgment and Writ of Mandate Remanding the Matter for Reconsideration Served June 5, 2019

Case No.: 12-MR-01-R

Sexually Violent Predators (CSM-4509),
12-MR-01

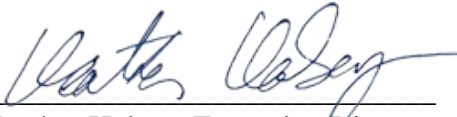
RECONSIDERATION OF REQUEST
FOR MANDATE
REDETERMINATION PURSUANT TO
COURT ORDER [Pursuant to *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196;
Judgment and Writ of Mandate Issued by Superior Court for the County of San Diego, Case No. 37-2014-00005050-CU-WM-CTL.]

(Adopted May 22, 2020)

(Served May 26, 2020)

REQUEST FOR MANDATE REDETERMINATION ON REMAND

The Commission on State Mandates adopted the attached Denial of Request for a New Test Claim Decision on May 22, 2020.



Heather Halsey, Executive Director

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Case No.: 12-MR-01-R

Sexually Violent Predators (CSM-4509), 12-MR-01

RECONSIDERATION OF REQUEST FOR MANDATE REDETERMINATION PURSUANT TO COURT ORDER [Pursuant to *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196; Judgment and Writ of Mandate Issued by Superior Court for the County of San Diego, Case No. 37-2014-00005050-CU-WM-CTL.]

(Adopted May 22, 2020)

(Served May 26, 2020)

DECISION

The Commission in State Mandates (Commission) heard and decided this Request for Mandate Redetermination on Remand during a regularly scheduled hearing on May 22, 2020. Donna Ferebee appeared on behalf of the requester, the Department of Finance. Christina Snider appeared on behalf of the County of San Diego.

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 the Proposed Denial of the Request for a New Test Claim Decision by a vote of 7-0, as follows:

Member	Vote
Lee Adams, County Supervisor	Yes
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	Yes
Jeannie Lee, Representative of the Director of the Office of Planning and Research	Yes
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	Yes
Sarah Olsen, Public Member	Yes
Carmen Ramirez, City Council Member	Yes
Jacqueline Wong-Hernandez, Representative of the State Controller	Yes

Summary of the Findings

This matter was remanded from the Court to determine “whether the expanded SVP definition in Proposition 83 transformed the test claim statutes as a whole into a voter-imposed mandate or, alternatively, did so to the extent the expanded definition incrementally imposed new, additional duties on the Counties.”¹ With regard to the State’s argument, first raised on appeal, that “the specified local government duties became necessary to implement the ballot measure, in that the Counties had been under no obligation to perform any duties for this class of offenders until the voters by initiative expanded the definition of an SVP,”² the Court also found that “the current record is insufficient to establish how, if at all, the expanded SVP definition in Proposition 83 affected the number of referrals to local governments.”³

The Commission finds that the expanded sexually violent predator (SVP) definition and other indicia support the conclusion that voters reasonably intended to prohibit the Legislature from repealing or significantly reducing the civil commitment program for SVPs; however, the voter mandate did not impose *any* new duties or activities on local government, nor did it require the state to impose any duties or activities on local government. Therefore, the duties remain mandated by the state. Specifically, the Commission finds:

- The record shows that although the number of SVP referrals has not increased over time, at least some portion of all new referrals since 2006 are based on a single offense and those referrals are therefore triggered by Proposition 83 and not by the test claim statutes or other later changes in law.
- An ongoing program and policy of civil commitment of SVPs is *integral* to accomplishing the electorate’s goals in enacting Proposition 83 and other indicia support the conclusion that voters reasonably intended to prohibit the Legislature from repealing or significantly reducing the civil commitment program and, thus, the voters are the source of an ongoing policy of civil commitment of SVPs.
- Proposition 83 does not constitute a subsequent change in law that modifies the state’s liability for the SVP program because the activities and costs to implement a civil commitment program in accordance with the voter mandate have been shifted to counties based on the state’s “true choice” and, thus, the activities and costs remain mandated by the state.

¹ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

² *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 216.

³ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

COMMISSION FINDINGS

I. Chronology

- 06/25/1998 The Commission adopted the Test Claim Decision on the *Sexually Violent Predators*, CSM-4509 program, approving eight activities related to civil commitment procedures for persons alleged to be sexually violent predators.⁴
- 11/07/2006 The voters adopted Proposition 83, which amended some of the Welfare and Institutions Code sections approved in the Test Claim Decision.
- 01/15/2013 The Department of Finance (Finance) filed a Request for Mandate Redetermination alleging that Proposition 83 constitutes a subsequent change in law that modifies the State's liability for the SVP program.⁵
- 12/06/2013 The Commission adopted the New Test Claim Decision, approving Finance's Request for Redetermination ending reimbursement for six and approving reimbursement for two of the original eight approved activities.
- 02/28/2014 The Counties of San Diego, Los Angeles, Orange, Sacramento, and San Bernardino filed a petition for writ of mandate and complaint for declaratory relief.
- 05/30/2014 The Commission adopted the Statement of Decision and Amended Parameters and Guidelines for the New Test Claim Decision.
- 03/27/2015 The Commission adopted the Statewide Cost Estimate for the New Test Claim Decision.
- 11/19/2018 The California Supreme Court held that the Commission's New Test Claim Decision was not supported, and remanded the matter to the trial court to issue a writ directing the Commission to set aside the New Test Claim Decision, the Parameters and Guidelines, and the Statewide Cost Estimate and reconsider its New Test Claim Decision to address specific issues identified in the Court's decision.
- 02/08/2019 Commission staff issued a Request for Comment and Legal Argument Relating to the Reconsideration of the Request for Mandate Redetermination on Remand, 12-MR-01-R, pursuant to *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196 to be filed by March 11, 2019.⁶
- 03/04/2019 The County of Orange filed a Request for Extension of Time to file comments.

⁴ Exhibit B, Test Claim Statement of Decision, *Sexually Violent Predators*, CSM-4509, adopted June 25, 1998.

⁵ Exhibit A, Finance's Request for Mandate Redetermination.

⁶ Exhibit E, Request for Comment and Legal Argument Relating to the Reconsideration of the Request for Mandate Redetermination on Remand, 12-MR-01-R, Pursuant to *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196.

03/05/2019 The Counties of Los Angeles, Sacramento, San Bernardino, and San Diego each filed a Request for Extension of Time to file comments.

03/06/2019 Commission staff issued a Notice of Limited Extension Request Approval of an extension to March 22, 2019 for the requesting counties for good cause shown.

03/08/2019 Finance filed a Request for Extension of Time to file comments to March 22, 2019.

03/08/2019 and 03/11/2019 The Counties of Los Angeles, Sacramento, and San Bernardino filed requests for extension of time to comment until at least to April 10, 2019 and postponement of hearing to September 27, 2019.

03/12/2019 The County of San Diego filed a Notice of Change of Representation and a Request for Extension of Time and Postponement of Hearing.

03/12/2019 Commission staff issued a Notice of Limited Approval of Request for Extension of Time and Postponement of Hearing extending the comment period for Finance to March 22, 2019 and for the Counties of Los Angeles, Sacramento, and San Bernardino to April 10, 2019 for good cause shown and Approval of Postponement of Hearing to September 27, 2019.

03/15/2019 The County of Orange filed a Request for Extension of Time to file comments.

03/19/2019 Commission staff issued a Notice of Limited Extension Request Approval extending the comment period to April 10, 2019 for the counties of Orange and San Diego.

03/26/2019 Finance filed Late Comments on the Request for Mandate Redetermination on Remand.⁷

04/10/2019 The County of Los Angeles filed Comments on the Request for Mandate Redetermination.⁸

04/10/2019 The County of Orange filed Comments on the Request for Mandate Redetermination.⁹

04/10/2019 The County of Sacramento filed Comments on the Request for Mandate Redetermination.¹⁰

⁷ Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand.

⁸ Exhibit G, County of Los Angeles’s Comments on the Request for Mandate Redetermination on Remand.

⁹ Exhibit H, County of Orange’s Comments on the Request for Mandate Redetermination on Remand.

¹⁰ Exhibit I, County of Sacramento’s Comments on the Request for Mandate Redetermination on Remand.

04/10/2019 The County of San Bernardino filed Comments on the Request for Mandate Redetermination.¹¹

04/10/2019 The County of San Diego filed Comments on the Request for Mandate Redetermination.¹²

04/10/2019 The District Attorney for the County of Los Angeles filed Late Comments on the Request for Mandate Redetermination.¹³

04/29/2019 The Superior Court for the County of San Diego, Case No. 37-2014-00005050-CU-WM-CTL, entered the judgment and writ, directing the Commission to set aside the prior decisions on Finance’s Request for Mandate Redetermination in *Sexually Violent Predators (CSM-4509)*, 12-MR-01, and to reconsider the matter consistently with the Supreme Court’s opinion.¹⁴

06/05/2019 The Commission was served the Notice of Entry of Judgment, with the Judgment attached, and the Writ of Mandate.¹⁵

06/12/2019 The County of San Diego filed additional Late Comments on the Request for Mandate Redetermination on Remand.¹⁶

07/26/2019 The Commission adopted the Order to Set Aside the Statement of Decision adopted December 6, 2013, the Statement of Decision and Amended Parameters and Guidelines adopted May 30, 2014, and the Statewide Cost Estimate adopted March 27, 2015 pursuant to the court’s Judgment and Writ of Mandate.

01/31/2020 Commission staff issued the Draft Proposed Denial of a New Test Claim Decision on Remand.¹⁷

¹¹ Exhibit J, County of San Bernardino’s Comments on the Request for Mandate Redetermination on Remand.

¹² Exhibit K, County of San Diego’s Comments on the Request for Mandate Redetermination on Remand.

¹³ Exhibit L, Los Angeles County District Attorney’s Office’s Late Comments on the Request for Mandate Redetermination on Remand.

¹⁴ Exhibit C, Writ of Administrative Mandamus, filed in the San Diego Superior Court April 29, 2019 and served to the Commission June 5, 2019 (San Diego County Superior Court, Case No.: 37-2014-00005050-CU-WM-CTL, in accordance with *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196).

¹⁵ Exhibit D, Notice of Entry of Judgment, Judgment, and Writ of Mandate, San Diego Superior Court, Case No. 37-2014-00005050-CU-WM-CTL, served June 5, 2019.

¹⁶ Exhibit M, County of San Diego’s Late Comments on the Request for Mandate Redetermination on Remand.

¹⁷ Exhibit N, Draft Proposed Denial of a New Test Claim Decision, issued January 31, 2020.

03/12/2020

Commission staff issued the Proposed Denial of a New Test Claim Decision on Remand setting the matter for the March 27, 2020 meeting.¹⁸

II. Background

A. Test Claim Decision Adopted June 25, 1998

The *Sexually Violent Predators (SVP)*, CSM-4509 program established procedures for the civil detention and treatment of sexually violent predators (SVPs) following the completion of an individual's criminal sentence imposed for certain sex-related offenses. The test claim statutes, specifically Statutes 1995, chapters 763 and 764, defined a "sexually violent predator" in section 6600(a) of the Welfare and Institutions Code as "a person who has been convicted of a sexually violent offense against two or more victims for which he or she has received a determinate sentence and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior."¹⁹ Thus, for a person to be deemed an SVP and civilly committed under the SVP mandate as originally approved, the person must be (1) convicted; (2) of a sexually violent offense; (3) against two or more victims; (4) received a determinate sentence; and (5) have a diagnosed mental disorder that makes the person a danger to others and presents a likelihood that the person will engage in future sexually violent criminal behavior. Section 6600(b) defined "sexually violent offense" to mean the following acts when committed by "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or on another person, and that are committed before or after the effective date of [the statute], and result in a conviction and a determinate sentence," a felony conviction for section 261(a)(2) [forcible rape]; section 262(a)(1) [forcible rape of a spouse]; section 264.1 [conspiracy to commit rape, spousal rape, or forcible penetration by force or violence]; section 288(a or b) [lewd or lascivious acts with a minor under 14]; 289 [forcible sexual penetration]; or sections 286 [sodomy] or former 288a [oral copulation].²⁰ And finally, a "diagnosed mental disorder" was defined to include "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person as a menace to the health and safety of others."²¹

Under the test claim statutes, before civil detention and treatment can be imposed, the Department of Corrections must refer a potential SVP, at least six months before the person's release date, for screening by the Department of Corrections and the Board of Prison Terms (now the Parole Board).²² If that screening finds that the person may be an SVP, the statutes require a mental health examination by two qualified psychiatrists or psychologists with the Department of

¹⁸ The March 27, 2020 meeting was postponed to May 22, 2020 due to scheduling conflicts.

¹⁹ Welfare and Institutions Code section 6600(a) (as amended, Stats. 1995, ch. 762 and ch. 763).

²⁰ Welfare and Institutions Code section 6600(b) (as amended, Stats. 1995, ch. 762 and ch. 763).

²¹ Welfare and Institutions Code section 6600(c) (as amended, Stats. 1995, ch. 762 and ch. 763).

²² Welfare and Institutions Code section 6601 (as amended, Stats. 1995, ch. 762 and ch. 763 and Stats. 1996, ch. 4).

Mental Health (now Department of State Hospitals).²³ The Department of State Hospitals evaluates the person using a standardized assessment protocol developed by the Department, which includes assessing mental disorders and risk factors. The two evaluating professionals must concur that the person is an SVP; but if they do not, a second evaluation by independent professionals outside state government is required.²⁴ If the two professionals performing the evaluation find that the person *is* an SVP, the Department then forwards a request to the county in which the offense occurred to file a petition to have the person committed.²⁵

If the county's designated counsel concurs, the county counsel or district attorney files a petition for civil commitment.²⁶ The petition must first withstand a probable cause hearing, in which the judge must determine whether to go forward with a trial on the person's SVP status, or dismiss the petition and send the person to his or her parole.²⁷ A trial is then conducted to determine beyond a reasonable doubt if the person is an SVP.²⁸ If the person alleged to be an SVP is indigent, the county is required to provide the indigent person with the assistance of counsel and experts necessary to prepare the defense.²⁹

On June 25, 1998, the Commission adopted the Test Claim Decision for the *Sexually Violent Predators*, CSM-4509 mandated program.³⁰ That Decision approved mandate reimbursement for the following activities related to the counties' filing of petitions for civil commitment of sexually violent predators:

1. Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)
2. Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation. (Welf. & Inst. Code, § 6601(i).)

²³ Welfare and Institutions Code section 6601(as amended, Stats. 1995, ch. 762 and ch. 763 and Stats. 1996, ch. 4).

²⁴ Welfare and Institutions Code section 6601(as amended, Stats. 1995, ch. 762 and ch. 763 and Stats. 1996, ch. 4).

²⁵ Welfare and Institutions Code section 6601(as amended, Stats. 1995, ch. 762 and ch. 763 and Stats. 1996, ch. 4).

²⁶ Welfare and Institutions Code section 6601(as amended, Stats. 1995, ch. 762 and ch. 763 and Stats. 1996, ch. 4).

²⁷ Welfare and Institutions Code section 6602 (as amended, Stats. 1995, ch. 762 and ch. 763 and Stats. 1996, ch. 4).

²⁸ Welfare and Institutions Code sections 6602-6604 (as amended, Stats. 1995, ch. 762 and ch. 763).

²⁹ Welfare and Institutions Code section 6603 (as amended, Stats. 1995, ch. 762 and ch. 763).

³⁰ Exhibit B, Test Claim Statement of Decision, *Sexually Violent Predators*, CSM-4509, adopted June 25, 1998.

3. Preparation and filing of the petition for commitment by the county's designated counsel. (Welf. & Inst. Code, § 6601(i).)
4. Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)
5. Preparation and attendance by the county's designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)
6. Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6605(b-d), and 6608(a-d).)
7. Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605(d).)
8. Transportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)³¹

The Commission thereafter adopted Parameters and Guidelines consistent with the Test Claim Decision on September 24, 1998, and the boilerplate language of those and many other Parameters and Guidelines was amended on October 30, 2009.

B. Subsequent Amendments to the Test Claim Statutes Made by Statutes 1996, Chapter 462; Statutes 1998, chapter 19; Statutes 2006, Chapter 337 (SB 1128); and Proposition 83 (November 7, 2006)

Statutes 1996, chapter 462 amended section 6600(a) of the Welfare and Institutions Code, effective September 13, 1996, to add that for purposes of SVP commitment, conviction of a sexually violent offense includes a finding of not guilty by reason of insanity; a conviction prior to July 1, 1977, resulting in an indeterminate sentence; a conviction resulting in a finding that the person is a mentally disordered sex offender; or a conviction in another state that includes all the elements of an offense described in section 6600(b) of the Welfare and Institutions Code, thereby expanding the class of offenders to which the civil commitment process applies. Statutes 1996, chapter 462 was never the subject of a test claim and the statute of limitations for filing a test claim on this statute has long past.

Statutes 1998, chapter 19, among other things, amended section 6602.5 to provide that no person may be placed in a state hospital pursuant to sections 6601.3 and 6602 without a finding of probable cause pursuant to 6602. And section 6602.5 provided a process to identify persons in custody who had not had a probable cause hearing and, within 30 days, either remove the person from the state hospital and return the person to local custody or provide a probable cause hearing, thereby increasing the number of probable cause hearings. Statutes 1998, chapter 19 was also never the subject of a test claim.

³¹ Exhibit B, Test Claim Statement of Decision, *Sexually Violent Predators*, CSM-4509, adopted June 25, 1998, pages 3 and 13.

On August 15, 2005, Assembly member Sharon Runner amended her bill, AB 231, to propose the substance of what would become known as Proposition 83.³² At around the same time, Assembly member Sharon Runner and her husband State Senator George Runner began the work of qualifying the proposal as a Proposition to put before the voters.³³ AB 231 failed passage in January 2006, and State Senator Alquist introduced a similar bill that same month, SB 1128, which contained many of the same proposed amendments to the Penal Code and the Welfare and Institutions Code found in AB 231 and Proposition 83.³⁴ SB 1128 passed as an urgency measure seven weeks prior to the election in which Proposition 83 was adopted.³⁵ Accordingly, most of the additions and amendments to the Penal Code and Welfare and Institutions Code that were proposed in Proposition 83 were enacted by SB 1128 on September 20, 2006 and became effective immediately upon enactment and prior to the election in which Proposition 83 was put before the voters.³⁶ And, just as with Statutes 1996, chapter 462, no test claim was filed on Statutes 2006, chapter 337 (SB 1128), despite the significant expansion of the class of offenders to which the civil commitment process applies.

On November 7, 2006, the voters approved Proposition 83, also known as the “Sexual Predator Punishment and Control Act: Jessica’s Law,” after Jessica Lunsford, of Florida, who was abducted and killed by a registered sex offender.³⁷ Proposition 83 proposed to amend and reenact several sections of the Penal Code and the Welfare and Institutions Code, including some of the sections approved for reimbursement in the CSM-4509 Test Claim.³⁸ The Voter Guide for Proposition 83 stated its goals as follows:

- Increases penalties for violent and habitual sex offenders and child molesters.

³² See Exhibit O, Assembly Bill 231 (2005-2006 Reg. Sess.), as amended (2005-2006 Reg. Sess.); Exhibit O, Assembly Committee on Public Safety, Analysis of AB 231 as amended January 10, 2006 (2005-2006 Reg. Sess.). See also, Exhibit O, Written Comment by Senator George Runner (Ret.), Late Filing for September 27, 2013 Hearing of the Commission on State Mandates, dated September 26, 2013.

³³ Exhibit O, California Secretary of State, Campaign Finance Data, Campaign for Child Safety 2006, Jessica’s Law, Yes on 83 (Fundraising Events in support of the Proposition began in December 2005) <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1277423&session=2005&view=expenditures> (accessed March 4, 2019).

³⁴ Exhibit O, Senate Committee on Public Safety, Analysis of SB 1128, as amended March 7, 2006 (2005-2006 Reg. Sess.), page 35 [Describing some of the similarities of and differences between Proposition 83 and SB 1128].

³⁵ Statutes 2006, chapter 337 (SB 1128), enacted September 20, 2006.

³⁶ Government Code section 9600(b).

³⁷ Exhibit O, *California Follows Trend with Sex-Offender Crackdown*, Capitol Public Radio, November 2, 2006, <https://www.npr.org/templates/story/story.php?storyId=6418295> (accessed February 28, 2019).

³⁸ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83.

- Prohibits registered sex offenders from residing within 2,000 feet of any school or park.
- Requires lifetime Global Positioning System (GPS) monitoring of felony registered sex offenders.
- Expands definition of sexually violent predator.
- Changes current two-year involuntary civil commitment for a sexually violent predator to an indeterminate commitment, subject to annual review by the Director of Mental Health and subsequent ability of sexually violent predator to petition court for sexually violent predator's conditional release or unconditional discharge.³⁹

With respect to the SVP program specifically, Proposition 83 proposed the following changes:

- Section 6600 expanded the definition of a sexually violent predator by broadening the underlying criminal offenses supporting a finding that a person is an SVP; by reducing the number of victims of underlying qualifying offenses from 2 to 1; and by removing the ceiling on juvenile offenses applied as qualifying.⁴⁰
- Section 6601 provides that an SVP determination and commitment shall toll the term of parole for the underlying offense or offenses during indeterminate civil commitment.⁴¹
- Section 6604 provides for indeterminate commitment, and accordingly, eliminates the requirement to hold a new SVP hearing every two years.⁴²
- Section 6605 eliminates the requirement that the Department of Mental Health provide annual notice of an SVP's right to petition for release, and eliminates the requirement that the court must hold a show cause hearing if not waived by the committed person. Under amended section 6605, DMH would authorize an SVP to file a petition for release if the annual report by DMH finds it appropriate.⁴³
- Section 6608 provides that even without DMH approval, "nothing in this article shall prohibit" a committed SVP from petitioning for conditional release *or* unconditional discharge. But the section would still prohibit frivolous petitions: if a prior petition was found to be frivolous the court shall deny the petition unless new facts are presented.⁴⁴

³⁹ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, page 4.

⁴⁰ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, pages 18-19 [Proposed amendments to Welfare and Institutions Code section 6600 (a)(1); (b); (g)].

⁴¹ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 26 page 20 [Proposed amendments to Welfare and Institutions Code section 6601(k)].

⁴² Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 27, page 20 [Proposed amendments to Welfare and Institutions Code section 6604].

⁴³ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 29, page 20 [Proposed amendments to Welfare and Institutions Code section 6605].

⁴⁴ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 30, page 21 [Proposed amendments to Welfare and Institutions Code section 6608].

- In addition, section 6600.1, not part of the original 1998 test claim decision, nor part of the 1995 and 1996 test claim statutes, removes a requirement that sexual offenses against children under 14 must involve “substantial sexual conduct” in order to qualify as sexually violent offenses within the meaning of section 6600(b).⁴⁵
- And, section 6604.1, also not part of the original 1998 test claim decision or the 1995 and 1996 test claim statutes, provides that the indeterminate term of commitment shall commence on the date the court issues the initial order of commitment. Previously this section provided that a *two-year* term of commitment would begin on the date the court issued the order of commitment, and for subsequent extended commitments, the term would be two years commencing from the date of termination of the previous commitment. This section would have been unworkable and inconsistent with the indeterminate commitment provided for under amended section 6604 without amendment.⁴⁶

Of the provisions of Proposition 83 amending the Penal Code and the Welfare and Institutions Code relating to SVP commitments, only the following were *not* first made by SB 1128, but were imposed *solely* by Proposition 83:

- Penal Code section 3000, describing the tolling of parole during an SVP commitment and the terms of parole, is structured differently in SB 1128 and Proposition 83, but mostly appears to produce the same results, based on the plain language;⁴⁷
- Welfare and Institutions Code section 6600(a)(1), reducing the number of victims of qualifying offenses required to meet the definition of a sexually violent predator from *two* victims, to *one*; and subdivision (g) and paragraph (g)(2), removing the ceiling on prior juvenile adjudications (“no more than one”) that may be counted against an alleged

⁴⁵ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 25, page 19 [Proposed amendments to Welfare and Institutions Code section 6600.1].

⁴⁶ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 28, page 20 [Proposed amendments to Welfare and Institutions Code section 6604.1].

⁴⁷ Compare Statutes 2006, chapter 337 (SB 1128), section 45 with Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 17, page 16 [Both amendments to Penal Code section 3000 provide for tolling of parole during civil commitment, but SB 1128 provides that tolling shall begin during the person’s evaluation to determine whether the person is an SVP; in addition, both amendments provide for a ten year term of parole for persons sentenced to life under Penal Code sections 667.61 and 667.71 (sentence enhancements for prior sex offenses), SB 1128 also provided for a ten year term of parole for persons receiving a life sentence under section 209(b) (kidnapping with intent to commit certain violent felonies, including rape); 269 (aggravated sexual assault of a child); and 288.7 (felony sexual intercourse, sodomy, oral copulation with a child under 10 years of age, by a person over 18 years of age, carries a life sentence).].

sexually violent predator, and eliminating the limitation that sex offenses against children must involve “substantial sexual conduct.”⁴⁸

- Welfare and Institutions Code section 6605 previously required DMH to provide annual notice to each SVP of his or her right to petition for release, and if the person did not affirmatively waive his or her right, the court was required to set a show cause hearing. The Proposition 83 amendments to section 6605 require DMH to file an annual report with the court, which includes “consideration of whether the committed person currently meets the definition of a sexually violent predator.” If DMH determines that the person either no longer meets the definition of an SVP, or that conditional release to a less restrictive alternative is in the best interest of the person and the community can be adequately protected, the director of DMH “shall authorize the person to petition the court” for conditional release or unconditional discharge.⁴⁹

So although the voters may have believed (and were informed by the ballot materials prepared by the Attorney General, which were published on August 7, 2006) that they were adopting the other substantive amendments to the SVP program and definitions proposed in Proposition 83 (including the broadening of “sexually violent offense[s]” to include certain intent crimes, other forms of rape and sexual assault not covered under prior law, and “threatening to retaliate in the future against the victim or any other person;”⁵⁰ and broadening the definition of “conviction”⁵¹), these changes were *already in effect* pursuant to the enactment of SB 1128 on September 20, 2006, prior to the 2006 general election on November 7, 2006.⁵²

⁴⁸ Compare Statutes 2006, chapter 337 (SB 1128), section 53 with Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 24, pages 18-19.

⁴⁹ Compare Statutes 2006, chapter 337 (SB 1128), section 57 with Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 29, page 20. Notwithstanding the apparent restriction imposed upon a committed person’s right to petition for release under section 6605, Proposition 83 left largely untouched section 6608, which provides, in pertinent part: “Nothing in this article shall prohibit the person who has been committed as a sexually violent predator from petitioning the court for conditional release ~~and subsequent or an~~ unconditional discharge without the recommendation or concurrence of the Director of Mental Health.” Thus, while the sections appear to make changes to the annual duties of DMH with respect to informing committed persons of their rights, the right to petition for release remains relatively intact. (Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 30, page 21.)

⁵⁰ Welfare and Institutions Code section 6600(b) (as amended, Stats. 2006, ch. 337 (SB 1128); Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 24, page 19.

⁵¹ Welfare and Institutions Code section 6600(a)(2)(H-I) (as added, Stats. 2006, ch. 337 (SB 1128); Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 24, page 18.

⁵² See Elections Code section 9605.

C. The Commission's December 6, 2013 Decision on the Request for Mandate Redetermination.

On January 15, 2013, Finance filed a Request for Mandate Redetermination alleging that Proposition 83, approved by the voters in the November 2006 general election, constitutes a subsequent change in law with respect to the *Sexually Violent Predators* program, and that the program is no longer reimbursable pursuant to Government Code section 17556(f).⁵³

The Commission partially approved Finance's request on December 6, 2013, and adopted a New Test Claim Decision superseding the prior Test Claim Decision. Specifically, the Commission found that the following activities were no longer reimbursable because they had been expressly included in or were necessary to implement Proposition 83:

Activity 1 – Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)

Activity 2 – Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation. (Welf. & Inst. Code, § 6601(i).)

Activity 3 – Preparation and filing of the petition for commitment by the county's designated counsel. (Welf. & Inst. Code, § 6601(j).)

Activity 5 – Preparation and attendance by the county's designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)

Activity 6 – Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6605(b-d), and 6608(a-d).)

Activity 7 – Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605(d).)⁵⁴

In addition, the Commission found that activities 4 and 8 remained partially reimbursable, to the extent of costs and activities attendant to statutorily required probable cause hearings for alleged sexually violent predators were not expressly included in or necessary to implement Proposition 83:

Therefore, the following activities are required as modified, only for probable cause hearings:

Activity 4- Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)

⁵³ Exhibit A, Finance's Request for Mandate Redetermination.

⁵⁴ *Sexually Violent Predators (CSM-4509)*, 12-MR-01 New Test Claim Statement of Decision, adopted December 6, 2013, page 2.

Activity 8 – Transportation and housing for each potential sexually violent predator from a secured facility to the probable cause hearing while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)⁵⁵

The Commission thereafter adopted Amended Parameters and Guidelines consistent with the New Test Claim Decision on May 30, 2014, and a Statewide Cost Estimate on March 27, 2015.

D. The California Supreme Court’s Decision Overturning and Remanding the Commission’s Decision on the Request for Mandate Redetermination

The County of San Diego, joined by the Counties of Los Angeles, Orange, Sacramento, and San Bernardino, filed a petition for writ of mandate and complaint for declaratory relief in the Superior Court for the County of San Diego seeking a determination that the Commission’s New Test Claim Decision was incorrect as a matter of law and should be vacated. The case proceeded to the California Supreme Court, and after briefing and oral argument, the Supreme Court rejected the Commission’s reasoning and findings and granted the writ of mandate.⁵⁶

The California Supreme Court began its consideration of Proposition 83 and the Commission’s decision on the Request for Mandate Redetermination with a summary of the competing legal principles at play:

To resolve the question before us, we must consider four distinct legal principles. First, the state must reimburse local governments for the costs of discharging mandates imposed by the Legislature. Second, this reimbursement requirement does not apply to those activities that are necessary to implement, or are expressly included in, a ballot measure approved by the voters. Third, a statute must be reenacted in full as amended if any part of it is amended. And fourth, the Legislature is prohibited from amending an initiative statute unless the initiative itself permits amendment.⁵⁷

Beginning with article XIII B, section 6 and Government Code section 17556(f), the Court acknowledged that “the state must reimburse local governments for mandates imposed by the Legislature, but not for mandates imposed by the voters themselves through an initiative.”⁵⁸ Thus, “[w]here the Legislature cannot use the ordinary legislative process to amend or alter duties imposed by the voters (see Cal. Const., art. II, § 10, subd. (c)), it can no longer be reasonably characterized as the source of those duties.”⁵⁹

However, the Court continued by stating that not every word printed in the body of an initiative falls within the scope of the statutory terms “expressly included” in a ballot measure:

⁵⁵ New Test Claim Statement of Decision, *Sexually Violent Predators (CSM-4509)*, 12-MR-01, adopted December 6, 2013, page 3.

⁵⁶ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196.

⁵⁷ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 206.

⁵⁸ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 207.

⁵⁹ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 207.

The question left unresolved by these provisions is what, precisely, qualifies as a mandate imposed by the voters. Government Code section 17556, subdivision (f) exempts from reimbursement only those “duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters.” The boundaries of this subdivision depend, then, on the definition of a “ballot measure” in section 17556. Our reading of the provision’s text, the overall statutory structure, and related constitutional provisions persuades us that not every single word printed in the body of an initiative falls within the scope of the statutory terms “expressly included in...a ballot measure.”⁶⁰

The Court noted that Proposition 83 “reenacted verbatim” the provisions of Welfare and Institutions Code section 6601, 6605, and 6608 that the Commission had previously identified as imposing mandated activities. The changes that were made to these sections, the Court held, were minor, and non-substantive: “Whatever else Proposition 83 accomplished, it effectively left undisturbed these test claim statutes and the various mandates imposed therein.”⁶¹

The Court therefore rejected the Commission’s reasoning that amending and reenacting the relevant sections wholesale within the ballot measure was sufficient to satisfy the “expressly included in” prong of section 17556. Instead, the Court held: “Statutory provisions that are not actually reenacted and are instead considered to ‘have been the law all along’ cannot fairly be said to be *part of* a ballot measure.”⁶² Rather, the Court held: “The mere happenstance that the mandated duties were contained in test claim statutes that were amended in other respects not germane to any of the duties – and thus had to be reenacted in full under the state Constitution – should not in itself diminish their character as state mandates.”⁶³

The Court went on to address the State’s argument that, based on Proposition 83’s amendment clause, the “compelled reenactment of the test claim statutes transformed the state mandate into a voter-imposed mandate because the voters *simultaneously* limited the Legislature’s ability to revise or repeal the test claim statutes.”⁶⁴ The court explained the amendment clause as follows:

The strict limitation on amending initiatives generally — and the relevance of the somewhat liberalized constraints imposed by Proposition 83’s amendment clause — derive from the state constitution. Article II, section 10, subdivision (c) of the California Constitution provides that an initiative statute may be amended or repealed only by another voter initiative, “unless the initiative statute permits amendment or repeal without the electors’ approval.” The evident purpose of limiting the Legislature’s power to amend an initiative statute “‘is to ‘protect the people’s initiative powers by precluding the Legislature from undoing what the

⁶⁰ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 207-208.

⁶¹ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 208.

⁶² *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 209-210 (emphasis added) (citing *Vallejo etc. R. R. Co. v. Reed Orchard Co.* (1918) 177 Cal. 249, 255).

⁶³ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 210.

⁶⁴ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211 (emphasis in original).

people have done, without the electorate’s consent.””” (Shaw v. People ex rel. Chiang (2009) 175 Cal.App.4th 577, 597 (Shaw).) But we have never had occasion to consider precisely “what the people have done” and what qualifies as “undoing” (*ibid.*) when the subject is a statutory provision whose reenactment was constitutionally compelled under article IV, section 9 of the Constitution.⁶⁵

The Court, however, disagreed with the State’s assumption that because of article II, section 10(c), “none of the technically restated provisions may be amended, except as provided in the initiative’s amendment clause.”⁶⁶ If that were the case, then all of the nine subsequent legislative amendments to the test claim statutes technically restated in Proposition 83, as identified by the amicus parties, would be unconstitutional.⁶⁷

The Court distinguished *Shaw*, on which the State relied, saying, “that case analyzed a legislative amendment aimed at the heart of a voter initiative, not a bystander provision that had been only technically restated.”⁶⁸

By contrast, nothing in Proposition 83 focused on duties local governments were already performing under the SVPA. No provision amended those duties in any substantive way. Nor did any aspect of the initiative’s structure or other indicia of its purpose suggest that the listed duties merited special protection from alteration by the Legislature....Indeed, no indication appears in the text of the initiative, nor in the ballot pamphlet, to suggest voters would have reasonably understood they were restricting the Legislature from amending or modifying any of the duties set forth in the test claim statutes. Nor is an overbroad construction of article II, section 10 of the California Constitution necessary to safeguard the people’s right of initiative. To the contrary: Imposing such a limitation as a matter of course on provisions that are merely technically restated would unduly burden the people’s willingness to amend existing laws by initiative.⁶⁹

The Court held that a “more prudent conclusion” was to interpret article II, section 10 and the Amendment Clause more narrowly, and on that basis the Court announced the following rule:

When technical reenactments are required under article IV, section 9 of the Constitution – yet involve no substantive change in a given statutory provision – the Legislature in most cases retains the power to amend the restated provision through the ordinary legislative process. This conclusion applies *unless* the provision is integral to accomplishing the electorate’s goals in enacting the

⁶⁵ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211.

⁶⁶ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211.

⁶⁷ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211.

⁶⁸ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 212.

⁶⁹ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 213-214.

initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature's ability to amend that part of the statute.⁷⁰

In other words, a provision only technically restated, without amendment, in a ballot measure should not be considered a voter-imposed mandate merely by virtue of its restatement within the initiative “*unless* the provision is integral to accomplishing the electorate’s goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature’s ability to amend that part of the statute.”⁷¹ Therefore, where the provision is integral to accomplishing the electorate’s goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature’s ability to amend that part of the statute, the provision is reasonably necessary to implement the Proposition although it is not “expressly included” in it within the meaning of Government code section 17556(f). This is so because any other interpretation would thwart the will of the people.

Here, the Court noted that Finance “offer[s] no reason – putting aside for the moment the expanded SVP definition – why these restated provisions should be deemed integral to accomplishing the initiative’s goals. Nor have they identified any basis for believing that it was within the scope of the voters’ intended purpose in enacting the initiative to limit the Legislature’s capacity to alter or amend these provisions.”⁷² Thus, the court concluded that the Commission erred in its finding that those provisions were expressly included in a ballot measure approved by the voters merely because they were restated in the initiative’s text, and therefore transformed into mandates of the voters.⁷³

The Court then addressed the Commission’s findings that the remaining procedures required by the test claim statutes (those that were not restated in the ballot measure) were necessary to implement the ballot measure because they were “indispensable to the implementation of other provisions that – according to the Commission – were ‘expressly included’ in Proposition 83.”⁷⁴

In analyzing that question, the Court considered the State’s argument that the expansion of the “definition” of an SVP under section 6600 might be held to impose a voter mandate and noted that Proposition 83 expanded the definition of an SVP in two ways:

[T]he voters broadened the definition of an SVP within the meaning of Welfare and Institutions Code section 6600 in *two ways*. First, they reduced the required number of victims, so that an offender need only have been ‘convicted of a sexually violent offense against one or more victims,’ instead of two or more victims. Second, the voters eliminated a provision that had capped at one the

⁷⁰ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214 (emphasis in original).

⁷¹ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214 (emphasis in original).

⁷² *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214-215.

⁷³ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 215.

⁷⁴ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 215.

number of juvenile adjudications that could be considered a prior qualifying conviction.⁷⁵

In this respect, the State contended that the test claim duties became necessary to implement the ballot measure, in that the Counties had been under no obligation to perform any duties for this class of offenders until the voters by initiative expanded the definition of an SVP.⁷⁶

The Court went on to observe:

None of the specified local government duties is triggered until an inmate is identified as someone who may be an SVP. (See §§ 6601, 6603, 6604, 6605, 6608.) Although the SVP definition does not *itself* impose any particular duties on local governments, it is necessarily incorporated into each of the listed activities. Indeed, whether a county has a duty to act (and, if so, what it must do) depends on the SVP definition...When more people qualify as potential SVPs, a county must review more records. It must file more commitment petitions, and conduct more trials. One can imagine that if the roles were reversed — i.e., if the Legislature expanded the scope of a voter-created SVP program — the Counties would be claiming that the burdens imposed by the expanded legislative definition constituted a state mandate.⁷⁷

On this basis, the Court remanded the matter to the Commission, stating:

Unfortunately, the Commission never considered whether the expanded SVP definition in Proposition 83 transformed the test claim statutes as a whole into a voter-imposed mandate or, alternatively, did so to the extent the expanded definition incrementally imposed new, additional duties on the Counties. Its ruling granting the State respondents' request for mandate redetermination instead rested entirely on grounds that we now disapprove. Moreover, the parties admit — and the Court of Appeal found — that the current record is insufficient to establish how, if at all, the expanded SVP definition in Proposition 83 affected the number of referrals to local governments...Under the circumstances, we find it prudent to remand the matter to the Commission to enable it to address these arguments in the first instance.⁷⁸

Accordingly, the case was remanded to the Superior Court, which issued a modified judgment and writ, directing the Commission to rehear Finance's request in a manner consistent with the opinion of the California Supreme Court.⁷⁹

⁷⁵ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 216 ([emphasis added] citing Welfare and Institutions Code section 6600(a; g), as amended by Proposition 83 (Nov. 2006).

⁷⁶ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 216.

⁷⁷ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 216-217.

⁷⁸ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

⁷⁹ Exhibit D, Notice of Entry of Judgment, Judgment, and Writ of Mandate, San Diego Superior Court, Case No. 37-2014-00005050-CU-WM-CTL, served June 5, 2019, page 17.

III. Positions of the Parties and Interested Person

A. Department of Finance, Requester

Finance’s response to the Request for Comment and Legal Argument Relating to the Reconsideration of the Request for Mandate Redetermination on Remand argues that the voters, by adopting Proposition 83 “materially expanded” the definition of a sexually violent predator, “and directed that the Legislature could not narrow or repeal that definition through its ordinary legislative process.”⁸⁰ Finance argues that “[t]he source of that expanded definition is now the voters,” and “[a]fter that expansion, the costs incurred by local governments in complying with the Sexually Violent Predators mandate flow from Proposition 83 and are ‘necessary to implement’ the ballot measure for purposes of Government Code section 17556, subdivision (f).”⁸¹ Specifically, Finance asserts:

In adopting Proposition 83, the voters expanded the definition of “sexually violent predator” in several ways. First, they reduced the required number of victims, so that the offender must have “been convicted of a sexually violent offense against one or more victims,” as opposed to “two or more” in the original statute. (Welf. & Inst. Code, § 6600, subd. (a)(1).) Second, the voters expanded the set of crimes that qualify as a “sexually violent offense,” adding any felony violation of Penal Code section 207 (kidnapping), section 209 (kidnapping for ransom, reward, or extortion, or to commit robbery or rape), or section 220 of the Penal Code (assault to commit mayhem, rape, sodomy, or oral copulation), committed with the intent to commit another enumerated “sexually violent offense.” (Welf. & Inst. Code, § 6600, subd. (b).) Third, the voters directed that if an offender had a prior conviction for which he “was committed to the Department of the Youth Authority pursuant to [Welfare and Institutions Code] Section 1731.5,” or that “resulted in an indeterminate prison sentence,” that prior conviction “shall be considered a conviction for a sexually violent offense.” (Welf. & Inst. Code, § 6600, subd. (a)(2)(H), (I).)⁸²

Finance argues that “[t]his expansion of the category of people who would be subject to the SVPA process was a central purpose of Proposition 83.”⁸³ Finance points to section 2 of Proposition 83, which states that the existing SVPA “must be strengthened and improved,” and section 31, which states “[i]t is the intent of the People of the State of California in enacting this

⁸⁰ Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand, page 1.

⁸¹ Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand, page 1.

⁸² Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand, pages 1-2.

⁸³ Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand, page 2.

measure to strengthen and improve the laws that punish and control sexual offenders.”⁸⁴ Finance also relies on statements in the Voter Guide relating to expanding the definition of a sexually violent predator and making more offenders eligible for SVP commitment.⁸⁵

Further, Finance asserts that “[t]he voters also insulated these definitional changes from legislative repeal or revision,” with section 33 of Proposition 83, which states that “[t]he provisions of this act shall not be amended by the Legislature except by a statute passed in each house by rollcall vote...two-thirds of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters.”⁸⁶ Finance concludes that “the Legislature cannot modify the SVPA through its normal legislative process to revert to the definition of ‘sexually violent predator’ that existed before Proposition 83.”⁸⁷

Finance then argues that all of the costs and duties of the SVPA “flow from the definition of ‘sexually violent predator.’”⁸⁸ Finance states that “[t]he entire purpose of the SVPA is to provide a mechanism for processing and, where appropriate, civilly committing the category of offenders defined as ‘sexually violent predators.’”⁸⁹ Finance concludes: “Regardless of the number of offenders processed by local governments in a particular year, it is not disputed that the voters expanded the category of offenders who ‘shall’ be referred to local governments as a part of the SVPA process...All those offenders are now referred to local governments at the direction of the voters – not the Legislature.”⁹⁰

Finance did not file comments on the Draft Proposed Denial of a New Test Claim Decision.

B. County of Los Angeles

The County of Los Angeles argues that Finance has not met its burden under Government Code section 17570. The County asserts that “DOF’s argument is conclusory in stating that because the voters ‘are the source’ of the expanded definition of Prop. 83, that the state is no longer

⁸⁴ Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand, page 2.

⁸⁵ Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand, page 2.

⁸⁶ Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand, page 2; Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 33, page 21.

⁸⁷ Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand, page 2.

⁸⁸ Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand, page 2.

⁸⁹ Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand, page 3.

⁹⁰ Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand, page 3.

financially responsible for reimbursing such costs.”⁹¹ Accordingly, the County argues that “DOF has failed to make a showing that the state’s liability...has been modified based on a subsequent change in law.”⁹²

The County argues that the expanded definition of a sexually violent predator did not transform the test claim statutes into a voter-imposed mandate:

The definition of an SVP has always involved a two part process. First, an individual must have been convicted of a crime involving sexual violence. A second component is that an individual “has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent behavior.” Prior to Proposition 83, WIC section 6600 defined a SVP as an individual who had been convicted of two or more qualifying sexually violent offenses. The passage of Proposition 83 resulted in the reduction of the qualifying offense to one or more. However, Proposition 83 left unchanged the mental disorder component of the SVP definition.⁹³

The County also notes that “DOF ignores the legislature’s own expansion of the SVP definition in SB 1128.” The County asserts that “[w]hile it is true that Proposition 83 expanded the set of crimes that qualify as ‘sexually violent offenses’...it avoids the fact that the legislature in enacting SB 1128, prior to the passage of Proposition 83, had already expanded the SVP definition to include those offenses.”⁹⁴ The County goes on to assert that “DOF incorrectly states that ‘it is undisputed that the voters expanded the category of offenders who “shall” be referred to local governments as part of the SVPA process.’”⁹⁵ The County again explains that a person is not deemed an SVP based on “simply whether they have committed one or more qualifying offenses, there is also a mental evaluation component.” The County argues that Finance’s statement that “all those offenders are now referred to local governments at the direction of the voters” is inaccurate: “This statement misconstrues the SVP identification process by suggesting that Proposition 83 automatically resulted in referrals being generated, giving no consideration to the second prong which involves mental health diagnoses.”⁹⁶

Finally, the County argues that the expanded definition of an SVP pursuant to Proposition 83 did not result in an increase in referrals to local governments. The County again argues that the

⁹¹ Exhibit G, County of Los Angeles’ Comments on the Request for Mandate Redetermination on Remand, page 3.

⁹² Exhibit G, County of Los Angeles’ Comments on the Request for Mandate Redetermination on Remand, page 3.

⁹³ Exhibit G, County of Los Angeles’ Comments on the Request for Mandate Redetermination on Remand, page 3.

⁹⁴ Exhibit G, County of Los Angeles’ Comments on the Request for Mandate Redetermination on Remand, pages 3-4.

⁹⁵ Exhibit G, County of Los Angeles’ Comments on the Request for Mandate Redetermination on Remand, page 4.

⁹⁶ Exhibit G, County of Los Angeles’ Comments on the Request for Mandate Redetermination on Remand, page 4.

mental health diagnosis is critical, and that the average annual number of petitions actually decreased after Proposition 83:

CDCR's primary role in the SVP identification process was to refer only those prisoners that had the requisite prior convictions. The expanded definition in Proposition 83 resulted in an increase in the number of referrals from CDCR to [the Department of State Hospitals]. (See Table 3 of the July 2011 California State Audit on the Sex Offender Commitment Program, "SVP Audit"). Although the number of individuals screened by CDCR and DSH increased, the number of referrals to local government did not increase as expected. In Los Angeles County, the average annual number of referrals from DSH to the Los Angeles District Attorney's Office was 32.9 cases from 1996-2006. The average annual number of referrals after the passage of Proposition 83 was 23.5 cases.⁹⁷

The County cites a "Dr. Brian Abbott, a psychologist who has conducted over 500 SVP evaluations since 2002," and who offers that the most common diagnosis leading to an SVP designation is one that requires a pattern of behavior and an inability to control impulses or urges, which manifests over a period of months.⁹⁸ Dr. Abbott contends that this diagnosis must be established through a pattern of conduct, because a person subject to evaluation "typically [would] not reveal information about their sexual urges and fantasies." And thus, the reduction from two offenses to one means that it is more difficult to establish that pattern for a substantial number of cases referred from CDCR to DSH for evaluation.⁹⁹ The County of Los Angeles data, which breaks down its referral data by year, however, indicates an initial spike in referrals after the 2006 amendments in 2007 (46) and 2008 (44), up from an average of just under 30 per year in the five years prior.¹⁰⁰ And, like several other counties, the county notes that it does not file petitions on all referrals received. Rather, although it received 45 referrals in 2011, it filed petitions on just 30 of those referrals.¹⁰¹

The County did not file comments on the Draft Proposed Denial of a New Test Claim Decision.

C. County of Orange

The County of Orange also argues that Finance has not met its burden: "On March 26, 2019, the DOF submitted its comments, which cited no evidence regarding whether, and to what extent,

⁹⁷ Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, page 5.

⁹⁸ Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, pages 6; 14-17.

⁹⁹ Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, pages 6; 14-17.

¹⁰⁰ Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, page 10.

¹⁰¹ Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, page 10.

the number of referrals to local governments was affected by Proposition 83's expanded SVP definition.”¹⁰² The County further argues:

Given that the Supreme Court has already opined that the current record is insufficient to establish that such a change resulted from the simple expansion of the SVP definition, the DOF needed to create a record and provide evidence of the practical effects and costs flowing from this change. By declining to do so, it failed to meet its burden.¹⁰³

The County argues that in Finance’s Comments, it “asserted that the new SVP definition expanded the ‘category of people’ who could be subject to the SVP protocols and, therefore, the costs relating to previously state-mandated duties now ‘flow from’ this definition.”¹⁰⁴ The County argues that “[t]his assertion is completely meaningless in the absence of any data demonstrating that the change in definition had anything other than a de minimis effect on referrals to local governments.”¹⁰⁵

The County argues that Proposition 83 did “nothing” to transform the test claim statutes into a voter-imposed mandate.¹⁰⁶ The County states that “[h]ad Proposition 83 failed, the fundamental burdens of the SVPA protocols would still exist...” and that “Proposition 83 merely asked voters whether they wanted to amend the act in a limited manner and recited a large portion of the remaining statutory scheme to provide the voters with context to guide their decision.”¹⁰⁷ The County asserts that “[i]n particular, changes to the SVP definition resulting from Proposition 83 did not require local entities to perform new services or provide a higher level of service.”¹⁰⁸ The County acknowledges that “[w]hile the Supreme Court acknowledge [sic] the possibility that the definitional change might, as a practical matter, modify legal duties or significantly increase the burdens of those duties, the DOF has presented no evidence that this actually happened.”¹⁰⁹ The County, on the other hand, provides evidence that from 2000 through 2006, it filed an

¹⁰² Exhibit H, County of Orange’s Comments on the Request for Mandate Redetermination on Remand, page 2.

¹⁰³ Exhibit H, County of Orange’s Comments on the Request for Mandate Redetermination on Remand, page 2.

¹⁰⁴ Exhibit H, County of Orange’s Comments on the Request for Mandate Redetermination on Remand, page 3.

¹⁰⁵ Exhibit H, County of Orange’s Comments on the Request for Mandate Redetermination on Remand, page 3.

¹⁰⁶ Exhibit H, County of Orange’s Comments on the Request for Mandate Redetermination on Remand, page 3.

¹⁰⁷ Exhibit H, County of Orange’s Comments on the Request for Mandate Redetermination on Remand, page 3.

¹⁰⁸ Exhibit H, County of Orange’s Comments on the Request for Mandate Redetermination on Remand, page 3.

¹⁰⁹ Exhibit H, County of Orange’s Comments on the Request for Mandate Redetermination on Remand, page 4.

average of 4.43 commitment cases per year, while from 2007 through 2018, the average dropped to 3.42 cases per year.¹¹⁰ The county does not provide a breakdown by whether there were one or two victims or provide any annual data that might show an overall trend.

The County did not file comments on the Draft Proposed Denial of a New Test Claim Decision.

D. County of Sacramento

The County of Sacramento argues that Proposition 83 does not constitute a voter-imposed mandate because, “[i]n short, the reimbursable activities have not changed since Jessica’s Law was adopted by the voters.”¹¹¹ The County asserts that “[t]he constitutionally compelled reenactment of the unaltered test claim statutes cannot be construed as a decision by the voters to impose duties that the ballot measure did not add or amend.”¹¹² The County also notes that “the Department of Finance in their March 22, 2019 comments failed to provide evidence as to this issue and has not met its initial burden of proof.”¹¹³

In addition, the County submits evidence that, as a practical matter, “since the passage of Jessica’s Law, the number of referrals has actually decreased state-wide.”¹¹⁴ The County cites a 2011 report from the California State Auditor, which shows a temporary increase in the number of referrals, petitions, and commitments in the first two years after Proposition 83, followed by a significant decrease.¹¹⁵ The County states: “Sacramento County’s statistics are similar to state-wide statistics.” In 2007 and 2008, the County experienced a significant increase in petitions filed, but all had more than one victim, and therefore were not part of the population of potential SVPs brought within the coverage of the SVP program by Proposition 83. Since 2008, the County asserts, “the total number of petitions filed has steadily dropped, and there have never been more than three single-victim petitions filed in a year.”¹¹⁶ The County further states that “[t]he District Attorney has located at least four referrals for which a petition was not filed, and several that were dismissed either prior to or shortly after the probable cause hearing.”¹¹⁷ The

¹¹⁰ Exhibit H, County of Orange’s Comments on the Request for Mandate Redetermination on Remand, pages 5, 51.

¹¹¹ Exhibit I, County of Sacramento’s Comments on the Request for Mandate Redetermination on Remand, page 2.

¹¹² Exhibit I, County of Sacramento’s Comments on the Request for Mandate Redetermination on Remand, page 2.

¹¹³ Exhibit I, County of Sacramento’s Comments on the Request for Mandate Redetermination on Remand, page 2.

¹¹⁴ Exhibit I, County of Sacramento’s Comments on the Request for Mandate Redetermination on Remand, page 2.

¹¹⁵ Exhibit I, County of Sacramento’s Comments on the Request for Mandate Redetermination on Remand, page 2.

¹¹⁶ Exhibit I, County of Sacramento’s Comments on the Request for Mandate Redetermination on Remand, page 3.

¹¹⁷ Exhibit I, County of Sacramento’s Comments on the Request for Mandate Redetermination on Remand, page 3.

County concludes: “Regardless, the change in law did not increase the number of referrals to Sacramento County and in fact appears to have greatly reduced the number of referrals and certainly the number of petitions filed.”¹¹⁸ The County submits a declaration from Brian Morgan, of the Sacramento County District Attorney’s office, which includes a year-by-year breakdown of the number of petitions filed, and how many of those were based on only an offense against a single victim and how many on an offense against more than one victim.¹¹⁹ That data shows a spike from 2006 to 2008 of SVP filings with more than one victim.¹²⁰ Then from 2009 to 2019 it shows that there was a significant reduction of total filings and that about 30 percent of the filings that there were (15 out of a total of 50) were with a single victim.¹²¹

The County did not file comments on the Draft Proposed Denial of a New Test Claim Decision.

E. County of San Bernardino

The County of San Bernardino states that it “objects to the Commission’s request for comments at this time.”¹²² The County asserts that Finance should be required to first establish “its legal and factual basis for its redetermination request.”¹²³ The County argues that “[o]nly after DOF has met this burden should interested parties be required to submit comments,” and “[s]ince the DOF has not set forth a factual basis for seeking redetermination, the County of San Bernardino hereby reserves the right to submit further data regarding specific SVP cases, should the Commission find that DOF has met its initial burden.”¹²⁴

The County argues that Proposition 83 “modified the SVP criteria by decreasing the number of victims from two to one,” but that “this change is de minimis when compared to the overall SVP program and did not relieve the counties of their preexisting state mandated activities...”¹²⁵

The County asserts that there is no significant statistical increase in SVP filings and that “[t]he likely reason...is because the offender is still required to be diagnosed with a mental disorder

¹¹⁸ Exhibit I, County of Sacramento’s Comments on the Request for Mandate Redetermination on Remand, page 3.

¹¹⁹ Exhibit I, County of Sacramento’s Comments on the Request for Mandate Redetermination on Remand, page 4.

¹²⁰ Exhibit I, County of Sacramento’s Comments on the Request for Mandate Redetermination on Remand, page 4.

¹²¹ Exhibit I, County of Sacramento’s Comments on the Request for Mandate Redetermination on Remand, page 4.

¹²² Exhibit J, County of San Bernardino’s Comments on the Request for Mandate Redetermination on Remand, page 1.

¹²³ Exhibit J, County of San Bernardino’s Comments on the Request for Mandate Redetermination on Remand, page 2.

¹²⁴ Exhibit J, County of San Bernardino’s Comments on the Request for Mandate Redetermination on Remand, page 2.

¹²⁵ Exhibit J, County of San Bernardino’s Comments on the Request for Mandate Redetermination on Remand, page 2.

and such diagnoses require demonstration of a pattern of behaviors, fantasies or urges that have occurred for at least six months, which would be difficult to obtain in a case with a single victim.”¹²⁶ In other words, even though the number of underlying offenses needed was reduced, the fact that an individual still must be diagnosed with a “congenital or acquired condition affecting the emotional or volitional capacity that pre-disposes the person to the commission of criminal sexual acts” means that the population of potential SVPs is not significantly increased due to the relatively high burden of the final criterion.¹²⁷ Finally, the County asserts that its data is “[s]imilar to the statewide data trend,” in that it has declined generally in the years following Proposition 83: “[t]he data available at this time...indicates that prior to Jessica’s Law, 2002 to 2006, the average number of SVP filings countywide was 9.2 per year.”¹²⁸ The County states that “[a]fter Jessica’s Law passed, 2007, to 2018, the average number of SVP filings countywide was 6 per year.”¹²⁹ The county does not provide a break down by whether there were one or two victims or provide any annual data that might show an overall trend.

The County did not file comments on the Draft Proposed Denial of a New Test Claim Decision.

F. County of San Diego

The County of San Diego argues that Finance has the initial burden to demonstrate that the expanded definition of a sexually violent predator constitutes a subsequent change in law, and that it has not yet met that burden. The County cites Government Code section 17570(d), and section 1190.1(c) of the Commission’s regulations, which require a detailed analysis and narrative, signed under penalty of perjury, demonstrating how and why the State’s liability for mandate reimbursement has been modified by a subsequent change in law.¹³⁰ The County notes that “[t]he question presented in the DOF’s 2013 request – whether the reenactment of SVPA provisions in Proposition 83 constituted a subsequent change in law...was resolved by the Supreme Court in 2018.” The County argues that “[b]ecause the Supreme Court rejected the only basis asserted by DOF in its request for redetermination, its pending request is facially deficient.”¹³¹

¹²⁶ Exhibit J, County of San Bernardino’s Comments on the Request for Mandate Redetermination on Remand, page 3.

¹²⁷ Exhibit J, County of San Bernardino’s Comments on the Request for Mandate Redetermination on Remand, page 3.

¹²⁸ Exhibit J, County of San Bernardino’s Comments on the Request for Mandate Redetermination on Remand, page 4.

¹²⁹ Exhibit J, County of San Bernardino’s Comments on the Request for Mandate Redetermination on Remand, page 4.

¹³⁰ Exhibit K, County of San Diego’s Comments on the Request for Mandate Redetermination on Remand, pages 2-3.

¹³¹ Exhibit K, County of San Diego’s Comments on the Request for Mandate Redetermination on Remand, page 3.

The County goes on to argue that Finance’s Comments, filed March 22, 2019, are conclusory and “unsupported by any factual analysis.”¹³² The County argues that Finance failed to provide any data or evidence regarding the effect of Proposition 83 on the number of referrals to local government, and that “while *in theory*, the expanded definition could result in more referrals, as further discussed below, the actual facts presented in the State’s own audit demonstrates that, *in reality*, the ‘expanded definition’ has not resulted in a sustained number of higher referrals being made to local governments.”¹³³ The County continues:

The State's own audit indicates that the “expanded definition” of SVP has had, at most, a nominal effect on the number of referrals to counties, and thus it can't be said that the definitional changes so altered the duties imposed on local governments that the source of all those duties now derives from the voters as opposed to the Legislature. Additionally, as noted by the Sacramento County District Attorney's Office in its March 26, 2013 letter to the Commission: “The legislature chose to have these civil proceedings handled by the local entities. It can remove that requirement from the local entities if it so chooses...” The fact that there may be limits on the Legislature's ability to narrow the definition of an SVP in a manner that is inconsistent with Proposition 83 is of no moment.¹³⁴

The County goes on to argue that a July 2011 report by the California State Auditor concluded that “while there was a dramatic increase in the number of referrals from the Department of Corrections (“Corrections”) to the state Department of Mental Health (“Mental Health”) after Senate Bill 1128 became law and the voters passed Prop. 83, there was only a brief uptick in the number of referrals to local designated counsel in 2006 through 2008, after which the number of referrals dropped to the pre-Proposition 83 levels.”¹³⁵ The County also cites the following from the 2011 California State Auditor’s report:

Thus, Jessica’s Law has not resulted in what some expected: the commitment as SVPs of many more offenders. Although an initial spike in commitments occurred in 2006 and 2007, this increase has not been sustained. By expanding the population of potential SVPs to include offenders with only one victim rather than two, Jessica’s Law may have unintentionally removed an indirect but effective filter for offenders who do not qualify as SVPs because they lack diagnosed mental disorders that predispose them to criminal sexual acts. In other words, the fact that an offender has had more than one victim may correlate to the

¹³² Exhibit K, County of San Diego’s Comments on the Request for Mandate Redetermination on Remand, page 4.

¹³³ Exhibit K, County of San Diego’s Comments on the Request for Mandate Redetermination on Remand, page 4.

¹³⁴ Exhibit K, County of San Diego’s Comments on the Request for Mandate Redetermination on Remand, page 5.

¹³⁵ Exhibit K, County of San Diego’s Comments on the Request for Mandate Redetermination on Remand, page 5.

likelihood that he or she has a diagnosed mental disorder that increases the risk of recidivism.¹³⁶

The County states that it has requested data from the Department of State Hospitals on the number of referrals to designated counsel, both in the County of San Diego and statewide, for the years 1996 through 2018: “Since the DOF has not set forth a factual basis for seeking redetermination, the County hereby reserves the right to submit further data should the Commission find that DOF has met its initial burden.”¹³⁷ In subsequent Late Comments on the Request for Mandate Redetermination on Remand, the County of San Diego submitted data obtained from the Department of State Hospitals, which show a small increase in the number of referrals from State Hospitals to counties, and specifically to the County of San Diego, between 2006 and 2007, the year of and the first full year after both Proposition 83 and Senate Bill 1128 became law.¹³⁸ However, the same data show that over the next several years after the adoption of Proposition 83, those referrals, both statewide and in the County steadily declined, and have remained well below pre-Proposition 83 levels.¹³⁹

Finally, with respect to the changes to the definition of a sexually violent predator, the County argues that the program, “and the duties it imposes on local governments, would have remained in place whether or not Proposition 83 had been approved by the voters.”¹⁴⁰ The County argues that “Proposition 83 could only be said to have ‘transformed’ these duties from obligations imposed by the State to obligations imposed by the voters, if the definitional changes to SVP fundamentally changed the operation of the SVP program as it pertains to local governments.”¹⁴¹ The County argues that “[t]o the extent there exists a small population of offenders who would not have otherwise been eligible for commitment under the SVPA but for Jessica’s Law, the County contends the added costs incurred by the County in fulfilling its duties with respect to these offenders should nonetheless be reimbursed as part of the SVP program established by the Legislature.”¹⁴² The data provided by the county does not provide a break down by whether there were one or two victims for the referrals that were made.

¹³⁶ Exhibit K, County of San Diego’s Comments on the Request for Mandate Redetermination on Remand, pages 5-6 (quoting *Sex Offender Commitment Program*, California State Auditor, July 2011 Report, page 15 [See Exhibit O]).

¹³⁷ Exhibit K, County of San Diego’s Comments on the Request for Mandate Redetermination on Remand, page 6.

¹³⁸ Exhibit M, County of San Diego’s Late Comments on the Request for Mandate Redetermination on Remand, pages 2; 4.

¹³⁹ Exhibit M, County of San Diego’s Late Comments on the Request for Mandate Redetermination on Remand, pages 2; 4.

¹⁴⁰ Exhibit K, County of San Diego’s Comments on the Request for Mandate Redetermination on Remand, page 6.

¹⁴¹ Exhibit K, County of San Diego’s Comments on the Request for Mandate Redetermination on Remand, page 6.

¹⁴² Exhibit K, County of San Diego’s Comments on the Request for Mandate Redetermination on Remand, pages 6-7.

The County did not file comments on the Draft Proposed Denial of a New Test Claim Decision.

G. Office of the Los Angeles District Attorney

The District Attorney for the County of Los Angeles argues that the expanded definition of an SVP did not alter the duties performed by the counties, but instead only expanded the number of possible cases that could be referred.¹⁴³ However, the District Attorney also asserts that the greater burden of the expanded definition is borne by the state agencies implementing the SVPA.¹⁴⁴ The state entities “conduct multiple levels of screening,” and “[t]he vast majority of cases considered by the Department of State Hospitals are not referred to the DA for filing of an SVP petition.”¹⁴⁵ The District Attorney submits annual statistics for the number of SVP referrals, which show a spike in referrals in 2007 (46) and 2008 (44) referrals followed by a general decline thereafter, except for another one-year spike in 2011 (45).¹⁴⁶

The Los Angeles County District Attorneys’ Office did not file comments on the Draft Proposed Denial of a New Test Claim Decision.

IV. Discussion

Under Government Code section 17570, the Commission may consider a request to adopt a new test claim decision to supersede a prior test claim decision based on a subsequent change in law which modifies the state’s liability. As relevant to this case, a “subsequent change in law” is defined as “a change in law that requires a finding that an incurred cost . . . is not a cost mandated by the state pursuant to [Government Code] Section 17556.”¹⁴⁷ If the Commission adopts a new test claim decision that supersedes the previously adopted test claim decision, the Commission is required to adopt new parameters and guidelines or amend existing parameters and guidelines.¹⁴⁸

The Department of Finance filed this request for a new test claim decision in accordance with Government Code section 17570, contending that the test claim statutes in the *Sexually Violent Predators*, CSM-4509 program impose duties that are necessary to implement or are expressly included in Proposition 83, adopted by the voters on November 7, 2006, in accordance with Government Code section 17556(f). Government Code section 17556(f) states that the Commission shall not find “costs mandated by the state” when

¹⁴³ Exhibit L, Los Angeles County District Attorney’s Office’s Late Comments on the Request for Mandate Redetermination on Remand, page 2.

¹⁴⁴ Exhibit L, Los Angeles County District Attorney’s Office’s Late Comments on the Request for Mandate Redetermination on Remand, page 2.

¹⁴⁵ Exhibit L, Los Angeles County District Attorney’s Office’s Late Comments on the Request for Mandate Redetermination on Remand, page 2.

¹⁴⁶ Exhibit L, Los Angeles County District Attorney’s Office’s Late Comments on the Request for Mandate Redetermination on Remand, page 3.

¹⁴⁷ Government Code section 17570(a)(2) (Stats. 2010, ch. 719).

¹⁴⁸ Government Code section 17570 (Stats. 2010, ch. 719).

The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.

Therefore, the issue before the Commission is whether Proposition 83 constitutes a subsequent change in law that modifies the state's liability for the *Sexually Violent Predators*, CSM-4509 program.

Pursuant to the court's Judgment and Writ, the Commission is required to consider, on remand "whether the expanded SVP definition in Proposition 83 transformed the test claim statutes as a whole into a voter-imposed mandate or, alternatively, did so to the extent the expanded definition incrementally imposed new, additional duties on the Counties."¹⁴⁹ Thus, the Court remanded this matter to the Commission ". . . so that it can determine, in the first instance, whether and how the initiative's expanded definition of an SVP may affect the state's obligation to reimburse the Counties for implementing the amended statute."¹⁵⁰

In addition, the court noted that the current record is insufficient to establish how, if at all, the expanded SVP definition in Proposition 83 affected the number of referrals to local governments and, thus, the court remanded the matter to the Commission to enable it to address these arguments in the first instance.¹⁵¹

A. The Expanded SVP Definition and Other Indicia Support the Conclusion That Voters Reasonably Intended to Prohibit the Legislature from Repealing or Significantly Reducing the Civil Commitment Program for SVPs; However, the Voter Mandate Did Not Impose Any New Duties or Activities on Local Government, Nor Did It Require the State To Impose Any Duties or Activities on Local Government. Therefore, the Duties Remain Mandated by the State.

1. The Record Shows That Although the Number of SVP Referrals Has Not Increased Over Time, at Least Some Portion of All New Referrals Since 2006 Are Based on a Single Victim and Those Referrals Are Therefore Triggered by Proposition 83 and Not By the Test Claim Statutes or Other Later Changes in Law.

The Court's direction to the Commission on remand follows the State's argument that "the specified local government duties became necessary to implement the ballot measure, in that the Counties had been under no obligation to perform any duties for this *class of offenders* until the voters by initiative expanded the definition of an SVP."¹⁵² The Court acknowledged that "[a]lthough the SVP definition does not itself impose any particular duties on local governments,

¹⁴⁹ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

¹⁵⁰ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 201.

¹⁵¹ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

¹⁵² *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

it is necessarily incorporated into each of the listed activities.”¹⁵³ The Court reasoned that “[n]one of the specified local government duties is triggered until an inmate is identified as someone who may be an SVP..., [w]hen more people qualify as potential SVPs, a county must review more records” and “[i]t must file more commitment petitions, and conduct more trials.”¹⁵⁴ However, the court found that the record was insufficient to establish how, if at all, the expanded SVP definition in Proposition 83 affected the number of referrals to counties and, thus, remanded the case back for the Commission to address this argument.¹⁵⁵

In reference to the “expanded definition,” the Court agrees that Proposition 83 broadened the definition of an SVP in the following two ways:

[T]he voters broadened the definition of an SVP within the meaning of Welfare and Institutions Code section 6600 in two ways. First, they reduced the required number of victims, so that an offender need only have been ‘convicted of a sexually violent offense against one or more victims,’ instead of two or more victims. Second, the voters eliminated a provision that had capped at one the number of juvenile adjudications that could be considered a prior qualifying conviction.¹⁵⁶

As the court points out, neither SB 1128 nor Proposition 83 changed the duties or the activities that a local government must perform under the SVP program once a referral has been made. And the court did not attribute to Proposition 83 the expansion of the list of underlying offenses that qualify as “sexually violent offense[s].”¹⁵⁷ Those changes were previously in effect with the enactment of SB 1128.¹⁵⁸

Thus, the question whether Proposition 83 “transformed” the test claim statutes “to the extent the expanded definition incrementally imposed new, additional duties...” must refer to the “*class of offenders*” that would not have been subject to civil commitment as SVPs but for the enactment of Proposition 83; i.e., those individuals convicted of a sexually violent offense against only *one* victim.

In response to the Commission’s Request for Comment and Legal Argument Relating to the Reconsideration of the Request for Mandate Redetermination on Remand, Finance asserts, without evidence, that all SVP referrals are now as a result of Proposition 83:

Regardless of the number of offenders processed by local governments in a particular year, it is not disputed that the voters expanded the category of offenders who “shall” be referred to local governments as part of the SVPA process when they adopted Proposition 83 and altered the definition of “sexually

¹⁵³ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 216.

¹⁵⁴ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

¹⁵⁵ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

¹⁵⁶ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 216 (citing Welfare and Institutions Code section 6600(a; g), as amended by Proposition 83 (Nov. 2006)).

¹⁵⁷ Welfare and Institutions Code section 6600(b) (Stats. 2006, chapter 337 (SB 1128)).

¹⁵⁸ Statutes 2006, chapter 337, section 53.

violent predator.” All those offenders are now referred to local governments at the direction of the voters—not the Legislature. This mandate is now imposed by the voters and is no longer reimbursable by the State.¹⁵⁹

Thus Finance seems to argue that since the trigger for the mandate is now one versus two offenses, Proposition 83 is the source of the mandate for all referrals as a matter of law, regardless of the number of offenders actually referred to local government as a result of only one offense. However, the court directed the Commission to establish a record to address how, if at all, the expanded SVP definition in Proposition 83 affected the number of referrals to counties.¹⁶⁰ The number of referrals to counties as a result of Proposition 83 is a question that must be based on evidence in the record.

As described in the Background, the civil commitment process begins when the Department of Corrections refers a potential SVP, at least six months before the person’s release date, for screening by the Department of Corrections and the Board of Prison Terms (now the Parole Board).¹⁶¹ If that screening finds that the person may be an SVP, the statutes require a mental health examination by two qualified psychiatrists or psychologists with the Department of Mental Health (now Department of State Hospitals).¹⁶² The Department of State Hospitals evaluates the person using a standardized assessment protocol developed by the Department, which includes assessing mental disorders and risk factors. The two evaluating professionals must concur that the person is an SVP; but if they do not, a second evaluation by independent professionals outside state government is required.¹⁶³ The Department then forwards a request to the county in which the offense occurred for a petition to have the person committed only if the two professionals performing the evaluation find that the person *is* an SVP.¹⁶⁴ If the county’s designated counsel concurs with the recommendation, the county counsel or district attorney is required to file a petition for civil commitment.¹⁶⁵

Several counties submitted argument and evidence regarding the number of SVP referrals to counties, or in some cases petitions for commitment filed by the county, before and after Proposition 83. The evidence does not show a permanent increase in the number of referrals to counties, commitment petitions filed, or commitments imposed following the passage of Proposition 83. Rather, it shows a spike in referrals and petitions in 2007 and 2008, followed by a significant decline in the following years. Some of the counties assert that the decline of referrals and petitions is because the definitional changes made in Proposition 83 did not alter the final, controlling criterion for civil commitment of an SVP – that the potential SVP must also

¹⁵⁹ Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand.

¹⁶⁰ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

¹⁶¹ Welfare and Institutions Code section 6601.

¹⁶² Welfare and Institutions Code section 6601.

¹⁶³ Welfare and Institutions Code section 6601.

¹⁶⁴ Welfare and Institutions Code section 6601.

¹⁶⁵ Welfare and Institutions Code section 6601.

have a diagnosable mental condition that necessitates confinement and treatment.¹⁶⁶ However, as discussed below, a likely cause for the overall decrease in referrals is the change made by Statutes 2006, chapter 337 (SB 1128) from a two-year period of commitment (requiring new SVP commitment every two years) to an indefinite period of commitment. In addition, data from one county shows a number of SVP referrals of persons convicted of a sexually violent offense against one victim in accordance with Proposition 83, though the other counties did not provide breakdowns of whether their referrals were based on an offense against one or more than one victim.

Specifically, the County of Los Angeles asserts, based on the declaration of Deputy District Attorney Jay Grobeson of the Los Angeles County District Attorney's Office, that the county received an average of 32.9 SVP referrals per year from 1996 through 2006 when Proposition 83 was adopted, and an average of only 23.5 per year after 2006.¹⁶⁷ The Los Angeles data in the record shows that after an initial spike in 2007 and 2008 of 44 and 46 SVP referrals respectively, there was in fact a significant decline to an average of 20.75 referrals annually from 2009-2016.¹⁶⁸

The County of Orange tracks the petitions for commitment filed, stating that the County filed an average of 4.43 commitment cases per year between 2000 and 2006, and an average of 3.42 cases per year between 2007 and 2018 and does not indicate what its numbers were for 2007 and 2008 specifically - but does note that the State Auditor found an initial spike overall for those years followed by a decline thereafter.¹⁶⁹

The County of San Bernardino asserts that the expanded definition based on Proposition 83 "had no discernable [sic] long term effect on the number of SVP filings" in the County: "San Bernardino County has experienced a general decline in SVP filings year over year since the passage of Jessica's Law," though it notes an initial spike in referrals in 2006 and 2007.¹⁷⁰ Supervising Deputy County Counsel Carol A. Greene of San Bernardino County states under penalty of perjury that from 2002 to 2006, the county filed an average of 9.2 SVP petitions per year, while "[a]fter Jessica's Law passed, 2007 to 2018, the average number of SVP filings countywide was 6 per year," but does not break down the number of referrals by year.¹⁷¹

¹⁶⁶ See, e.g., Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand, pages 4-5.

¹⁶⁷ Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, pages 5; 10. See also, Exhibit L, Los Angeles County District Attorney's Office's Late Comments on the Request for Mandate Redetermination on Remand.

¹⁶⁸ Exhibit G, County of Los Angeles' Comments on the Request for Mandate Redetermination on Remand, page 10.

¹⁶⁹ Exhibit H, County of Orange's Comments on the Request for Mandate Redetermination on Remand, pages 5; 50-51.

¹⁷⁰ Exhibit J, County of San Bernardino's Comments on the Request for Mandate Redetermination on Remand, page 3.

¹⁷¹ Exhibit J, County of San Bernardino's Comments on the Request for Mandate Redetermination on Remand, page 3.

The County of San Diego submitted evidence showing that in the years prior to Proposition 83 (from 1996 through 2006), the County received between five and 29 SVP referrals per year.¹⁷² In the years following Proposition 83, through 2018, the County received between one and nine referrals per year, averaging 6.33 per year in 2004-2006. Then in 2007, the first full year of implementation after Proposition 83 was adopted, the County received 12 referrals, nearly double that of the prior three years, but this spike fell off and a general decline in referrals followed.¹⁷³ The statewide data the county provided shows a similar trend: a “spike” in referrals in 2007 and 2008 followed by a relatively steady decline (2011 being an apparent outlier¹⁷⁴).

And the County of Sacramento data shows, after an initial spike in petitions in 2006, 2007, and 2008 (19, 12 and 18, respectively), petitions have steadily declined with fewer petitions filed each year than before Proposition 83.¹⁷⁵ However, the Sacramento County data indicates that approximately one-third of the petitions it has filed since 2009 were based on a conviction of a sexually violent offense against a single victim and therefore there is evidence in the record that at least some portion of all referrals and petitions are now based on only a single victim.¹⁷⁶

Some of the counties cited to or attached the California State Auditor’s report (Report 2010-116, issued July 2011), which covers a time period before and after Proposition 83 (2005-2010), and tracks the number of mental health screenings and referrals to the counties for civil commitment of SVPs statewide.¹⁷⁷ The audit was focused on the screening and evaluation processes at the California Department of Corrections and Rehabilitation and the Department of Mental Health (now the Department of Corrections and Department of State Hospitals, respectively), which occur before the referral to the county is made.¹⁷⁸ But the audit also acknowledged the changes

¹⁷² Exhibit M, County of San Diego’s Late Comments on the Request for Mandate Redetermination, page 4.

¹⁷³ Exhibit M, County of San Diego’s Late Comments on the Request for Mandate Redetermination, page 4.

¹⁷⁴ The reason for the 2011 spike is unclear, however, that does correlate with the last year that Mental Health was authorized to use contracted evaluators. According to the California State Auditor’s 2011 report: “our review also found that Mental Health primarily used contracted evaluators to perform its evaluations—which state law expressly permits through the end of 2011. Mental Health indicated that it has had difficulty attracting qualified evaluators to its employment and hopes to remedy the situation by establishing a new position with higher pay that is more competitive with the contractors.” (Exhibit H, County of Orange’s Comments on the Request for Mandate Redetermination on Remand (July 2011 Report 2010-116), pages 6-49.

¹⁷⁵ Exhibit I, County of Sacramento’s Comments on the Request for Mandate Redetermination on Remand, page 3-4.

¹⁷⁶ Exhibit I, County of Sacramento’s Comments on the Request for Mandate Redetermination on Remand, page 4.

¹⁷⁷ E.g., Exhibit H, County of Orange’s Comments on the Request for Mandate Redetermination on Remand, pages 6-49.

¹⁷⁸ Exhibit O, Sex Offender Commitment Program, California State Auditor, July 2011 Report, page 9.

to the SVPA made by Proposition 83 and Statutes 2006, chapter 337 (SB 1128), and the effect on the population of potential SVPs that must be screened and evaluated.¹⁷⁹ Specifically, it notes that the underlying offense(s) committed is not the only factor or criterion within the “definition” of an SVP: a diagnosable mental condition making the person dangerous to the community is the final, essential criterion, and thus, “despite the increased number of evaluations [conducted by the state], Mental Health recommended to the...[counties] about the same number of offenders in 2009 as it did in 2005, before the voters passed Jessica’s Law.”¹⁸⁰

There has been no comment from any of the parties, or discussion in the audit, addressing the change in law made by Statutes 2006, chapter 337 (SB 1128) to the term of commitment from two-years to indeterminate, which almost certainly contributed to the spike in petitions in 2007 and 2008, and the subsequent reduction in the number of petitions. Under the SVPA, until it was amended in 2006 by Statutes 2006, chapter 337 (SB 1128), a person determined to be an SVP was committed to the custody of DMH for a period of two years and was not to be kept in actual custody for longer than two years unless a new petition to extend the commitment was filed by the county.¹⁸¹ And former Welfare and Institutions Code section 6604.1 provided when the initial two-year term of commitment and subsequent terms of extended commitment began.¹⁸² The requirement that a commitment under the SVPA be based on a *currently* diagnosed mental disorder applied to proceedings to extend a commitment under pre-2006 law. Such proceedings were *not a review hearing or a continuation of an earlier proceeding*.¹⁸³ Rather, an extension hearing was a new and independent proceeding at which the petitioner (the county) was required to prove the person meets the criteria of an SVP.¹⁸⁴ The county was required to prove the person *is* an SVP, not that the person *is still* one.¹⁸⁵ Therefore, under pre-SB 1128 law a new commitment was required every two years to hold an SVP in civil commitment. As the Third District Court of Appeal, in 2005, found, “each recommitment requires petitioner independently to prove that the defendant has a currently diagnosed mental disorder making him or her a danger. The task is not simply to judge changes in the defendant's mental state.”¹⁸⁶ Statutes 2006, chapter 337 (SB 1128) amended the SVPA to provide that all *new* SVP civil commitments continue indefinitely without the county having to file a petition for recommitment every two years. However, previous two-year commitments were not converted to indeterminate terms under SB 1128 and those SVPs previously committed were entitled to a new civil commitment hearing at the end of their existing two-year term. If recommitted, the subsequent term would

¹⁷⁹ Exhibit O, Sex Offender Commitment Program, California State Auditor, July 2011 Report, page 13.

¹⁸⁰ Exhibit O, Sex Offender Commitment Program, California State Auditor, July 2011 Report, page 15.

¹⁸¹ Former Welfare and Institutions Code section 6604 (Stats.1995, ch. 763, § 3, p. 5925).

¹⁸² Former Welfare and Institutions Code section 6604 (Stats.1998, ch. 19, § 5.).

¹⁸³ *People v. Munoz* (2005) 129 Cal.App.4th 421, 429, emphasis in original.

¹⁸⁴ *People v. Munoz* (2005) 129 Cal.App.4th 421, 429, emphasis added.

¹⁸⁵ *People v. Munoz* (2005) 129 Cal.App.4th 421, 430.

¹⁸⁶ *People v. Munoz* (2005) 129 Cal.App.4th 421, 430.

now be an indeterminate term.¹⁸⁷ As a result, the subsequent reduction in referrals and petitions reflected in the State Auditor and local government data was likely based, at least in part, on the fact that new commitment hearings are no longer required every two-years for those already committed for an indeterminate term.

As noted, much of the data and evidence in the record, including the State Auditor's report, do not isolate the effects of the amendments to the "definition" of an SVP attributable to Proposition 83, from those attributable to Statutes 2006, chapter 337 (SB 1128). Therefore, it is difficult to tell to what extent the petitions from 2006 to present day are based on only one victim.

Nonetheless, the Sacramento County data indicates that approximately one-third of the petitions it has filed since 2009 were based on a single victim and, thus, there is evidence in the record that at least some portion of all referrals and petitions are now based on only a single victim.¹⁸⁸

Therefore, it can be safely said at least some portion of all new referrals since 2006 are based on a single victim and those referrals are therefore triggered by Proposition 83 and not by the test claim statutes or other later changes in law.

2. An Ongoing Program and Policy of Civil Commitment of SVPs Is *Integral* to Accomplishing the Electorate's Goals in Enacting Proposition 83 and Other Indicia Support the Conclusion That Voters Reasonably Intended to Prohibit the Legislature from Repealing or Significantly Reducing the Civil Commitment Program and, Thus, the Voters Are the Source of an Ongoing Policy of Civil Commitment of SVPs.

As discussed above, the Court directed the Commission to consider, in this remand "whether the expanded SVP definition in Proposition 83 transformed the test claim statutes as a whole into a voter-imposed mandate. . ."¹⁸⁹ Finance argues that Proposition 83's expanded definition of an SVP and the initiative's Amendment Clause, which prohibits the Legislature from narrowing or repealing "the provisions of this act" through its ordinary legislative process, transforms the mandate as a whole into a voter-imposed mandate. Finance explains its argument as follows:

This expansion of the category of people who would be subject to the SVPA process was a central purpose of Proposition 83. The voters found in Section 2 of the ballot measure that "existing laws that provide for the commitment and control of sexually violent predators must be strengthened and improved." Section 31 of Proposition 83 stated, "It is the intent of the People of the State of California in enacting this measure to strengthen and improve the laws that punish and control sexual offenders." The opening lines of the ballot summary notified voters that one of the ways Proposition 83 would accomplish this goal was by "Expand[ing] [the] definition of a sexually violent predator." The Legislative Analyst also explained that Proposition 83 "generally makes more sex offenders

¹⁸⁷ *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1288; See also footnote 3; See also *People v. Taylor* (2009) 174 Cal.App.4th 920 (in accord on this point of law).

¹⁸⁸ Exhibit I, County of Sacramento's Comments on the Request for Mandate Redetermination on Remand, page 4.

¹⁸⁹ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 217.

eligible for an SVP commitment” by changing the definition of a sexually violent predator.¹⁹⁰

Finance further states that:

The voters also insulated these definitional changes from legislative repeal or revision. Proposition 83 prohibits the Legislature from repealing or narrowing the scope of its provisions “except by a statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters.” So, the Legislature cannot modify the SVPA through its normal legislative process to revert to the definition of “sexually violent predator” that existed before Proposition 83.¹⁹¹

Thus, Finance concludes that the source of the expanded definition is the voters and the costs incurred by counties in complying with the test claim statutes flow from Proposition 83 and are necessary to implement the ballot measure for purposes of Government Code section 17556(f).¹⁹² On that basis, Finance asserts that Proposition 83 constitutes a subsequent change in law, within the meaning of Government Code section 17570, and the State is no longer liable for mandate reimbursement.

The counties disagree, as described above, and contend that the test claim statutes have not been transformed into voter mandates at all. For example, the County of Orange argues:

Had Proposition 83 failed, the fundamental burdens of the SVPA protocols would still exist as they now exist; [*sic*] Proposition 83’s failure would not have changed this. Instead, Proposition 83 merely asked voters whether they wanted to amend the act in a limited manner and recited a large portion of the remaining statutory scheme to provide the voters with context to guide their decision.¹⁹³

Accordingly, the issue here is whether the voters are now the source of the mandated activities.

The Court in *County of San Diego* held that “[w]here the Legislature cannot use the ordinary legislative process to amend or alter duties imposed by the voters (see Cal. Const., art. II, § 10, subd. (c)), it can no longer be reasonably characterized as the source of those duties.”¹⁹⁴ And, the Court observed, “[t]he evident purpose of limiting the Legislature’s power to amend an initiative statute is to protect the people’s initiative powers by precluding the Legislature from

¹⁹⁰ Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand, page 2.

¹⁹¹ Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand, page 2.

¹⁹² Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand, page 1.

¹⁹³ Exhibit H, County of Orange’s Comments on the Request for Mandate Redetermination on Remand, page 3.

¹⁹⁴ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 207.

undoing what the people have done, without the electorate’s consent.”¹⁹⁵ But, the Court continued, “we have never had occasion to consider precisely ‘what the people have done’ and what qualifies as ‘undoing’ when the subject is a statutory provision whose reenactment was constitutionally compelled under article IV, section 9 of the Constitution.”¹⁹⁶

As discussed above, the Court rejected the Commission’s reasoning and findings that the test claim provisions in Welfare and Institutions Code sections 6601, 6604, and 6605, were “expressly included in” the ballot measure, within the meaning of Government Code section 17556(f), merely by virtue of being restated and reenacted within the text Proposition 83 in accordance with article IV, section 9.¹⁹⁷ The Court held instead that “no indication appears in the text of the initiative, nor in the ballot pamphlet, to suggest voters would have reasonably understood they were restricting the Legislature from amending or modifying any of the duties set forth in the test claim statutes.”¹⁹⁸ In this respect, the court stated that when technical reenactments [of existing provisions] are required to be included in a ballot measure under article IV, section 9 of the California Constitution – yet involve no substantive change in a given statutory provision – the Legislature in most cases retains the power to amend the restated provision through the ordinary legislative process and, thus, remains the source of the duties.¹⁹⁹ This conclusion applies “*unless* the provision is integral to accomplishing the electorate’s goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature’s ability to amend that part of the statute.”²⁰⁰

Thus, in order to determine whether Proposition 83 “transformed” the test claim statutes into a voter-imposed mandate, the Commission must determine the extent to which the Legislature “retains the power to amend [the test claim statutes] through its ordinary legislative process.”²⁰¹ To make that determination, the Commission must consider the electorate’s goals when adopting Proposition 83, and determine whether and to what extent those goals and “other indicia” support a conclusion that the voters reasonably intended to limit the Legislature’s ability to subsequently amend the test claim statutes. As described below, the voters were informed by the Ballot Pamphlet, the Legislative Analyst’s Office summary, and the text of Proposition 83 itself, that the Proposition would expand the definition of an SVP, and “strengthen and improve the laws that . . . control sexual offenders.”²⁰² And from that, when read in context of Proposition 83’s

¹⁹⁵ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211 (quoting *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, 597 [internal quotations omitted]).

¹⁹⁶ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211 (quoting *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, 597.)

¹⁹⁷ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 215.

¹⁹⁸ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 213-214.

¹⁹⁹ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214.

²⁰⁰ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214 (emphasis in original).

²⁰¹ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214.

²⁰² Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, sections 1; 31, pages 10; 21.

Amendment Clause and article II, section 10 of the California Constitution, it can be inferred that voters intended to preserve and expand the policy of civil commitment of SVPs.

The limitations imposed on the Legislature's authority to amend the SVPA derive from article II, section 10, and the "somewhat liberalized constraints" of the Amendment Clause found in section 33 of Proposition 83.²⁰³ Article II, section 10 of the California Constitution provides that "[t]he Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval." Proposition 83's Amendment Clause is slightly more permissive with respect to *amendments*, but is silent on *repeal*:

The provisions of this act shall not be amended by the Legislature except by a statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters. However, the Legislature may amend the provisions of this act to expand the scope of their application or to increase the punishments or penalties provided herein by a statute passed by majority vote of each house thereof.²⁰⁴

Therefore, Proposition 83 itself permits a simple majority vote to enact amendments that "expand the scope" of the provisions of the act or "increase the punishments or penalties."²⁰⁵ Meanwhile any other amendment of the "provisions of this act" other than to expand the scope or increase penalties or punishments requires a two-thirds super-majority vote or a statute approved by the voters. Moreover, a complete repeal of the SVPA, or an amendment that substantially undermines the SVPA, would require submitting the question to the voters, pursuant to article II, section 10 and *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577.²⁰⁶

The Court does not precisely identify the scope of "the provisions of this act," but holds that if provisions of Proposition 83 were only technically reenacted pursuant to article IV, section 9 (i.e. the reenactment rule which requires reprinting of the entire section (including any unchanged portions) for any amendment), "and the Legislature has retained the power to amend the provisions through the ordinary legislative process" those provisions are not within "the

²⁰³ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211.

²⁰⁴ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 33.

²⁰⁵ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 33.

²⁰⁶ See *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 212-214 (The Court discussed *Shaw* at length, in which the Legislature "sought to undermine the voter-created [transportation] trust fund by adding new provisions to divert those funds from uses the voters had previously designated." The Court characterized this amendment as "alter[ing] the voters' careful handiwork, both the text and its intended purpose," and the Court noted with approval the *Shaw* court's holding that such Legislative "tinker[ing]" was improper and inconsistent with the voters' intent.)

provisions of this act.”²⁰⁷ This conclusion applies “*unless* the provision is integral to accomplishing the electorate’s goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature’s ability to amend that part of the statute.”²⁰⁸

On this basis the Amendment Clause would apply to those provisions substantively and actually amended by Proposition 83, including the definition of an SVP, and any other provision the repeal or narrowing of which would undermine the voter’s intent in approving Proposition 83 to “to strengthen and improve the laws that punish and control sexual offenders.” Thus, Finance is correct to the extent it argues that “voters also insulated these definitional changes from legislative repeal or revision.”²⁰⁹

The key to determining whether the voters or the Legislature is the source of the mandate lies in determining whether the expanded definition is *integral* to the electorate’s goals in enacting the initiative, or if “other indicia support the conclusion that the voters reasonably intended to limit the Legislature’s ability to amend” the test claim provisions.²¹⁰

The Official Title and Summary of Proposition 83 states that the Proposition:

- Increases penalties for violent and habitual sex offenders and child molesters.
- Prohibits registered sex offenders from residing within 2,000 feet of any school or park.
- Requires lifetime Global Positioning System monitoring of felony registered sex offenders.
- *Expands definition of a sexually violent predator.*
- *Changes current two-year involuntary civil commitment for a sexually violent predator to an indeterminate commitment, subject to annual review by the Director of Mental Health and subsequent ability of sexually violent predator to petition court for sexually violent predator’s conditional release or unconditional discharge.*²¹¹

The Legislative Analyst’s Office’s description of the initiative, as relevant to the SVP program, states:

²⁰⁷ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214 (“Imposing such a limitation as a matter of course on provisions that are merely technically restated would unduly burden the people’s willingness to amend existing laws by initiative.”).

²⁰⁸ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214 (emphasis in original).

²⁰⁹ Exhibit F, Finance’s Late Comments on the Request for Mandate Redetermination on Remand, page 2.

²¹⁰ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214.

²¹¹ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, page 4 (emphasis added).

Change SVP Law. This measure generally makes more sex offenders eligible for an SVP commitment. It does this by (1) reducing from two to one the number of prior victims of sexually violent offenses that qualify an offender for an SVP commitment and (2) making additional prior offenses – such as certain crimes committed by a person while a juvenile – “countable” for purposes of an SVP commitment.²¹²

And, the findings and declarations in the text of Proposition 83 itself states that “existing laws that provide for the commitment and control of sexually violent predators must be strengthened and improved.”²¹³

Thus, Proposition 83 as put before the voters sought amendments to strengthen and improve the laws that control sexual offenders as follows:

- Proposed amendment to section 6000 to *expand* the definition of a sexually violent predator by broadening the underlying criminal offenses supporting a finding that a person is an SVP; by reducing the number of victims of underlying qualifying offenses from two to one; and by removing the ceiling on juvenile offenses applied as qualifying.²¹⁴
- Proposed amendment to section 6601 to provide that an SVP determination and commitment shall toll the term of parole for the underlying offense or offenses during indeterminate civil commitment.²¹⁵
- Proposed amendment to section 6604 to provide for indeterminate commitment, and accordingly, to eliminate the requirement to hold a new SVP hearing every two years.²¹⁶
- Proposed amendment to section 6605 to eliminate the requirement that the Department of Mental Health provide annual notice of an SVP’s right to petition for release, and eliminate the requirement that the court must hold a show cause hearing if not waived by the committed person. Under amended section 6605, DMH would authorize an SVP to file a petition for release *if* the annual report by DMH finds it appropriate.²¹⁷
- Proposed amendment to section 6608 to provide that even without DMH approval, “nothing in this article shall prohibit” a committed SVP from petitioning for conditional

²¹² Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, page 6.

²¹³ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 2(h), page 10.

²¹⁴ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, pages 18-19 [Proposed amendments to Welfare and Institutions Code section 6600 (a)(1); (b); (g)].

²¹⁵ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 26 page 20 [Proposed amendments to Welfare and Institutions Code section 6601(k)].

²¹⁶ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 27, page 20 [Proposed amendments to Welfare and Institutions Code section 6604].

²¹⁷ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 29, page 20 [Proposed amendments to Welfare and Institutions Code section 6605].

release *or* unconditional discharge. But the section would still prohibit frivolous petitions: if a prior petition was found to be frivolous the court shall deny the petition unless new facts are presented.²¹⁸

- In addition, section 6600.1, not part of the original 1998 test claim decision, nor part of the 1995 and 1996 test claim statutes, was proposed to be amended by Proposition 83 to remove a requirement that sexual offenses against children under 14 must involve “substantial sexual conduct” in order to qualify as sexually violent offenses within the meaning of section 6600(b).²¹⁹
- And, section 6604.1, which also was not included test claim decision or the test claim statutes, was proposed to be amended by Proposition 83 to provide that the indeterminate term of commitment shall commence on the date the court issues the initial order of commitment. Previously (before the circulation of Proposition 83 and enactment of SB 1128) this section provided that a *two-year* term of commitment would begin on the date the court issued the order of commitment, and for subsequent extended commitments, the term would be two years commencing from the date of termination of the previous commitment. This section would have been unworkable and inconsistent with the indeterminate commitment provided for under amended section 6604 without amendment.²²⁰

As discussed in the Background, many of these proposed amendments were in fact first enacted by Statutes 2006, chapter 337 (SB 1128), which became effective on September 20, 2006, approximately seven weeks before the election in which Proposition 83 was adopted. As a result, those amendments enacted prior to the adoption of Proposition 83 are not, based on their restatement under the reenactment rule alone, expressly included as part of the ballot measure.²²¹ Thus the Court recognized only two of the four amendments to section 6600 shown in the *strikeout and italics* text of the ballot measure, which were not amended by SB 1128, as expressly included in Proposition 83:

[T]he voters broadened the definition of an SVP within the meaning of Welfare and Institutions Code section 6600 in two ways. First, they reduced the required number of victims, so that an offender need only have been “convicted of a sexually violent offense against *one* or more victims,” instead of two or more victims. (*Ibid.*; see *Welf. & Inst. Code*, § 6600, subd. (a)(1).) Second, the voters

²¹⁸ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 30, page 21 [Proposed amendments to Welfare and Institutions Code section 6608].

²¹⁹ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 25, page 19 [Proposed amendments to Welfare and Institutions Code section 6600.1].

²²⁰ Exhibit O, November 7, 2006 General Election, Voter Guide Excerpt, Proposition 83, section 28, page 20 [Proposed amendments to Welfare and Institutions Code section 6604.1].

²²¹ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 209-210, where the court held that “Statutory provisions that are not actually reenacted and are instead considered to ‘have been the law all along’ . . . cannot fairly be said to be part of a ballot measure within the meaning of Government Code section 17556, subdivision (f).”

eliminated a provision that had capped at one the number of juvenile adjudications that could be considered a prior qualifying conviction. (Voter Guide, *supra*, text of Prop. 83, § 24, p. 136; Welf. & Inst. Code, § 6600, subd. (g).)²²²

Nevertheless, the Court directed the Commission to consider the electorate’s goals and intent in adopting the initiative, and all of the proposed amendments could be relevant to the voters’ understanding of the scope of the initiative, and thus relevant to discerning their goals in enacting the initiative. The Legislature is generally presumed to know the state of the law, but the voters are not necessarily held to the same standard: “Although not deciding the validity of the legislative presumption as it applies to voter initiatives, the Supreme Court has acknowledged there exists [sic] qualitative and quantitative differences between the state of knowledge of informed voters and that of elected members of the Legislature.”²²³ Here, because SB 1128 and Proposition 83 were enacted so close in time, and because the ballot pamphlet for Proposition 83, including the proposed text, was prepared and circulated before SB 1128 was enacted, the voters, realistically, would have had no way of knowing that these provisions were already in effect. And because each of the proposed amendments appeared in the *strikeout and italics* of Proposition 83, those provisions would have appeared to voters as entirely new provisions in law. This includes the change from two-year commitments to indeterminate commitments, and the expansion of the list of underlying offenses that qualify as “sexually violent offense[s].”²²⁴ Both of those amendments, first enacted within SB 1128, nevertheless appeared on the face of Proposition 83. Therefore, even though the enactment of SB 1128 in September of 2006 effectively blunted the effects of Proposition 83, any and all provisions that *appeared to be amended* by Proposition 83 could be considered a part of the electorate’s goals and intent, including the change from two-year commitments to indeterminate commitments, and the changes in sections 6605 and 6608 addressing the SVP’s petitioning for release from commitment.

Therefore, consistent with the amended definition itself, “what the people have done” and what cannot be “undone” through the ordinary legislative process must include a *general intent* that civil commitment of SVPs continue, based on the text of Proposition 83, the legislative intent statement in section 31 of the initiative, the ballot arguments, and other information in the Voter Guide, discussed above. In other words, even if “[t]he provisions of this act,” for purposes of the Amendment Clause, does not expressly include each and every provision of the Welfare and Institutions Code that was technically restated in the ballot measure, the electorate’s goals in enacting the initiative include the continuance and expansion of civil commitment of SVPs and

²²² *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 216.

²²³ *McLaughlin v. State Bd. of Educ.* (1999) 75 Cal.App.4th 196, 214 (citing *People v. Davenport* (1985) 41 Cal.3d 247, 263, Fn 6 [“We recognize that in California initiatives are written and enacted without the benefit of the hearings, debates, negotiation and other processes by which the Legislature informs itself of the ramifications of its actions. Thus there may be some basis for the argument that some of the principles which guide courts in their efforts to ascertain the intent of particular statutory provisions enacted through the legislative process may not carry the same force and logic when applied to an initiative measure.”].)

²²⁴ Welfare and Institutions Code sections 6604; 6600(b) (Stats. 2006, chapter 337 (SB 1128)).

some of the provisions so restated are integral to accomplishing that goal and other indicia (i.e. the ballot materials) support the conclusion that voters reasonably intended to limit the Legislature's ability to amend those parts of the statute integral to maintaining a civil commitment program. It would therefore be inconsistent with article II, section 10 to *repeal* the SVP program as a whole leaving only the definition, or to undermine significant portions of the civil commitment policy without submitting the question first to the electorate.²²⁵ Some minor amendments, such as those pointed out by the Court in *County of San Diego*²²⁶ may be permissible, based on the Court's reading of the Amendment Clause. But based on the analysis herein, the Legislature has not retained its ordinary legislative authority to *repeal* or significantly *reduce the scope* of civil commitment.

Based on the foregoing, the Commission finds that an ongoing program and policy of civil commitment of SVPs is *integral* to accomplishing the electorate's goals in enacting Proposition 83, and other indicia (such as the information in the ballot pamphlet) support the conclusion that voters reasonably intended to prohibit the Legislature from repealing or significantly reducing the scope of the civil commitment program. Therefore, the voters are the source of an ongoing policy of civil commitment of SVPs.

3. Proposition 83 Does Not Constitute a Subsequent Change in Law that Modifies the State's Liability for the SVP Program Because the Activities and Costs to Implement a Civil Commitment Program in Accordance with the Voter Mandate Have Been Shifted to Counties Based on the State's "True Choice" and, Thus, the Activities and Costs Remain Mandated by the State.

As discussed above, there are no new duties imposed on local government as a result of Proposition 83- even to the extent that Proposition 83 expanded the population to which the mandated activities apply or is now the trigger for those activities for proceedings based on a single victim, the activities required to be performed remain the same as under the original test claim statutes.

To the extent the voters mandated a civil commitment program, and that voter mandate triggers a process that must be provided to implement that program consistent with constitutional due process requirements, there is no indication that the voters required that the process must be provided by *local government*. As the court in *Hayes* explained, when the state shifts costs to local agencies, even if the costs are imposed upon the state by federal law, or in this case a ballot measure, reimbursement under article XIII B, section 6 is required:

A central purpose of the principle of state subvention is to prevent the state from shifting the cost of government from itself to local agencies. (*City of Sacramento*

²²⁵ See *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577 (Rejecting legislative amendments that undermined the transportation trust fund created by Proposition 116.)

²²⁶ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211-212 (E.g., Stats. 2012, ch. 24, and Stats. 2012, ch. 440, which changed "Department of Mental Health" to "Department of State Hospitals" in several instances. These were technical, non-substantive changes, but nevertheless were not consistent with the plain language of Proposition 83's Amendment Clause, which requires a two-thirds legislative majority to amend "the provisions of this act" unless to expand the scope of the act or increase punishments or penalties.).

v. State of California, supra, 50 Cal.3d at p. 68.) Nothing in the statutory or constitutional subvention provisions would suggest that the state is free to shift state costs to local agencies without subvention merely because those costs were imposed upon the state by the federal government. In our view the determination whether certain costs were imposed upon a local agency by a federal mandate must focus upon the local agency which is ultimately forced to bear the costs and how those costs came to be imposed upon that agency. If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.²²⁷

Similarly, the Court in *Department of Finance v. Commission on State Mandates (Stormwater)* held that where the State had a “primary responsibility” for certain inspection requirements under both federal and state law, and “shifted that responsibility” to local governments through its permitting authority, those inspection requirements were not *federal* mandates.²²⁸

Here, unlike some other states with civil commitment programs for SVPs that provide for the filing of a commitment petition and the prosecution of the case to be handled by a state official rather than by county authorities, California law charges counties with the filing of the commitment petition as well as the prosecution and defense of the petition.²²⁹ In New Jersey, the Attorney General files the petition for commitment and “[t]he Attorney General is responsible for presenting the case for the person’s involuntary commitment as a sexually violent predator to the court.”²³⁰ Under Florida law, the state has a two tiered system of trial courts: county courts, whose jurisdiction is limited to civil disputes involving \$15,000 or less and misdemeanor crimes, and state circuit courts that are organized into 20 judicial circuits and have original jurisdiction over everything else, and each of the 20 state attorneys, rather than a county district attorney or county counsel, is the elected chief prosecutor and handles commitment petitions under the state’s SVP law.²³¹ In Iowa, if the person has not yet been released from confinement, the Attorney General “may file a petition,” but if the person has been discharged from confinement, or was acquitted by reason of insanity or held incompetent to stand trial and released, “[a] prosecuting attorney of the county in which the person was convicted or charged, or the attorney general if requested by the prosecuting attorney, may file a petition...”²³² Similarly, in the State

²²⁷ *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-1594; see also, *Department of Finance v. Commission on State Mandates (Stormwater)* (2016) 1 Cal.5th 749, 765, affirming that principle.

²²⁸ *Department of Finance v. Commission on State Mandates (Stormwater)* (2016) 1 Cal.5th 749, 771.

²²⁹ Revised Code Washington 71.09.030; Iowa Code 229A.4; Kansas Statutes Annotated 59-29a04.

²³⁰ N.J. Stat. Ann. § 30:4-27.29 (West).

²³¹ Fla. Stat. Ann. §§ 27.01; 27.02. See Fla. Stat. Ann. § 394.9125 (A “state attorney shall refer a person...for civil commitment.”).

²³² Iowa Code Ann. § 229A.4 (West).

of Washington, a petition may be filed by the prosecuting attorney of the county in which the person was charged or convicted, or by “the attorney general, if requested by the county prosecuting attorney...”²³³ In 38 of Washington’s 39 counties, SVP petitions and hearings are indeed filed and prosecuted by a team in the Attorney General’s office.²³⁴ The legislative history for SB 1128 shows that the California Legislature considered whether the prosecution of SVP cases “should be handled by a single state office (such as the Attorney General) to develop and maintain coordination, expertise and consistency in SVP cases, as has been the case in Washington,” as follows:²³⁵

In Washington, the Attorney General prosecutes SVP cases in 38 of the 39 counties. SVP cases can thereby be coordinated and streamlined. The Washington SVP prosecutors know the experts and issues in this field very well. Attorneys in the office report that they use discretion in the filing of cases so as to avoid wasting resources.

In California, each county district attorney handles SVP cases arising from that county. Different policies and standards can be followed in each county. Prosecutors and defense attorneys in Los Angeles can develop deep experience and skill in SVP cases, while those in smaller counties may have little experience or skill in these matters. Because of the constitutional right to a speedy trial in criminal cases, district attorneys are very likely to place a priority on felony trials over SVP cases. SVP cases are often delayed for years, producing absurd results.²³⁶

Although the Legislature in enacting SB 1128 did not shift the filing of civil commitment petitions to the State, it did consider having the State handle the civil commitment petitions as evidenced in the above legislative analysis, though the reasons it chose not to do so are unknown.²³⁷ Other than the test claim statutes themselves, there is no law or evidence in the record to support a finding that the State is compelled to require county district attorneys or county counsels, instead of the Attorney General’s Office, to handle the civil commitment petitions for SVPs.²³⁸ The California Constitution recognizes the Attorney General as the

²³³ Wash. Rev. Code Ann. § 71.09.030.

²³⁴ Exhibit O, Senate Committee on Public Safety, Analysis of SB 1128, as amended March 7, 2006 (2005-2006 Reg. Sess.), pages 36-37.

²³⁵ Exhibit O, Senate Committee on Public Safety, Analysis of SB 1128, as amended March 7, 2006 (2005-2006 Reg. Sess.), page 37.

²³⁶ Exhibit O, Senate Committee on Public Safety, Analysis of SB 1128, as amended March 7, 2006 (2005-2006 Reg. Sess.), page 37.

²³⁷ Exhibit O, Senate Committee on Public Safety, Analysis of SB 1128, as amended March 7, 2006 (2005-2006 Reg. Sess.), page 37.

²³⁸ See generally, California Constitution, article V, section 13, which describes the State Attorney General as the chief law enforcement officer of the state who has jurisdiction statewide, and holds supervisory authority over each district attorney. In addition, the Constitution

government's highest legal official. (Cal. Const., art. V, § 13 ["[T]he Attorney General shall be the chief law officer of the State."].) As such he possesses not only extensive statutory powers but also broad powers derived from the common law relative to the protection of the public interest. [Citations.] ... '[I]n the absence of any legislative restriction, [he] has the power to file any civil action or proceeding directly involving the rights and interests of the state' [Citation.]"²³⁹

Similarly, it is indisputable that a voter-imposed program of civil commitment of SVPs demands indigent defense counsel, experts, and investigators for the defense of the SVP.²⁴⁰ And here, those duties have been imposed on counties and mandated solely by the test claim statutes. Just as the petition may be filed and an adversarial hearing conducted by a State prosecutor, a constitutionally adequate defense may be provided by a State defender or an attorney appointed by the court at the State's expense.

Therefore, the activities and costs to implement a civil commitment program consistently with federal constitutional requirements may be "necessary to implement" civil commitment, but have been shifted to counties based on the State's "true choice." In addition, no "other indicia support the conclusion" that the voters specifically intended that *counties* perform these duties.²⁴¹ Thus, the State is free to shift the costs back to the State using its ordinary legislative process.²⁴² The costs imposed on counties by the test claim statutes are *state-mandated*, based on the reasoning of *Hayes v. Commission on State Mandates* and *Department of Finance v. Commission on State Mandates (Stormwater)*.²⁴³

Moreover, Finance has produced no argument or evidence to suggest that probable cause hearings, and the activities associated with those hearings, are required for a civil commitment program under Proposition 83. A number of federal and state cases demonstrate that there is substantial latitude in what process is due in civil commitment of mentally ill persons and sexually violent predators (or in some jurisdictions "sexually dangerous persons"), and

provides that "When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office."

²³⁹ *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d, pages 14-15.

²⁴⁰ *People v. Otto* (2001) 26 Cal.4th 200, 210 (outlining four part test of due process applicable to Sexually Violent Predators Act proceedings); *People v. Fraser* (2006) 138 Cal.App.4th 1430, 1449-1451 (assuming, without deciding, that SVPs have a right to counsel pursuant to the four part test of *Otto, supra*, but holding that there is no right to self-representation); *People v. Dean* (2009) 174 Cal.App.4th 186, 204 ("Here, even though an SVPA proceeding is a civil proceeding, due process requires the provision of a qualified expert for defendant.").

²⁴¹ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214.

²⁴² See *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-1594; see also, *Department of Finance v. Commission on State Mandates (Stormwater)* (2016) 1 Cal.5th 749, 765, affirming that principle.

²⁴³ *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-1594; *Department of Finance v. Commission on State Mandates (Stormwater)* (2016) 1 Cal.5th 749, 765.

substantial variation in the due process protections that states and the federal government have chosen to adopt for their programs.²⁴⁴ As noted above, where a deprivation of liberty is at stake, the courts have generally held that some form of adversarial hearing is required, which includes a right to counsel, and a right to expert witnesses.²⁴⁵ However, a number of other jurisdictions with similar civil commitment programs do not require probable cause hearings, as noted by the New Jersey Superior Court, Appellate Division, in *In re Commitment of M.G.*²⁴⁶ And, subsequent to that New Jersey decision, the federal government also instituted civil commitment for “sexually dangerous persons,” and the federal statute does not require a probable cause hearing before imposing commitment.²⁴⁷

Here, Welfare and Institutions Code section 6602 requires a formal probable cause hearing, and requires the assistance of counsel at that hearing, in excess of federal due process guarantees required for a civil commitment program. The activities and costs associated with this entirely separate hearing exceed the scope of the activities in *San Diego Unified School Dist.* (i.e. “primarily various notice, right of inspection, and recording rules”), which in that case were treated as part and parcel to the underlying federal program since those activities produced incidental and de minimis costs.²⁴⁸

Therefore, the activities and costs associated with the probable cause hearings are not necessary to implement voter-imposed civil commitment, but instead are required based on the state’s “true choice.”²⁴⁹ Moreover, no “other indicia support the conclusion” that the voters specifically or generally intended that probable cause hearings be included as part of the civil commitment process. Thus, the state is free to eliminate the probable cause hearing using its ordinary

²⁴⁴ See *In re Commitment of M.G.* (2000) 331 N.J.Super. 365, 380-383 (describing some of the differences in procedures and statutes for SVP commitment in different states). See also 18 U.S.C. 4241-4248 (The federal SVP statute); *United States v. Sahhar* (1990) 917 F.2d 1197 (upholding civil commitment of mentally ill persons based on federal statute).

²⁴⁵ *Vitek v. Jones* (1980) 445 U.S. 480, 494-495 (Finding a right to counsel for mentally disordered offenders, furnished by the state); *People v. Otto* (2001) 26 Cal.4th 200, 210 (outlining four part test of due process applicable to Sexually Violent Predators Act proceedings); *People v. Fraser* (2006) 138 Cal.App.4th 1430, 1449-1451 (assuming, without deciding, that SVPs have a right to counsel pursuant to the four part test of *Otto, supra*, but holding that there is no right to self-representation); *People v. Dean* (2009) 174 Cal.App.4th 186, 204 (“Here, even though an SVPA proceeding is a civil proceeding, due process requires the provision of a qualified expert for defendant.”).

²⁴⁶ *In re Commitment of M.G.* (2000) 331 N.J.Super. 365, 380-383; N.J. Stat. Ann. § 30:4-27.28 (West); Fla. Stat. Ann. § 394.915 (West) (adversarial probable cause hearing only if judge deems necessary due to failure to begin trial); 18 U.S.C. 4248 (no probable cause hearing under federal SVP statute).

²⁴⁷ 18 U.S.C. § 4248.

²⁴⁸ *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 873, footnote 11, and 890.

²⁴⁹ *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593.

legislative process,²⁵⁰ and the probable cause hearing and the costs associated with it are not necessary to implement Proposition 83 within the meaning of Government Code section 17556(f).

Accordingly, the Commission finds that the Legislature retains substantial discretion with respect to the activities involved in the program, and with respect to how those activities become imposed upon the counties. Based on these and the above findings, the Commission finds that the activities required by the test claim statutes remain mandated by the state and, thus, Proposition 83 does not constitute a subsequent change in law that modifies the state's liability for the *Sexually Violent Predators*, CSM-4509 program.

V. Conclusion

Based on the foregoing, the Commission denies the Request for a New Test Claim Decision.

²⁵⁰ *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214.

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 May 26, 2020, I served the:

- **Denial of Request for a New Test Claim Decision adopted May 22, 2020**

Reconsideration of the Request for Mandate Redetermination on Remand
Sexually Violent Predators (CSM-4509), 12-MR-01-R

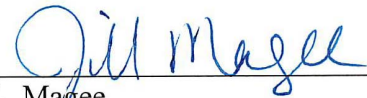
Pursuant to *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196; Judgment and Writ of Mandate Issued by Superior Court for the County of San Diego, Case No. 37-2014-00005050-CU-WM-CTL; Welfare and Institutions Code Sections 6601, 6602, 6603, 6604, 6605, and 6608; Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); Statutes 1996, Chapter 4 (AB 1496)

As Alleged to be Modified by: Proposition 83, General Election,
November 7, 2006

Department of Finance, Requester

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 May 26, 2020 at Sacramento, California.



Jill L. Magee
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COMMISSION ON STATE MANDATES

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Last Updated: 5/6/20

Claim Number: CSM-4509 (12-MR-01-R)

Matter: Sexually Violent Predators

Requester: Department of Finance

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, § 1181.3.)

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