BEFORE THE

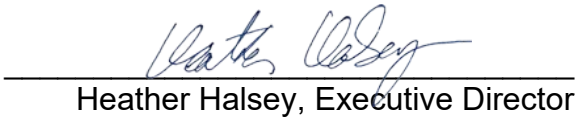
COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Penal Code Section 290.5, as Amended by Statutes 2017, Chapter 541, Section 12 (SB 384) Effective Date January 1, 2018, Operative Date July 1, 2021 Filed on June 29, 2022 County of Los Angeles, Claimant	Case No.: 21-TC-03 *Sex Offenders Registration: Petitions for Termination* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted October 27, 2023*) (*Served October 27, 2023*)

TEST CLAIM

The Commission on State Mandates adopted the attached Decision on October 27, 2023.



Heather Halsey, Executive Director

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DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on September 22, 2023, and October 27, 2023. Fernando Lemus appeared as the representative of and Lucia Gonzalez and Dylan Ford appeared as witnesses for the County of Los Angeles (claimant). Chris Hill appeared on behalf of the Department of Finance (Finance).

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

The Commission adopted the Proposed Decision to deny the Test Claim by a vote of 4-3, as follows:

Member	**Vote**
Lee Adams, County Supervisor	No
Regina Evans, Representative of the State Controller, Vice Chairperson	Yes
Jennifer Holman, Representative of the Director of the Office of Planning and Research	Yes
Renee Nash, School District Board Member	No
Sarah Olsen, Public Member	No
Joe Stephenshaw, Director of the Department of Finance, Chairperson	Yes
Spencer Walker, Representative of the State Treasurer	Yes

Summary of the Findings

The test claim statute amended the Sex Offender Registration Act to create a three-tiered system for classifying sex offenders based on the severity of the offense and the individual's likelihood for reoffending. Primarily at issue is a new procedure in Penal Code section 290.5, as amended by the test claim statute, which allows tier one or tier two sex offenders to petition the superior court in the county where they currently reside to terminate their duty to register as a sex offender after completing a mandatory minimum registration period. Under prior law, the duty to register as a sex offender persisted for life with rare exceptions,[1] but now a duty to register may be terminated 10 or 20 years after release from incarceration, placement, commitment or release on probation or other supervision.[2]

The petition to terminate the duty to register as a sex offender is served on the law enforcement agency and district attorney of the county where the petitioner currently resides, as well as the law enforcement agency and district attorney of the county where the petitioner was convicted for their registering offense if different from their county of residence. The law enforcement agencies of both counties (assuming the conviction was in a county other than the county of residence) determine whether the petitioner has satisfied their mandatory minimum registration period, and report their findings to the court and district attorney of the county where the petitioner resides, as well as to the Department of Justice if it is discovered that previously unknown registerable convictions occurred outside the state. The district attorney of the county where the petitioner resides may request the court hold a hearing on the petition if the petitioner did not complete the minimum mandatory registration period or if community safety would be significantly enhanced by the petitioner's continued registration. The district attorney is entitled to present evidence at the hearing as to why community safety would be significantly enhanced by the petitioner's continued registration. If the district attorney does not request a hearing, the court may either approve or summarily deny the petition based on whether the petitioner meets all the statutory requirements for approval and service and filing requirements. If the petition is denied, the court must set a time period of a minimum one year but not to exceed five years before the petitioner is allowed to petition again.

The Commission finds that the Test Claim was timely filed.

The Commission further finds that the test claim statute imposes state-mandated activities on law enforcement agencies and on district attorneys, but not on public defenders, who are not specifically required by the test claim statute to represent petitioners in this post-conviction civil proceeding. Law enforcement agencies must determine whether a petitioner has actually completed their mandatory minimum registration period, and are required to report their findings to the court, the registering county's district attorney, and the Department of Justice as necessary. District

[1] Former Penal Code section 290(b), as added by Statutes 2007, chapter 579, and last amended by Proposition 35, section 9, approved November 6, 2012.

[2] Penal Code section 290(d), as added by Statutes 2017, chapter 541.

attorneys are authorized by the statute to challenge a petition by requesting the court hold a hearing and presenting evidence at the hearing, if the mandatory minimum registration period was not met or if community safety would be significantly enhanced by the petitioner's continued registration, and have a duty to exercise this ability to protect public safety.[3] Although the test claim statute phrases the district attorney's activities permissively with language like "may request a hearing" or "be entitled to present evidence," case law suggests that a local decision is not truly voluntary for the purposes of article XIII B, section 6 if it is, as a practical matter, constrained by duty.[4] In contrast, the test claim statute imposes no duties on public defenders, there is no constitutional right to the effective assistance of counsel in state post-conviction proceedings, and there is no evidence in the record or support in the law to suggest that counsel is required to be appointed in these cases.[5]

The Commission further finds that the mandated activities imposed on law enforcement agencies and district attorneys are new in comparison to prior law, and constitute a new program or higher level of service. The ability to petition to terminate a duty to register as a sex offender after completing a mandatory minimum registration period did not exist under prior law and, thus, the required activities are new. The activities required of law enforcement agencies and district attorneys serve the functional purpose of ensuring that registration continues when appropriate for individual sex offenders who still pose a risk to community safety. This carries out a governmental function of protecting and enhancing community safety, and provides a governmental service to the public. Moreover, the duties are unique to local government.

However, the Commission finds these state-mandated activities do not impose costs mandated by the state because the test claim statute eliminates a crime within the meaning of article XIII B, section 6 and Government Code section 17556(g). Government Code section 17556(g) provides that the Commission "shall not find costs mandated by the state" when "the statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction." The Sex Offender Registration Act is enforced by Penal Code section 290.018, which makes it either a misdemeanor or felony to fail to register as required by the Act, depending on whether the person's original offense that requires registration was itself a misdemeanor or felony. For each day that the offender fails to register, it is considered a continuing

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[3] See *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1367-1368.

[4] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1367-1368.

[5] See *Pennsylvania v. Finley*, (1987) 481 U.S. 551, 555; *People v. Delgadillo*, (2022) 14 Cal.5th 216, 226; and *People v. Mary H.* (2016) 5 Cal.App.5th 246, 263 (finding that a right to appointed counsel generally has been recognized to exist only where the litigant's physical liberty is in jeopardy).

offense: "A defendant does not commit the crime only at the particular moment the obligation arises, but every day it remains unsatisfied."[6]

Under prior law, the requirement to register annually and any time the offender moved existed for life.[7] But as a direct result of the test claim statute, a sex offender is no longer required to register under the Act once the offender has successfully petitioned to terminate their duty to register, as early as ten or 20 years after release. This means that once the duty to register is terminated, the offender is no longer subject to the requirements of the Sex Offender Registration Act, and any criminal penalties under Penal Code section 290.018 for failing to register or to otherwise comply for life are eliminated.

This finding is consistent with the recent published decision of the Fourth District Court of Appeal in *County of San Diego v. Commission on State Mandates*, which addressed the Commission's Decision denying the *Youth Offender Parole Hearings,* 17-TC-29 Test Claim based on Government Code section 17556(g). There, the court found that Government Code section 17556(g) applied because "as a direct result" of the test claim statutes, penalties of the crimes were changed - most youth offenders are now statutorily eligible for parole years earlier than their original sentence.[8] The court rejected arguments from the County that the test claim statutes do not change the penalties for crimes under section 17556(g) because they do not vacate the youth offender's original sentence, but simply implement procedural and administrative changes.[9] This argument is similar to the claimant's argument here, that the test claim statute does not eliminate a crime within the meaning of Government Code section 17556(g) since Penal Code section 290.018, which makes it a crime for failing to register, still exists, and the statute simply implements a procedure.[10] The crime for failing to register does still exist in statute, but that does not mean that the test claim statute effects no change.[11] As a direct result of the test claim statute, a successful

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[6] *Wright v. Superior Court* (1997) 15 Cal.4th 521, 528.

[7] Former Penal Code section 290(b), as added by Statutes 2007, chapter 579, and last amended by Proposition 35, section 9, approved November 6, 2012; Penal Code section 290.012, as originally enacted by Statutes 2007, chapter 579, and as last amended by Statutes 2016, chapter 772; and Penal Code section 290.015 as originally enacted by Statutes 2007, chapter 579, and as last amended by Statutes 2016, chapter 772.

[8] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 640.

[9] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 642.

[10] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 2.

[11] See, *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 641, where the court agreed that the original sentences imposed on the juvenile offenders in the *Youth Offender Parole Hearings* program still exist, "[b]ut these facts do

petition to terminate registration, just like a successful youth offender following a parole hearing, means that the offender is no longer subject to the requirements of the Sex Offender Registration Act, and any criminal penalties under Penal Code section 290.018 for failing to register or to otherwise comply for life are eliminated.

Thus, the test claim statute has eliminated a crime within the meaning of Government Code section 17556(g), and, therefore, there are no costs mandated by the state.

Accordingly, the Commission denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

01/01/2018 Statutes 2017, chapter 541 became effective.

07/01/2021 Section 12 of Statutes 2017, chapter 541, which amended Penal Code section 290.5, became operative.

06/29/2022 The claimant filed the Test Claim.[12]

11/09/2022 Commission staff issued the Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date.

11/30/2022 The Department of Finance (Finance) requested and was granted an extension to file comments.

01/06/2023 Finance filed comments on the Test Claim.[13]

01/30/2023 The claimant filed rebuttal comments.[14]

03/17/2023 Commission staff issued the Draft Proposed Decision.[15]

03/23/2023 The claimant requested and was granted an extension to file comments for good cause.

05/08/2023 The claimant filed comments on the Draft Proposed Decision.[16]

09/22/2023 The Commission heard this matter. No action was taken.

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not mean the Test Claim Statutes effect no change on the penalties suffered by youth offenders."

[12] Exhibit A, Test Claim, filed June 29, 2022.

[13] Exhibit B, Finance's Comments on the Test Claim, filed January 6, 2023.

[14] Exhibit C, Claimant's Rebuttal Comments, filed January 30, 2023.

[15] Exhibit D, Draft Proposed Decision, issued March 17, 2023.

[16] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023.

II. Background

A. California's Sex Offender Registry

California was the first state to enact sex offender registration laws in 1947.[17] Before the enactment of the test claim statute, the Sex Offender Registration Act[18] required any person living in California who had been convicted of one of several enumerated sexual offenses in California, another state, or by a federal or military court, after July 1, 1944, "for the rest of his or her life while residing in California," to register with law enforcement as follows:

> Every person described in subdivision (c), for the rest of his or her life while residing in California, or while attending school or working in California, as described in Sections 290.002 and 290.01, shall be required to register with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence within, any city, county, or city and county, or campus in which he or she temporarily resides, and shall be required to register thereafter in accordance with the Act.[19]

Registration is required upon release from incarceration, placement, commitment, or probation.[20] Beginning on the first birthday following registration, the person is required to register annually using the Department of Justice's annual update form within five days of the registrant's birthday, whenever the sex offender moves residences within the jurisdiction, and people who are living as transients or were convicted as Sexually Violent Predators are additionally required to update their registration every 30 or 90 days respectively.[21]

The Act is enforced by Penal Code section 290.018, which states that a person required to register under the Act who willfully violates any requirement of the Act (including the failure to provide the information required to register), is guilty of a misdemeanor punishable by up to a year imprisonment in county jail if the registering offense was a

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[17] Statutes 1947, chapter 1124.

[18] Penal Code section 290, et seq.

[19] Former Penal Code section 290(b), as added by Statutes 2007, chapter 579, and last amended by Proposition 35, section 9, approved November 6, 2012.

[20] Penal Code section 290.015, as originally enacted by Statutes 2007, chapter 579, and as last amended by Statutes 2016, chapter 772.

[21] Penal Code section 290.012, as originally enacted by Statutes 2007, chapter 579, and as last amended by Statutes 2016, chapter 772.

misdemeanor, or a felony punishable by up to three years imprisonment in state prison if the registering offense was a felony.[22]

The Sex Offender Registration Act "is intended to promote the "state interest in controlling crime and preventing recidivism in sex offenders."[23] The Act "serves an important and vital public purpose by compelling registration of many serious and violent sex offenders who require continued public surveillance."[24]

Over time, the Act grew to cover additional offenses and impose new requirements on sex offenders and the local and state government agencies that manage the registry, but one thing was consistent: with rare exceptions, if a person was convicted for an offense that created a duty to register as a sex offender, that duty existed for life, so long as they lived in California.[25] Up until the test claim statute went into effect, California was one of only four states that required all sex offenders register for life, the other three being Florida, South Carolina, and Alabama.[26] One other state required all its sex offenders register for a finite duration, while the remaining 45 states used some type of tiered system where registration duration is determined by either the sex

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[22] Penal Code section 290.018(a), (b), as added by Statutes 2007, chapter 579, and amended by Statutes 2016, chapter 772. Penal Code section 290.015 requires the offender to provide the following information on registration: (1) A statement in writing signed by the person, giving information as shall be required by the Department of Justice and giving the name and address of the person's employer, and the address of the person's place of employment if that is different from the employer's main address; (2) fingerprints and a current photograph; (3) license plate number of any vehicle owned by, regularly driven by, or registered in the name of the person; (4) list of all Internet identifiers actually used by the person, as required by Section 290.024; (5) a statement in writing, signed by the person, acknowledging that the person is required to register and update the information required by this chapter; and (6) copies of adequate proof of residence, "which shall be limited to a California driver's license, California identification card, recent rent or utility receipt, printed personalized checks or other recent banking documents showing that person's name and address, or any other information that the registering official believes is reliable. If the person has no residence and no reasonable expectation of obtaining a residence in the foreseeable future, the person shall so advise the registering official and shall sign a statement provided by the registering official stating that fact."

[23] *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 874, 877.

[24] *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 877; see also, *People v. Thai* (2023) 90 Cal.App.5th 427, 432. ["The purpose of section 290 is to ensure police can surveil sex offenders at all times because they pose a 'continuing threat to society.'"]

[25] Former Penal Code section 290(b), as added by Statutes 2007, chapter 579, and amended by Proposition 35, section 9, approved November 6, 2012.

[26] Exhibit F (4), Senate Rules Committee, Office of Senate Floor Analysis, Unfinished Business on SB 384, as amended September 8, 2017, page 5.

offender's risk for re-offense, the severity of the offense, or both.[27] Requiring all sex offenders register for life resulted in California not only having the oldest sex offender registry in the United States, but the largest too.[28] By the time the test claim statute was enacted in 2017, there were over 100,000 registered sex offenders living in California.[29] Many of these were for misdemeanor convictions or people found to have a low risk of re-offense.[30]

In 2010 the California Sex Offender Management Board (CASOMB) published its recommended policies for future legislation regarding sex offenders.[31] It found that requiring lifetime registration for all sex offenders resulted in law enforcement agencies and the public having no way of differentiating high risk and low risk sex offenders.[32] Law enforcement agencies were unable to concentrate their limited resources on closely supervising the most dangerous sex offenders and those with a higher risk of re-offense.[33] It determined that imposing lifetime registration for all sex offenders was not necessary to safeguard the public, and recommended implementing a risk-based system with differentiated registration requirements.[34] As proposed by CASOMB, this would be a three-tiered system with registration durations of 10 years, 20 years, or lifetime, and the criteria for determining a person's tier would take into consideration the seriousness of the offender's criminal history, the empirically assessed risk level of the offender, and whether the offender is a recidivist or has violated California's sex offender registration law.[35]

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[27] Exhibit F (9), California Sex Offender Management Board, Recommendations Report (January 2010), page 53-54.

[28] Exhibit F (9), California Sex Offender Management Board, Recommendations Report (January 2010), page 50.

[29] Exhibit F (3), Senate Rules Committee, Office of Senate Analysis, Third Reading Analysis of SB 384, as amended September 8, 2017, page 12.

[30] Exhibit F (3), Senate Rules Committee, Office of Senate Analysis, Third Reading Analysis of SB 384, as amended September 8, 2017, page 12.

[31] Exhibit F (9), California Sex Offender Management Board, Recommendations Report (January 2010).

[32] Exhibit F (9), California Sex Offender Management Board, Recommendations Report (January 2010), page 50.

[33] Exhibit F (9), California Sex Offender Management Board, Recommendations Report (January 2010), page 50.

[34] Exhibit F (9), California Sex Offender Management Board, Recommendations Report (January 2010), page 51.

[35] Exhibit F (9), California Sex Offender Management Board, Recommendations Report (January 2010), page 96.

B. Federal Law –The Adam Walsh Act

The Adam Walsh Child Protection and Safety Act of 2006 is a federal law amending the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act that requires each state to maintain its own jurisdiction-wide sex offender registry.[36] The Adam Walsh Act recommends a three-tiered system in which tier 1 sex offenders are required to keep their registration current for 15 years, tier 2 sex offenders register for 25 years, and tier 3 sex offenders register for life.[37] A jurisdiction that fails to substantially implement the requirements of the Act is subject to a ten percent reduction in the funding it would otherwise receive under the Omnibus Crime Control and Safe Street Act of 1968.[38]

Although the legislative history of the test claim statute does note conforming with the Adam Walsh Act as one reason for moving to a tiered system,[39] the existing sex offender registry with its lifetime registration requirement was found by the U.S. Department of Justice to substantially conform to the Adam Walsh Act, meaning there was no actual risk of defunding that demanded implementing this change.[40] Additionally, the Adam Walsh Act does not require sex offenders actively petition to be removed from the registry at the end of the registration period, or dictate any other procedure to relieve sex offenders of their duty to register at the end of a registration period. This makes the entire petition and hearing process outlined in the test claim statute an activity that was not mandated by federal law, even if the tiered registration system were mandated by federal law.

C. Certificates of Rehabilitation

Under prior law, the only way a person could be relieved of their duty to register as a sex offender in California was by receiving a certificate of rehabilitation.[41] Former Penal Code section 290.5, as last amended in 2014, provided that "A person required to register under Section 290 for an offense not listed in paragraph (2), upon obtaining a certificate of rehabilitation under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3, shall be relieved of any further duty to register under Section 290 if he or she is not in custody, on parole, or on probation."[42]

A certificate of rehabilitation is proof that a person has been successfully rehabilitated in the eyes of the law and restores several civil rights. For example, a person who has

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[36] United States Code, title 34, section 20911 et seq.

[37] United States Code, title 34, section 20915.

[38] United States Code, title 34, section 20927.

[39] Exhibit F (2), Assembly Committee on Public Safety, Analysis of SB 421, as amended May 26, 2017, page 14.

[40] Exhibit F (2), Assembly Committee on Public Safety, Analysis of SB 421, as amended May 26, 2017, page 14.

[41] Penal Code section 4852.01 et seq., as last amended by Statutes 2015, chapter 378.

[42] Former Penal Code section 290.5, as last amended by Statutes 2014, chapter 280.

received a certificate of rehabilitation cannot be denied a business license based on their criminal history.[43] Neither can a person's criminal history be used to discredit them as a witness when testifying in a trial.[44] Being granted a certificate of rehabilitation also is treated as an automatic application to the governor for a pardon, which can be granted without any additional investigation.[45]

Prior to 1996, Penal Code section 290.5 said that anyone granted a certificate of rehabilitation would be relieved of their duty to register as a sex offender. However, in 1996, the Legislature amended section 290.5 to severely limit this ability by stating that a certificate of rehabilitation would not relieve a duty to register for several stated offenses unless the offender also received a full pardon from the governor.[46]

Today, sex offenders are only able to receive a certificate of rehabilitation if they were convicted of misdemeanor sexual offenses, or felony sex offenses where the person was granted probation, and the accusatory pleading was dismissed pursuant to Penal Code section 1203.4, "if the petitioner has not been incarcerated in a prison, jail, detention facility, or other penal institution or agency since the dismissal of the accusatory pleading, is not on probation for the commission of any other felony, and the petitioner presents satisfactory evidence of five years' residence in this state prior to the filing of the petition."[47]

Although the test claim statute made amendments so that a certificate of rehabilitation will no longer relieve a person of their duty to register as a sex offender, the certificate of rehabilitation procedure still exists. A person who was eligible under prior law to have their registration requirement terminated through a certificate of rehabilitation can petition for both a certificate of rehabilitation and to be terminated from the registry under current law, and would have good reasons to seek both for the different types of relief each grants.

D. Statute 2017, Chapter 541 (SB 384): the Test Claim Statute

Statutes 2017, chapter 541 became effective on January 1, 2018, with an operative date of July 1, 2021 to allow the Department of Justice adequate time to implement a

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[43] Business and Professions Code section 480(b).

[44] Evidence Code section 788.

[45] Penal Code section 4852.16(a).

[46] Former Penal Code section 290.5, as amended by Statutes 1996, chapter 461.

[47] Penal Code section 4852.01(a), (b), as amended by Statutes 2022, chapter 776, section 1, effective January 1, 2023. Section 4852.01(c) further states the following: "This chapter does not apply to persons serving a mandatory life parole, persons committed under death sentences, persons convicted of a violation of Section 269, subdivision (c) of Section 286, subdivision (c) of Section 287, Section 288, Section 288.5, Section 288.7, subdivision (j) of Section 289, or subdivision (c) of former Section 288a, or persons in military service."

new system.[48] The test claim statute established a three-tiered system for categorizing sex offenders, and created a process through which people registered in lower tiers may terminate their duty to register after completing a mandated minimum registration period. The claimant pleads Penal Code section 290.5, as amended by the test claim statute (Stats 2017, ch. 541, sec. 12), but there are a few other Penal Code sections amended by the test claim statute that are relevant to the analysis and are described below, though the Commission does not take jurisdiction over them since they were not pled.

1. Amendments to Penal Code Section 290.

Statutes 2017, chapter 541 amended section 290,[49] and subdivision (b) now states, with amendments in underline:

> (b) Every person described in subdivision (c), <u>for the period specified in subdivision (d)</u> while residing in California, or while attending school or working in California, as described in Sections 290.002 and 290.01, shall register with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence within, any city, county, or city and county, or campus in which he or she temporarily resides, and shall register thereafter in accordance with the Act, <u>unless the duty to register is terminated pursuant to Section 290.5 or as otherwise provided by law.</u>

Section 290(c) lists all the offenses that require registering under the act, and was unchanged by the test claim statute.

Section 290(d) was added by the test claim statute and requires a tier one sex offender to register for a minimum 10 years "following a conviction and release from incarceration, placement, commitment, or release on probation or other supervision," tier two sex offenders register for a minimum 20 years "following a conviction and release from incarceration, placement, commitment, or release on probation or other supervision," and tier three sex offenders register for life. It also states the criteria for determining a sex offender's tier based on the specific offense committed and certain enhancing factors such as subsequent convictions for registerable offenses or the person's risk level on the static risk assessment instrument for sex offenders (SARATSO).

[48] Exhibit F (1) Senate Committee on Appropriations, Analysis of SB 421, as introduced April 17, 2017, page 2.

[49] Statutes 2017, Chapter 541, sections 1 through 2.5.

The test claim statute also added section 290(e) to define when the minimum time period for the completion of the required registration period begins, and ways that the registration period can be extended or restarted, as follows:

> (e) The minimum time period for the completion of the required registration period in tier one or two commences on the date of release from incarceration, placement, or commitment, including any related civil commitment on the registerable offense. The minimum time for the completion of the required registration period for a designated tier is tolled during any period of subsequent incarceration, placement, or commitment, including any subsequent civil commitment, except that arrests not resulting in conviction, adjudication, or revocation of probation or parole shall not toll the required registration period. The minimum time period shall be extended by one year for each misdemeanor conviction of failing to register under this act, and by three years for each felony conviction of failing to register under this act, without regard to the actual time served in custody for the conviction. If a registrant is subsequently convicted of another offense requiring registration pursuant to the Act, a new minimum time period for the completion of the registration requirement for the applicable tier shall commence upon that person's release from incarceration, placement, or commitment, including any related civil commitment. If the subsequent conviction requiring registration pursuant to the Act occurs prior to an order to terminate the registrant from the registry after completion of a tier associated with the first conviction for a registerable offense, the applicable tier shall be the highest tier associated with the convictions.

Lastly, section 290(f) was added to note that a ward of the juvenile court is not required to register under this statute, except as provided by section 290.008.

2. Amendments to Penal Code Section 290.5

The test claim statute amended Penal Code section 290.5,[50] which under prior law simply acknowledged that a Certificate of Rehabilitation would relieve a person of their duty to register.[51]

The amended section now: (1) grants tier one or two offenders the ability to petition the court to be terminated from the sex offender registry after completing their mandated minimum registration period; (2) requires law enforcement agencies to determine whether the petitioner has met their mandatory minimum registration period, grants district attorneys the authority to request a hearing on the petition, and grants courts the authority to approve or deny the petition without a hearing if the district attorney did not request one; (3) authorizes district attorneys to present evidence that a petitioner has not fulfilled the minimum period for the completion of the required registration period, or that community safety would be significantly enhanced by the person's continued

[50] Statutes of 2017, chapter 541, sections 11 and 12.

[51] Former Penal Code section 290.5, as last amended by Statutes 2014, chapter 280.

registration, and states the factors courts should consider when determining whether or not to approve a petition at a hearing; (4) requires courts to set a time period before a petitioner is allowed to petition again if their petition is denied; and (5) requires courts to notify the Department of Justice of the outcome of the petition. As amended, Penal Code section 290.5(a) now states:

> (a)(1) A person who is required to register pursuant to Section 290 and who is a tier one or tier two offender may file a petition in the superior court in the county in which he or she is registered for termination from the sex offender registry at the expiration of his or her mandated minimum registration period, or if the person is required to register pursuant to Section 290.008, he or she may file the petition in juvenile court on or after his or her birthday following the expiration of the mandated minimum registration period. The petition shall contain proof of the person's current registration as a sex offender.
>
> (2) The petition shall be served on the registering law enforcement agency and the district attorney in the county where the petition is filed and on the law enforcement agency and the district attorney of the county of conviction of a registerable offense if different than the county where the petition is filed. The registering law enforcement agency and the law enforcement agency of the county of conviction of a registerable offense if different than the county where the petition is filed shall, within 60 days of receipt of the petition, report to the district attorney and the superior or juvenile court in which the petition is filed regarding whether the person has met the requirements for termination pursuant to subdivision (e) of Section 290. If an offense which may require registration pursuant to Section 290.005 is identified by the registering law enforcement agency which has not previously been assessed by the Department of Justice, the registering law enforcement agency shall refer that conviction to the department for assessment and determination of whether the conviction changes the tier designation assigned by the department to the offender. If the newly discovered offense changes the tier designation for that person, the department shall change the tier designation pursuant to subdivision (d) of Section 290 within three months of receipt of the request by the registering law enforcement agency and notify the registering law enforcement agency. If more time is required to obtain the documents needed to make the assessment, the department shall notify the registering law enforcement agency of the reason that an extension of time is necessary to complete the tier designation. The registering law enforcement agency shall report to the district attorney and the court that the department has requested an extension of time to determine the person's tier designation based on the newly discovered offense, the reason for the request, and the estimated time needed to complete the tier designation. The district attorney in the county where the petition is filed may, within 60 days of receipt of the report from either the registering law enforcement agency, the law enforcement agency of the county of

conviction of a registerable offense if different than the county where the petition is filed, or the district attorney of the county of conviction of a registerable offense, request a hearing on the petition if the petitioner has not fulfilled the requirement described in subdivision (e) of Section 290, or if community safety would be significantly enhanced by the person's continued registration. If no hearing is requested, the petition for termination shall be granted if the court finds the required proof of current registration is presented in the petition, provided that the registering agency reported that the person met the requirement for termination pursuant to subdivision (e) of Section 290, there are no pending charges against the person which could extend the time to complete the registration requirements of the tier or change the person's tier status, and the person is not in custody or on parole, probation, or supervised release.

(3) If the district attorney requests a hearing, he or she shall be entitled to present evidence regarding whether community safety would be significantly enhanced by requiring continued registration. In determining whether to order continued registration, the court shall consider: the nature and facts of the registerable offense; the age and number of victims; whether any victim was a stranger at the time of the offense (known to the offender for less than 24 hours); criminal and relevant noncriminal behavior before and after conviction for the registerable offense; the time period during which the person has not reoffended; successful completion, if any, of a Sex Offender Management Board-certified sex offender treatment program; and the person's current risk of sexual or violent reoffense, including the person's risk levels on SARATSO static, dynamic, and violence risk assessment instruments, if available. Any judicial determination made pursuant to this section may be heard and determined upon declarations, affidavits, police reports, or any other evidence submitted by the parties which is reliable, material, and relevant.

(4) If termination from the registry is denied, the court shall set the time period after which the person can repetition for termination, which shall be at least one year from the date of the denial, but not to exceed five years, based on facts presented at the hearing. The court shall state on the record the reason for its determination setting the time period after which the person may repetition.

(5) The court shall notify the Department of Justice, California Sex Offender Registry, when a petition for termination from the registry is granted or denied. If the petition is denied, the court shall also notify the Department of Justice, California Sex Offender Registry, of the time period after which the person can file a new petition for termination.

As amended, section 290.5(b) allows certain tier two and tier three offenders to petition to be terminated from the registry earlier than is normally permitted, and now states:

(b)(1) A person required to register as a tier two offender, pursuant to paragraph (2) of subdivision (d) of Section 290, may petition the superior court for termination from the registry after 10 years from release from custody on the registerable offense if all of the following apply: (A) the registerable offense involved no more than one victim 14 to 17 years of age, inclusive; (B) the offender was under 21 years of age at the time of the offense; (C) the registerable offense is not specified in subdivision (c) of Section 667.5, except subdivision (a) of Section 288; and (D) the registerable offense is not specified in Section 236.1.

(2) A tier two offender described in paragraph (1) of subdivision (b) may file a petition with the superior court for termination from the registry only if he or she has not been convicted of a new offense requiring sex offender registration or an offense described in subdivision (c) of Section 667.5 since the person was released from custody on the offense requiring registration pursuant to Section 290, and has registered for 10 years pursuant to subdivision (e) of Section 290. The court shall determine whether community safety would be significantly enhanced by requiring continued registration and may consider the following factors: whether the victim was a stranger (known less than 24 hours) at the time of the offense; the nature of the registerable offense, including whether the offender took advantage of a position of trust; criminal and relevant noncriminal behavior before and after the conviction for the registerable offense; whether the offender has successfully completed a Sex Offender Management Board-certified sex offender treatment program; whether the offender initiated a relationship for the purpose of facilitating the offense; and the person's current risk of sexual or violent reoffense, including the person's risk levels on SARATSO static, dynamic, and violence risk assessment instruments, if known. If the petition is denied, the person may not repetition for termination for at least one year.

(3) A person required to register as a tier three offender based solely on his or her risk level, pursuant to subparagraph (D) of paragraph (3) of subdivision (d) of Section 290, may petition the court for termination from the registry after 20 years from release from custody on the registerable offense, if the person (A) has not been convicted of a new offense requiring sex offender registration or an offense described in subdivision (c) of Section 667.5 since the person was released from custody on the offense requiring registration pursuant to Section 290, and (B) has registered for 20 years pursuant to subdivision (e) of Section 290; except that a person required to register for a conviction pursuant to Section 288 or an offense listed in subdivision (c) of Section 1192.7 who is a tier three offender based on his or her risk level, pursuant to subparagraph (D) of paragraph (3) of subdivision (d) of Section 290, shall not be permitted to petition for removal from the registry. The court shall determine whether community safety would be significantly enhanced by requiring continued registration and may consider the following factors: whether the victim was

a stranger (known less than 24 hours) at the time of the offense; the nature of the registerable offense, including whether the offender took advantage of a position of trust; criminal and relevant noncriminal behavior before and after the conviction for the registerable offense; whether the offender has successfully completed a Sex Offender Management Board-certified sex offender treatment program; whether the offender initiated a relationship for the purpose of facilitating the offense; and the person's current risk of sexual or violent reoffense, including the person's risk levels on SARATSO static, dynamic, and violence risk assessment instruments, if known. If the petition is denied, the person may not repetition for termination for at least three years. [52]

Section 290.5(c) sets the section's operative date as July 1, 2021.

3. Amendments to Penal Code Section 4852.03

Penal Code section 4852.03 provides the requirements to be eligible for a certificate of rehabilitation. The test claim statute amended Penal Code section 4852.03(a)(2), to specifically state that a certificate of rehabilitation issued after July 1, 2021, does not relieve a person of the obligation to register as a sex offender, unless the person complies with Penal Code section 290.5, and the specific amended subparagraphs provide as follows (in strikeout and underline):

> (2) (A) An additional five years in the case of a person convicted of committing an offense or attempted offense for which sex offender registration is required pursuant to Sections 290 to 290.024, inclusive., ~~except that in the case of a person convicted of a violation of subdivision (b), (c), or (d) of Section 311.2, or of Section 311.3, 311.10, or 314, an additional two years.~~
>
> (B) A certificate of rehabilitation issued on or after July 1, 2021, does not relieve a person of the obligation to register as a sex offender unless the person obtains relief granted under Section 290.5.

E. Prior Commission Decisions Addressing the Sex Offender Registration Act

On August 23, 2001, the Commission adopted a Decision in *Sex Offenders Disclosure by Law Enforcement Officers*, 97-TC-15, which addressed Penal Code sections 290 and 290.4, as amended in 1996 and 1997. The Commission denied reimbursement for any activity related to new crimes added by the Legislature, the conviction of which

[52] Penal Code section 290.5 has been subsequently amended by Statutes 2020 Chapter 29 (SB 118), to require all petitioners to wait until their first birthday after July 1, 2021 and after completing the mandatory registration period before filing a petition; to require law enforcement agencies to report receiving a petition to the Department of Justice; to clarify that courts have the authority to approve or summarily deny petitions if the district attorney did not request a hearing; to require the court to clearly state the reason for summarily denying a petition; and to make other non-substantive grammatical changes.

required the registration of the offender, based on Government Code section 17556(g). The Commission reasoned as follows:

> As stated above, if these convicted sex offenders fail to register as a sex offender, they will now be guilty of a misdemeanor, felony and/or a continuing offense; whereas before the test claim legislation, they would not have been guilty of a crime. Accordingly, the Commission finds that this portion of the test claim legislation creates a new crime.[53]

The Commission approved reimbursement for various notice, record-keeping, and communication activities with the Department of Justice.[54]

On September 27, 2005, the Commission adopted its Decision on *Reconsideration of Sex Offenders Disclosure by Law Enforcement Officers*, 04-RL-9715-06, as directed by Statutes 2004, chapter 316 (AB 2851), which required the Commission to reconsider the Test Claim "in light of federal statutes enacted and federal and state court decisions rendered" since the test claim statutes were enacted.[55] The Commission found that three previously approved activities were enacted because of the federal Megan's Law sex offender registration program that existed at the time, and were determined to be part and parcel of that federal law.

On January 24, 2014, the Commission adopted its Decision in *State Authorized Risk Assessment Tool for Sex Offenders (SARATSO)*, 08-TC-03, partially approving the Test Claim. The Commission denied the activities that changed the penalty for a crime or infraction within the meaning of Government Code section 17556(g), and approved the remaining new administrative requirements, including the requirements to use SARATSO to assess those persons previously convicted of a sex offense and to include that information in certain reports for the Department of Corrections and Rehabilitation.[56]

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[53] Exhibit F (5), Commission on State Mandates, Test Claim Decision on *Sex Offenders Disclosure by Law Enforcement Officers*, 97-TC-15, adopted on August 23, 2001, https://csm.ca.gov/decisions/sod502.pdf (accessed on January 31, 2023) page 6.

[54] Exhibit F (5), Commission on State Mandates, Test Claim Decision on *Sex Offenders Disclosure by Law Enforcement Officers*, 97-TC-15, adopted on August 23, 2001, https://csm.ca.gov/decisions/sod502.pdf (accessed on January 31, 2023) pages 9-25.

[55] Statutes 2004, chapter 316, section 3(a); Exhibit F (6), Commission on State Mandates, Test Claim Decision on *Reconsideration of Sex Offenders Disclosure by Law Enforcement Officers*, 04-RL-9715-06, adopted September 27, 2005, https://www.csm.ca.gov/decisions/doc87.pdf (accessed September 6, 2023).

[56] Exhibit F (7), Commission on State Mandates, Test Claim Decision on *State Authorized Risk Assessment Tool for Sex Offenders (SARATSO)*, 08-TC-03, adopted January 24, 2014, https://csm.ca.gov/decisions/SARATSO_SODadopt012414.pdf (accessed on February 28, 2023).

III. Positions of the Parties

A. County of Los Angeles

The claimant, County of Los Angeles, alleges that the test claim statute imposes a reimbursable state mandated program under article XIII B, section 6 of the California Constitution. The claimant asserts that Statutes 2017, chapter 541, section 12 amends Penal Code section 290.5(a)(2) to create newly mandated activities for public defenders, law enforcement agencies, and district attorneys, and amends Penal Code section 290.5(a)(3) to create newly mandated activities for district attorneys and public defenders.

The claimant alleges that to comply with the requirements of section 290.5(a)(2), public defenders must "gather records, conduct necessary research, assess the petitioner's eligibility, and prepare and file the petition. The PD's office must comply with PC § 290.5(a)(2) and serve copies of the petition on the superior or juvenile court, the registering agency, and the DA's office."[57]

The claimant alleges that to comply with the requirements of section 290.5(a)(2), the Los Angeles County Sheriff Department (LASD) "must thoroughly review each petition, which includes conducting local and national records checks to identify criminal convictions, post-conviction time spent in custody, and calculate convictions and time served pursuant to PC § 290."[58]

The claimant alleges that to prepare for being served petitions under section 290.5(a)(2), the district attorney's office "created a system accommodation in their Prosecutorial Information Management System (PIMS) in order to handle petitions. Additionally, the DA created an Excel spreadsheet and a shared drive capable of tracking petitions. Further, the petition and all accompanying documents must be scanned and entered into PIMS."[59] The claimant further asserts that, to determine whether to exercise the authority granted to district attorneys under section 290.5(a)(2) to request a hearing on a petition, the district attorneys "must retrieve court records (local and out of county) and review case documents and risk assessment tools to determine whether the petitioner is eligible and appropriate for removal from the registry in relation to public safety. The DA must submit a California Judicial Council Form to the court and defense counsel."[60]

For section 290.5(a)(3), the claimant alleges:

> PC § 290.5(a)(3) states that any judicial determination made pursuant to this section may be heard and determined upon declarations, affidavits, police reports, or any other evidence submitted by the parties, which is reliable, material, and relevant. As a result of this new hearing process,

[57] Exhibit A, Test Claim, filed June 29, 2022, page 14.

[58] Exhibit A, Test Claim, filed June 29, 2022, page 14.

[59] Exhibit A, Test Claim, filed June 29, 2022, page 15.

[60] Exhibit A, Test Claim, filed June 29, 2022, page 15.

> the DA and PD must collect affidavits, declarations, police reports, and any other relevant evidence for consideration by the court. A petitioner must be represented at this hearing by an attorney who understands the law, court process, and rules of evidence.

Regarding the alleged activities of public defenders, the claimant does not cite any provision of the test claim statute that specifically says public defenders must perform an action, and acknowledges that "once a PD client is sentenced, the PD's duties cease with respect to that client except in limited circumstances," giving civil commitment hearings under the Sexually Violent Predator Act as an example of one such limited circumstance.[61] The claimant, however, contends that the test claim statute imposes mandated duties on the public defender and asserts that "[t]he legislatively created post-conviction process in Penal Code section 290.5 would violate due process if a lawyer were not provided in this legal, evidentiary, and adversarial proceeding."[62]

In response to the Draft Proposed Decision, the claimant insists that indigent petitioners under Section 290.5 are entitled to the assistance of legal counsel once they have presented a prima facie showing that they are entitled to relief under the statute.[63] By complying with the sex offender registration time requirements, providing proof of current registration, and serving the petition on the court, district attorneys, and relevant law enforcement agencies, the petitioners have made the prima facie showing that they are entitled to relief under the statute. When a district attorney chooses to challenge the petition by requesting a hearing, the court will consider evidentiary factors presented by the district attorney and petitioner. "Permitting a petitioner who is not familiar with cross examination, subpoenaing witnesses or documents, hiring experts, and the rules of evidence would cause a breakdown in the process of meaningful adversarial testing that is central to our system of justice."[64] The claimant therefore concludes that the test claim statute mandates that public defenders represent indigent petitioners in hearings regarding contested petitions to be terminated from the sex offender registry.

The claimant alleges it has incurred increased costs of $316,299 in the 2021-2022 fiscal year to comply with the test claim statute.[65] Specifically, it alleges $27,407 in increased costs from the Los Angeles County Sheriff's Department associated with receiving and reviewing petitions under section 290.5, $198,835 in increased costs incurred by the District Attorney's Office for reviewing and processing petitions, and $90,057 in

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[61] Exhibit A, Test Claim, filed June 29, 2022, page 14.

[62] Exhibit A, Test Claim, filed June 29, 2022, page 34.

[63] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 3-4 (citing *In re Clark* (1993) 5 Cal.4th 750, 780; *People v. Shipman* (1965) 62 Cal.2d 226, 232; *People v. Fryhaat* (2019) 35 Cal.App.5th 969, 980-981; and *People v. Rouse* (2016) 245 Cal.App.4th 292, 299).

[64] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 4.

[65] Exhibit A, Test Claim, filed June 29, 2022, page 17.

increased costs incurred by the Public Defender's Office associated with training on section 290.5 and filing petitions.[66]

The claimant estimates it will incur $610,693 in increased costs in the 2022-2023 fiscal year for complying with the requirements of section 290.5,[67] and estimates annual statewide costs of $4,506,187.[68]

Finally, the claimant asserts that the test claim statute does not change the penalty for a crime within the meaning of Government Code section 17556(g), as asserted by the Department of Finance, because both the U.S. and California Supreme Courts have found that requiring a person to register as a sex offender is not a punishment for the offense, but is instead considered civil, nonpunitive, and regulatory in nature.[69] Because the sex offender registry is not considered a punishment, the test claim statute did not change the penalty for a crime. The claimant therefore requests that the Commission reject Finance's conclusion that the test claim be denied on the grounds of Government Code section 17556(g).

The claimant further asserts that since the test claim statute does not eliminate the crime of failing to register or remove any crimes from the list of registerable offenses, but instead creates a procedure by which convicted sex offenders may petition the court to be removed from the sex offender registry, Government Code section 17556(g) does not apply.[70] Failing to register is still a crime. The claimant therefore argues that the test claim statute should be distinguishable from the Commission's prior Decisions in *Sex Offenders Disclosure by Law Enforcement Officers* and *Accomplice Liability for Felony Murder*.[71] The claimant also contends that the language in Government Code

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[66] Exhibit A, Test Claim, filed June 29, 2022, page 25, (Declaration of Daniel Stanley); page 31, (Declaration of Tony Sereno); page 45, (Declaration of Sung Lee).

[67] Exhibit A, Test Claim, filed June 29, 2022, page 17.

[68] Exhibit A, Test Claim, filed June 29, 2022, page 17; page 25, (Declaration of Daniel Stanley); page 31, (Declaration of Tony Sereno); page 45, (Declaration of Sung Lee).

[69] Exhibit C, Claimant's Rebuttal Comments, filed January 30, 2023, page 2; citing *Smith v. Doe* (2003) 538 U.S. 84, 85-87, which found that the Alaska State Legislature intended to enact a civil program, and that registration of sex offenders was not a punishment for the crime.; and *In re Alva* (2004) 33 Cal.4th 254, 262, which found as follows: "[W]e conclude that California's law requiring the mere registration of convicted sex offenders is not a punitive measure subject to either state or federal proscriptions against punishment that is "cruel" and/or "unusual." However, the court also noted that "[o]ne who violates a registration requirement that is based on a misdemeanor conviction is guilty of a misdemeanor [citations omitted], and a "willful[ ]" violation is a continuing offense [citations omitted.]." (*In re Alva* (2004) 33 Cal.4th 254, 265.)

[70] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 2.

[71] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 2.

section 17556(g) that says "but only for that portion of the statute relating directly to the enforcement of the crime or infraction," needs to be applied to all of section 17556(g) to avoid the denial of reimbursement where reimbursement is constitutionally required.[72] Otherwise, the interpretation is similar to the "'reasonably within the scope of" language in former versions of 17556(f) that was found to be impermissibly broad in *California School Board Association v. State of California* (2009) 171 Cal.App.4th 1183, 1215."[73]

B. Department of Finance

Finance asserts that any costs incurred by the claimant are not state-reimbursable pursuant to Government Code section 17556(g), which states the Commission shall not find reimbursable costs mandated by the state when "The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."[74] Finance believes this section applies because the test claim statute, "made changes to the statutes governing the penalties for persons convicted of specified sex offenses. Prior to the enactment of SB 384, Penal Code (PC) Section 290 required that persons convicted of specified sex offenses register with the police department or the sheriff's department in whose jurisdiction they resided, and that this registration be maintained for the rest of their life or until they moved from California."[75] Finance reasons that the lifetime registration requirement was one of the penalties for committing a registerable offense, because the intent of the sex offender registry was

> to prevent the offenders from recommitting the same or similar offenses by making their presence known to law enforcement and to the broader community. The preventative effect of this penalty is enhanced by PC Section 290.46, which requires the California Department of Justice to make available on a public internet website specified identifying information, including the name, photograph, and address or community of residence and Zip Code, of sex offenders required to register pursuant to PC Section 290. That the registration requirement is a penalty for the triggering offenses is substantiated by the fact that the registration requirement only applies to a person who committed those offenses.[76]

Finance argues that the changes made to the sex offender registry system by the test claim statute change the penalty for a crime or infraction, and that the changes made relate directly to enforcing the crime or infraction. Therefore, Finance concludes that

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[72] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 3.

[73] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 3.

[74] Government Code section 17556(g).

[75] Exhibit B, Finance's Comments on the Test Claim, filed January 6, 2023, page 1.

[76] Exhibit B, Finance's Comments on the Test Claim, filed January 6, 2023, page 1.

Government Code 17556(g) requires the Commission to deny the test claim in its entirety.

Finance did not file comments on the Draft Proposed Decision.

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service…

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[77] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[78]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[79]
2. The mandated activity constitutes a "program" that either:
   a. Carries out the governmental function of providing a service to the public; or
   b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[80]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or

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

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

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

[80] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

executive order and it increases the level of service provided to the public.[81]

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[82]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[83] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[84] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[85]

A. The Test Claim Was Timely Filed.

Government Code section 17551(c) states that test claims "shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later." Section 1183.1(c) of the Commission's regulations defines 12 months as 365 days.[86]

Here, the test claim statute went into effect on January 1, 2018, but to give the Department of Justice lead-up time to prepare the new system and sort existing registered sex offenders into the three new tiers, the statutes did not become operative until three years later.[87] Penal Code section 290.5, as amended by the test claim statute, became operative on July 1, 2021.[88] This was the earliest date that a sex offender could petition to terminate their duty to register pursuant to the test claim

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[81] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[82] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[83] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 335.

[84] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[85] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 [citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817].

[86] California Code of Regulations, title 2, section 1183.1(c).

[87] Statutes 2017, chapter 541.

[88] Statutes 2017, chapter 541, section 12.

statute, and that is the earliest date that claimant alleges it incurred costs.[89] The claimant filed the Test Claim on June 29, 2022, within 365 days of the test claim statute's operative date.[90] Thus, the Test Claim was timely filed within 12 months of first incurring costs.

B. The Test Claim Statute Imposes State-Mandated Activities on County Law Enforcement Agencies and District Attorneys, But Not on Public Defenders.

1. Penal Code Section 290.5, as Amended by Statutes 2017, Chapter 541, Imposes State-Mandated Activities on Law Enforcement Agencies and District Attorneys.

To be reimbursable under article XIII B, section 6 of the California Constitution, the requirements must be mandated by the state; or ordered, commanded, or legally compelled by state law.[91] "Legal compulsion is present when the local entity has a mandatory, legally enforceable duty to obey."[92] Generally, a requirement is not mandated by the state if it is triggered by a local voluntary decision.[93] However, the courts have recognized the possibility that a state-mandated program may exist when that decision is not truly voluntary, i.e., when local government is compelled as a practical matter to perform the requirements.[94]

The activities required of law enforcement agencies by the test claim statute are mandated by the state. After being served a petition to terminate a duty to register, the registering law enforcement agency and the law enforcement agency of the county of conviction of a registerable offense if different than the county where the petition is filed "shall, within 60 days of receipt of the petition, report to the district attorney and the superior or juvenile court in which the petition is filed regarding whether the person has

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[89] Exhibit A, Test Claim, filed June 29, 2022, page 29 (Declaration of Daniel Stanley, para. 6), and page 31 (Declaration of Tony Sereno, para. 7).

[90] Exhibit A, Test Claim, filed June 29, 2022, page 1.

[91] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 741.

[92] *Coast Community College District v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.

[93] *Coast Community College District v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815; see e.g. *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 107; see also *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743.

[94] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 744, 754. This form of compulsion is also referred to as "nonlegal compulsion." (See e.g. *Coast Community College District v. Commission on State Mandates* (2022) 13 Cal.5th 800, 821-822.)

met the requirements for termination pursuant to subdivision (e) of Section 290."[95] As indicated above, Penal Code section 290(e) defines the minimum time period for the completion of the required registration period, and ways that the registration period can be extended or restarted. If the registering law enforcement agency identifies a conviction that was not previously assessed by the Department of Justice, but which requires registration pursuant to the requirements of Penal Code section 290.005 regarding out-of-state, federal, or military court convictions, the registering law enforcement agency "shall" refer that conviction to the Department of Justice for assessment and determination of whether the conviction changes the tier designation assigned by the Department to the offender.[96] If the Department of Justice needs more time to obtain the documents to make the assessment, the Department of Justice is required to notify the registering law enforcement agency of the reason that an extension of time is necessary to complete the tier designation. The registering law enforcement agency "shall" then report to the district attorney and the court that the Department of Justice has requested an extension of time to determine the person's tier designation based on the newly discovered offense, the reason for the request, and the estimated time needed to complete the tier designation.[97] Based on the plain language of the test claim statute, these activities are mandated by the state.

The test claim statute imposes activities on district attorneys which are mandated by the state. Within 60 days of receiving reports from the law enforcement agencies or the district attorney of the county of conviction of the registerable offense, the registering county's district attorney "may" request the court hold a hearing on the petition if the petitioner has not fulfilled the requirements described in Penal Code section 290(e) to meet their mandatory minimum registration period, or if community safety would be significantly enhanced by the petitioner's continued registration.[98] If the district attorney requests a hearing, the district attorney "shall be entitled to present evidence" showing why community safety would be significantly enhanced by the petitioner's continued registration.[99] Penal Code section 290.5(a)(3) describes the evidence considered by the court:

> The court shall consider: the nature and facts of the registerable offense; the age and number of victims; whether any victim was a stranger at the time of the offense (known to the offender for less than 24 hours); criminal and relevant noncriminal behavior before and after conviction for the registerable offense; the time period during which the person has not reoffended; successful completion, if any, of a Sex Offender Management Board-certified sex offender treatment program; and the person's current risk of sexual or violent reoffense, including the person's risk levels on

[95] Penal Code section 290.5(a)(2).

[96] Penal Code section 290.5(a)(2).

[97] Penal Code section 290.5(a)(2).

[98] Penal Code section 290.5(a)(2).

[99] Penal Code section 290.5(a)(3).

> SARATSO static, dynamic, and violence risk assessment instruments, if available. Any judicial determination made pursuant to this section may be heard and determined upon declarations, affidavits, police reports, or any other evidence submitted by the parties which is reliable, material, and relevant.

The Court of Appeal recently explained the statutory phrase "if community safety would be significantly enhanced" by petitioner's continued registration, as follows:

> Section 290.5 does not define the phrase "community safety would be significantly enhanced." The purpose of section 290 is to ensure police can surveil sex offenders at all times because they pose a " ' " 'continuing threat to society.' " ' " (Citation omitted.) In the absence of a statutory definition, words should be given their usual and ordinary meanings. [Citation omitted.] "Significant" is defined as "having or likely to have influence or effect: deserving to be considered: important, weighty, notable." [Citation omitted.] "Enhanced" is defined as to raise or lift. [Citation omitted.] Thus, the prosecution must produce evidence establishing that requiring continued registration appreciably increased society's safety.[100]

The court further held that the district attorney has the burden to produce evidence that shows the petitioner *currently* presents a danger to the community (based on the factors identified in test claim statute), and not just evidence of the underlying offense.[101]

Although the test claim statute phrases the district attorney's activities permissively with language like "may request a hearing" or "be entitled to present evidence," case law suggests that a local decision is not truly voluntary for the purposes of article XIII B, section 6 if it is, as a practical matter, constrained by duty. In *San Diego Unified School Dist.*, the California Supreme Court suggested that a local discretionary action should not be considered voluntary if, as a practical matter, it must inevitably occur.[102] In that case, the Court was faced with statutory hearing requirements triggered by two types of school expulsions: "mandatory" expulsions, which state law required school principals to recommend whenever a student was found to be in possession of a firearm at school or at a school activity off school grounds, and "discretionary" expulsions, which state law granted school principals the authority to recommend for other conduct.[103] Although the Court confidently concluded that costs for the hearing requirements triggered by

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[100] *People v. Thai* (2023) 90 Cal.App.5th 427, 432.

[101] *People v. Thai* (2023) 90 Cal.App.5th 427, 433.

[102] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888; see *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

[103] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 869-870.

"mandatory" expulsions were reimbursable state mandated costs,[104] it hesitated to apply that same logic to deny reimbursement for the "discretionary" expulsions.[105] However, it cautioned in dicta that strictly denying reimbursement whenever a requirement was triggered by a technically discretionary local action may well contravene both the intent underlying article XIII B, section 6 and past holdings,[106] stating:

> Upon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs. Indeed, it would appear that under a strict application of the language in *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, as explained above, in *Carmel Valley*, supra, 190 Cal.App.3d 521, 234 Cal.Rptr. 795, an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (Id., at pp. 537–538, 234 Cal.Rptr. 795.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ—and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. *Yet, under a strict application of the rule gleaned from City of Merced, supra, 153 Cal.App.3d 777, 200 Cal.Rptr. 642, such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this*

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[104] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 881-882.

[105] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888.

[106] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888.

case, an application of the rule of City of Merced that might lead to such a result.[107]

In *Department of Finance v. Commission on State Mandates (POBRA)*, the Third District Court of Appeal suggested that duty is the dividing line between truly voluntary and technically discretionary decisions.[108] In that case, the court was tasked with determining whether the Public Safety Officers Procedural Bill of Rights Act (POBRA), which granted procedural protections to state and local peace officers subject to investigation, interrogation, or discipline, imposed a reimbursable state mandated program on school districts and community college districts that employ peace officers.[109] The court held that because those protections were triggered by a local discretionary decision, that statute did not impose a reimbursable state mandated program on those districts.[110] However, the court also clarified that this discretionary decision was *not* the district's decision to investigate, interrogate, or discipline its peace officers, but rather the district's decision to employ peace officers in the first place.[111] It explained that since counties and cities had a basic and mandatory duty to provide policing services,[112] their administration of this duty, as a practical matter, necessarily included actions such as investigating, interrogating, or disciplining its peace officers. Thus, those actions and the downstream requirements imposed by the POBRA statutes could not reasonably be considered "truly voluntary" when performed by counties and cities.[113]

The same analysis applies here. Although the test claim statute authorizes the district attorney to request a hearing when the petitioner has not met the requirements for termination or if the petitioner continues to present a threat to community safety, the decision of the district attorney to request a hearing under these circumstances is not truly voluntary. It is a district attorney's duty as a public prosecutor to "attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all

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[107] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888, footnote omitted and emphasis added.

[108] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

[109] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1358.

[110] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

[111] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

[112] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

[113] See *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

prosecutions for public offenses."[114] It would be a gross dereliction of a district attorney's duty to the people of the state to elect not to appear in a serious felony case.[115] The sex offender registry's purpose is to make law enforcement and the public aware of potentially dangerous individuals, so there is a strong public policy interest in requiring a sex offender's continued registration if there is reason to believe the petitioner still poses a potential threat to community safety.[116] Therefore, if the district attorney determines that keeping a sex offender on the registry is in the interest of significantly enhancing community safety, it is not a discretionary action within the meaning of article XIII B, section 6 to exercise the authority granted by the test claim statute to request the court hold a hearing and to present evidence in the hearing.

Therefore, Penal Code section 290.5, as amended by the test claim statute, imposes state-mandated requirements on county law enforcement and district attorneys' offices.

2. The Test Claim Statute Does Not Impose Any State-Mandated Requirements on County Public Defenders.

Unlike with law enforcement agencies or district attorneys however, the plain language of Penal Code section 290.5, as amended by the test claim statute, makes no mention of public defenders or petitioners having a right to counsel in the procedure to terminate a sex offender registration requirement. Nor do the other provisions of the Sex Offender Registration Act impose any requirements on public defenders. Looking at the test claim statute's legislative history, there was no discussion of public defenders representing petitioners that suggests intent that public defenders play a role in the petitioning process, or a general understanding that they would be inherently involved.[117]

Despite the test claim statute not specifically requiring anything of public defenders, the claimant asserts that "the legislatively created post-conviction process in Penal Code section 290.5 would violate due process if a lawyer were not provided in this legal, evidentiary, and adversarial proceeding."[118] The claimant cites no statutes or case law in the Test Claim that supports this, except to note that there are some limited circumstances where a public defender's duties to their client continue to civil matters after sentencing, using civil commitment hearings under the Sexually Violent Predator

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[114] Government Code section 26500.

[115] *People ex rel. Kottlneier v. Municipal Court* (1990) 220 Cal.App.3d 602, 609.

[116] See, *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 874, 877.

[117] Exhibit F (1) Senate Committee on Appropriations, Analysis of SB 421, as introduced April 17, 2017; Exhibit F (2) Assembly Committee on Public Safety, Analysis of SB 421, as amended May 26, 2017; Exhibit F (3) Senate Rules Committee, Office of Senate Analysis, Third Reading Analysis of SB 384, as amended September 8, 2017; Exhibit F (4) Senate Rules Committee, Office of Senate Floor Analysis, Unfinished Business on SB 384, as amended September 8, 2017.

[118] Exhibit A, Test Claim, filed June 29, 2022, page 34 (Declaration of Debra Werbel, para. 12).

Act as an example.[119] But the Sexually Violent Predator Act does specifically grant the right to counsel for those civil commitment hearings.[120] Petitions for a certificate of rehabilitation also are granted a right to counsel.[121] There are no similar provisions in the test claim statute.

The claimant also points to the fact that informational literature provided by the Department of Justice to registered sex offenders about the new tiered registration system directs them to seek assistance from public defenders as evidence of the public defenders' duty to represent petitioners.[122] Specifically, the Department of Justice said "The CA DOJ cannot provide legal assistance. If assistance is required, a registrant may contact a local public defender's office or a private attorney."[123] But that direction is not an executive order or legislative act that would create a reimbursable state mandate.

In its response to the Draft Proposed Decision, claimant acknowledges there is no federal right to counsel in post-conviction matters,[124] but insists that indigent petitioners under Penal Code section 290.5 are entitled to the assistance of legal counsel under the state's due process law once they have presented a prima facie showing that they are entitled to relief under the statute.[125] The claimant argues that by complying with the sex offender registration time requirements, providing proof of current registration, and serving the petition on the court, district attorneys, and relevant law enforcement agencies, the petitioners have made the prima facie showing that they are entitled to terminate their duty to register under the statute. When a district attorney chooses to challenge the petition by requesting a hearing, the court will consider evidentiary factors presented by the district attorney and petitioner. "Permitting a petitioner who is not familiar with cross examination, subpoenaing witnesses or documents, hiring experts, and the rules of evidence would cause a breakdown in the process of meaningful

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[119] Exhibit A, Test Claim, filed June 29, 2022, page 14.

[120] Welfare and Institutions Code Section 6602.

[121] Penal Code section 4852.08.

[122] Exhibit A, Test Claim, filed June 29, 2022, page 41 (Declaration of Debra Werbel, Exhibit A, California Department of Justice Frequently Asked Questions, page 6).

[123] Exhibit A, Test Claim, filed June 29, 2022, page 41 (Declaration of Debra Werbel, Exhibit A, California Department of Justice Frequently Asked Questions, page 6).

[124] See, for example, *Pennsylvania v. Finley*, (1987) 481 U.S. 551, 555; *People v. Delgadillo*, (2022) 14 Cal.5th 216, 226, where the courts hold there is no constitutional right to the effective assistance of counsel in state post-conviction proceedings.

[125] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 3-4 (citing *In re Clark* (1993) 5 Cal.4th 750, 780; *People v. Shipman* (1965) 62 Cal.2d 226, 232; *People v. Fryhaat* (2019) 35 Cal.App.5th 969, 980-981; and *People v. Rouse* (2016) 245 Cal.App.4th 292, 299).

adversarial testing that is central to our system of justice."[126] The claimant therefore concludes that the test claim statute mandates that public defenders represent petitioners during hearings for contested petitions.

It is not clear from the case law cited by the claimant that the law requires the appointment of counsel to defend a petitioner when seeking to terminate his or her sex offender registration. The cases relied upon by the claimant all address convicted defendants challenging the validity of their conviction or sentence.[127] In those cases, when a prima facie case has been made to challenge a judgment of conviction, the indigent petitioner has the right to appointed counsel.[128]

However, the courts have also held that the right to appointed counsel does not apply under due process principles when the matter does *not* involve a deprivation of the person's liberty interests; in other words, there is no possibility that the petitioner may lose his or her physical liberty if litigation is lost. Such was the case in *People v. Mary H*., where the petitioner, who had been banned from owning a firearm after being taken into custody for psychiatric evaluation and treatment under the Lanterman-Petris-Short Act, requested an order lifting the firearm prohibition.[129] The court held that the petitioner did not have the right to appointed counsel as follows:

> . . . while procedural due process "has been held to include the right ... to appointed counsel under certain circumstances, regardless of whether the action is labelled criminal or civil" (citation omitted), because such a right generally "has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation" (citation omitted), "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel" (citation omitted). "[W]hether [one] has a personal liberty interest that requires appointment of counsel ... must be determined on a case-by-case basis ... by applying a two prong-test." (Citation omitted.) First, the court conducts the three-factor "fundamental fairness" balancing test. (Citation omitted.) Second, the "net weight" of these factors are "set ... against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his

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[126] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 4.

[127] *In re Clark* (1993) 5 Cal.4th 750, (sought to overturn a death sentence); *People v. Shipman* (1965) 62 Cal.2d 226, (petition to vacate a judgment on the grounds defendant had been insane both at the time of the offense and at pleading); *People v. Fryhaat* (2019) 35 Cal.App.5th 969, (motion to vacate guilty plea on the grounds ineffective counsel failed to advise the defendant of a guilty plea's effect on his immigration status); and *People v. Rouse* (2016) 245 Cal.App.4th 292, (petition for resentencing under statute that reclassified several of defendant's offenses as misdemeanors).

[128] *In re Clark* (1993) 5 Cal.4th 750, 779; *People v. Shipman* (1965) 62 Cal.2d 226, 231; *People v. Fryhaat* (2019) 35 Cal.App.5th 969, 981.

[129] *People v. Mary H.* (2016) 5 Cal.App.5th 246.

> personal freedom." (Citation omitted.) "The dispositive question ... is whether the three ['fundamental fairness'] factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption and thus to lead to the conclusion that the Due Process Clause requires the appointment of counsel...." (Citation omitted.) Given our earlier analysis under the "fundamental fairness" balancing test (see *ante*, at pp. 40–43) and this matter does not involve the deprivation of Mary's physical liberty, we cannot conclude procedural due process requires appointment of counsel.[130]

Here, a petition to be terminated from the sex offender registry is not a post-conviction challenge to the petitioner's conviction or sentence. It is a petition to terminate the registration requirements filed decades after release from custody and after the petitioner has satisfied the minimum mandatory registration period for their respective tier. The petition does not question the validity of the conviction that created the duty to register in the first place. Moreover, if the petitioner loses the petition, he or she must continue to register as a sex offender for one to five more years, which is considered non-punitive and civil in nature, and does not result in a person's loss of physical liberty.[131]

Thus, without any law or evidence showing that the appointment of counsel is required in these cases, the Commission cannot find that the test claim statute mandates any duties of the county public defenders' offices.

C. The Mandated Activities Constitute a New Program or Higher Level of Service.

For a state-mandated activity to constitute a new program or higher level of service, it must be new when compared with the legal requirements in effect immediately before the enactment of the test claim statute and increase the level of service provided to the public.[132] In addition, the requirement must either carry out the governmental function of providing a service to the public, or impose unique requirements on local agencies or school districts that do not apply generally to all residents and entities in the state.[133]

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[130] *People v. Mary H.* (2016) 5 Cal.App.5th 246, 263.

[131] *People v. Castellanos* (1999) 21 Cal.4th 785, 796; *In re Alva* (2004) 33 Cal.4th 254, 292; see generally *People v. Mosley* (2015) 60 Cal.4th 1044, 1054.

[132] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[133] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56); *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.).

1. The Mandated Activities Are New in Comparison to What Was Required Under Prior Law.

The activities required of law enforcement agencies and district attorneys by the test claim statute are new in comparison to prior law, as under prior law the entire procedure of petitioning to be relieved of a duty to register after completing a mandatory minimum registration period did not exist. Under prior law, the only means of being relieved from the duty to register was through a certificate of rehabilitation.[134] The certificate of rehabilitation process has not been eliminated and is still available to eligible sex offenders who may wish to see their other rights restored, meaning petitioning to be terminated from the sex offender registry is a new process that exists alongside, rather than replaces the certificate of rehabilitation process.

Thus, the mandated activities are new when compared to prior law.

2. The Mandated Activities Carry Out the Governmental Function of Providing a Service to the Public, and Impose Unique Requirements on Counties that Do Not Apply Generally to All Residents and Entities in the State.

The activities required of law enforcement agencies and district attorneys serve the functional purpose of ensuring that registration continues when appropriate for individual sex offenders with a high risk of re-offense.[135] This carries out a governmental function of protecting and enhancing community safety, and provides a service to the public. In addition, the requirements are uniquely imposed on county law enforcement and district attorneys.

Thus, the mandated activities impose a new program or higher level of service.

D. There Are No Costs Mandated by the State Because the Test Claim Statute Falls Within the Government Code Section 17556(g) Exception for Statutes that "Eliminate a Crime or Infraction."

The final element that must be met for reimbursement to be required under article XIII B, section 6 of the California Constitution is that the mandated activities must result in a local agency incurring increased costs mandated by the state within the meaning of Government Code section 17514. That section defines "costs mandated by the state" as "any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." Government Code section 17564 also provides that "[n]o claim shall be made pursuant to Sections 17551, . . ., nor shall any payment be made on claims submitted pursuant to Sections 17551 or 17561, . . . , unless these claims exceed one thousand dollars ($1,000)." Even if the

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[134] Former Penal Code section 290.5, as last amended by Statutes 2014, chapter 280.

[135] Exhibit F (3), Senate Rules Committee, Office of Senate Analysis, Third Reading Analysis of SB 384, as amended September 8, 2017, page 13.

claims exceed $1,000, however, the claimed costs are not reimbursable if an exception identified in Government Code section 17556 applies.

Here, there is substantial evidence that the claimant incurred over $1,000 in complying with the test claim statute, as required by Government Code section 17564.[136]

However, article XIII B, section 6 of the California Constitution does not require subvention for the enforcement or elimination of crime, or when the Legislature changes the penalty for a crime. Government Code section 17556(g) provides that the Commission "shall not find costs mandated by the state" when "the statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."[137]

Finance argued that this claim should be denied because of Government Code section 17556(g), but asserted that the test claim statute changed the penalty for a crime or infraction.[138] The claimant responded, and the Commission agrees, that the requirement to register as a sex offender is not historically considered a punishment by either the courts or the Legislature.[139] Rather, the requirement to register as a sex offender is considered non-punitive and civil in nature.[140] The stated legislative purpose behind the sex offender registry is to deter offenders from committing future crimes, provide law enforcement with an additional investigative tool, and increase public protection.[141] Courts have frequently found that the sex offender registry is not a punishment at least with respect to whether the registration requirement violates an individual's constitutional rights against ex post facto laws or cruel and unusual punishments.[142] Both its purpose and effect are considered regulatory in nature because section 290 is meant to make sex offenders "readily available for police surveillance at all times because the legislature deemed them likely to commit similar offenses in the future."[143] The obligation to register is not part of the sentence, instead

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[136] Exhibit A, Test Claim, filed June 29, 2022, page 17; page 25, (Declaration of Daniel Stanley); page 31, (Declaration of Tony Sereno); alleging increased costs in fiscal year 2021-2022 of $27,407 for the Los Angeles County Sheriff's Department and $198,835 for the Los Angeles County District Attorney's Office.

[137] Government Code section 17556(g).

[138] Exhibit B, Finance's Comments on the Test Claim, filed January 6, 2023, page 1-2.

[139] Exhibit C, Claimant's Rebuttal Comments, filed January 30, 2023, page 1; *People v. Castellanos* (1999) 21 Cal.4th 785, 796.

[140] *People v. Castellanos* (1999) 21 Cal.4th 785, 796; *In re Alva* (2004) 33 Cal.4th 254, 292; see generally *People v. Mosley* (2015) 60 Cal.4th 1044, 1054.

[141] *Wright vs. Superior Court* (1997) 15 Cal.4th 521, 526.

[142] *People v. Castellanos* (1999) 21 Cal.4th 785, 796; *In re Alva* (2004) 33 Cal.4th 254, 292; see generally *People v. Mosley* (2015) 60 Cal.4th 1044, 1054.

[143] *In re Alva* (2004) 33 Cal.4th 254, 264.

"the obligation is a separate consequence of [a sex offense conviction] automatically imposed as a matter of law."[144] The burdens caused by requiring convicted sex offenders continuously register are incidental to a legitimate government regulatory purpose, and being a registered sex offender does not impose affirmative restrictions that have a punitive effect. Despite being triggered by a person's conviction for a sexual offense, the requirement to register as a sex offender is not itself a punishment. Therefore the test claim statute did not change the penalty for a crime or infraction.

The claimant also alleges that the test claim statute does not eliminate the crime of failing to register or remove any crimes from the list of registerable offense, but instead created a procedure by which convicted sex offenders may petition the court to be removed from the sex offender registry and, thus, Government Code section 17556(g) does not apply. The claimant argues that the test claim statute should therefore be distinguishable from the Commission's prior Decisions in *Sex Offenders Disclosure by Law Enforcement Officers* and *Accomplice Liability for Felony Murder*.[145]

The Commission finds, however, that Government Code section 17556(g) still applies because the test claim statute eliminates a crime. The requirement to register as a sex offender is enforced by Penal Code section 290.018, which provides that a person who willfully violates any requirement under the Sex Offender Registration Act is guilty of a misdemeanor punishable by up to a year imprisonment if the original conviction that triggered the registration requirement was a misdemeanor, or guilty of a felony punishable by up to three years imprisonment if the original conviction was a felony.[146] For each day that the offender fails to register, it is considered a continuing offense: "A defendant does not commit the crime only at the particular moment the obligation arises, but every day it remains unsatisfied."[147]

Under prior law, the requirement to register annually and any time the offender moved existed for life.[148] But the test claim statute eliminates the requirement for a sex offender to register under the Act once the offender has successfully petitioned to terminate their duty to register, as early as 10 or 20 years after release. Although the test claim statute made no changes to the language in section 290.018 regarding the criminal penalties, it did amend section 290 to note that every person described in the section has a duty to register under the Act "*unless the duty to register is terminated*

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[144] *People v. Picklesimer* (2010) 48 Cal.4th 330, 338.

[145] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 2.

[146] Penal Code section 290.018(a), (b).

[147] *Wright v. Superior Court* (1997) 15 Cal.4th 521, 528.

[148] Former Penal Code section 290(b), as last amended by Proposition 35, section 9, approved November 6, 2012; Penal Code section 290.012, as added by Statutes 2007, chapter 579, and last amended by Statutes 2016, chapter 772; and Penal Code section 290.015 as added by Statutes 2007, chapter 579, and last amended by Statutes 2016, chapter 772.

pursuant to Section 290.5 . . . ."[149] This means that once the duty to register is terminated, the offender is no longer subject to the requirements of the Sex Offender Registration Act, and any criminal penalties under Penal Code section 290.018 for failing to register or to otherwise comply for life are eliminated. Thus, the test claim statute has eliminated the crime within the meaning of Government Code section 17556(g), and, therefore, there are no costs mandated by the state.

This finding is consistent with the recent published decision issued by the Fourth District Court of Appeal in *County of San Diego v. Commission on State Mandates*, which addressed the Commission's Decision denying the *Youth Offender Parole Hearings* (17-TC-09) test claim based on Government Code section 17556(g). The court found that Government Code section 17556(g) applied because "as a direct result" of the test claim statutes, penalties of the crimes were changed - most youth offenders are now statutorily eligible for parole years earlier than their original sentence:

> Now, as a direct result of the Test Claim Statutes, most youth offenders are statutorily eligible for parole at a youth offender parole hearing conducted during the 15th, 20th, or 25th year of incarceration, depending on the term of incarceration included within the youth offender's original sentence. (Pen. Code, §§ 3046, subd. (c), 3051, subds. (b), (d), 4801, subd. (c).) In practice, this parole eligibility ensures that some youth offenders will be released from prison years earlier, and perhaps even decades earlier, than they otherwise would have been but-for the Test Claim Statutes.
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> Thus, the Test Claim Statutes, and the youth offender parole hearing system established thereunder, "superseded the statutorily mandated sentences of inmates who ... committed their controlling offense" when they were under the age of 26. (Citation omitted.) Stated differently, the laws "effectively reform[ed] the parole eligibility date of a [youth] offender's original sentence so that the longest possible term of incarceration before parole eligibility is 25 years." (Citations omitted.) By guaranteeing parole eligibility for most youth offenders, and overriding those offenders' original sentences, the Test Claim Statutes change the penalties for crimes within the meaning of Government Code section 17556, subdivision (g).[150]

The court also rejected arguments from the County that the test claim statutes do not change the penalties for crimes under section 17556(g) because they do not vacate the youth offender's original sentence, but simply implement procedural and administrative changes.[151] The court agreed that the original sentences imposed on the juvenile

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[149] Penal Code section 290(b), emphasis added.

[150] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 640-641.

[151] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 642.

offenders in the *Youth Offender Parole Hearings* program still exist, "[b]ut these facts do not mean the Test Claim Statutes effect no change on the penalties suffered by youth offenders."[152] This argument is similar to the claimant's argument here, that the test claim statute does not eliminate a crime within the meaning of Government Code section 17556(g) since Penal Code section 290.018, which makes it a crime for failing to register, still exists.[153] The crime for failing to register still exists in statute, but that does not mean that the test claim statute effects no change. As a direct result of the test claim statute, a successful petition to terminate registration, just like a successful youth offender following a parole hearing, means that the offender is no longer subject to the requirements of the Sex Offender Registration Act, and any criminal penalties under Penal Code section 290.018 for failing to register or to otherwise comply for life are eliminated. The claimant also relies on the "but only" language in Government Code section 17556(g) to suggest that the "crime elimination" exception to reimbursement should be narrowly interpreted and, when viewed narrowly, the exception does not apply to the procedure required by the test claim statute here.[154] However, the "longstanding rule of statutory construction—the 'last antecedent rule'—provides that "qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote."[155] Government Code section 17556(g) says that the Commission shall not find costs mandated by the state when "[t]he statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction." Under the last antecedent rule, the "but only" clause modifies only the third phrase: "changed the penalty for a crime or infraction." This application is in accordance with legislative intent and the rules of construction. It would not make sense for the "but only" clause to modify the first phrase, "created a new crime or infraction," because that exception to reimbursement is already provided for in article

[152] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 641.

[153] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 2.

[154] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed May 8, 2023, page 3.

[155] *White v. County of Sacramento* (1982) 31 Cal.3d 676, 679-680. In that case, the statute defined "punitive action" as "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer *for purposes of punishment*." (Emphasis added.) The court held that under the last antecedent rule, the phrase "for purposes of punishment" must be read only with the word "transfer" and not the words "dismissal," "demotion," "suspension," "reduction in salary," and "written reprimand."

XIII B, section 6(b), of the California Constitution without the "but only" language.[156] Similarly, it would not make sense for the "but only" clause to modify the second phrase, "eliminated a crime or infraction," because an eliminated crime cannot be enforced. Thus, the "but only" language applies only to a statute that changes the penalty for a crime or infraction.

Finally, although the Commission's past decisions on prior test claims are *not* precedential, this interpretation is consistent with the Commission's prior decisions regarding the "eliminate a crime or infraction" language in Gov. Code section 17556(g). In *Accomplice Liability for Felony Murder*, 19-TC-02, the claimant sought reimbursement for costs associated with statutes that changed the felony murder rule and natural and probable causes doctrine to require either an intent to kill or that the defendant was a major participant in a crime who acted with reckless indifference towards human life, and allowed people convicted for murder under the felony murder rule or natural and probable causes doctrine prior to the change in law to petition to have their murder conviction vacated if they lacked the requisite state of mind.[157] Local agency interested parties argued this did not eliminate a crime because the test claim statute did not eliminate felony murder or murder under the natural and probable causes doctrine as crimes as a whole; the test claim statute only changed the element of malice required to find a person liable for the offenses.[158] The Commission was not convinced by this argument, noting that "The test claim statute and the court cases make it clear, however, that the crime of murder has been eliminated for those persons who lack intent to kill while committing other felonies, or who are not major participants acting with reckless indifference to human life, as they may no longer be found guilty of murder."[159] Similarly, even though the test claim statute does not stop failure to register from being a crime as a whole, the test claim statute here makes it clear that those who have successfully petitioned the courts under section 290.5 no longer have a duty to register as a sex offender. This means they can no longer be found guilty under section

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[156] "[T]he Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (b) Legislation defining a new crime or changing an existing definition of a crime."

[157] Exhibit F (8), Commission on State Mandates, Test Claim Decision on *Accomplice Liability for Felony Murder*, 19-TC-02, adopted December 4, 2020, https://csm.ca.gov/decisions/19-tc-01-120920.pdf (accessed on January 31, 2023), page 29-30.

[158] Exhibit F (8), Commission on State Mandates, Test Claim Decision on *Accomplice Liability for Felony Murder*, 19-TC-02, adopted on December 4, 2020, https://csm.ca.gov/decisions/19-tc-01-120920.pdf (accessed on January 31, 2023), page 30-31

[159] Exhibit F (8), Commission on State Mandates, Test Claim Decision on *Accomplice Liability for Felony Murder*, 19-TC-02, adopted on December 4, 2020, https://csm.ca.gov/decisions/19-tc-01-120920.pdf (accessed on January 31, 2023), page 32.

290.018 for failing to register, and thus the test claim statute eliminates a crime with respect to the people who are granted petitions under section 290.5.

Additionally, *Sex Offenders Disclosure by Law Enforcement Officers*, 97-TC-15 is another prior Commission Decision dealing with the sex offender registry.[160] In that case, the test claim statute expanded the list of registerable offenses. The claimants argued that adding additional crimes to the list of registerable offenses did not create a new crime or change the definition of any crime.[161] The Commission found this interpretation lacking, and explained that if a person convicted of any of the newly added offenses does not register as a sex offender, they are now guilty of a misdemeanor or felony, whereas prior to the test claim statute, they would not have been guilty of a crime.[162] Although the prior test claim deals in the creation of a new crime rather than the elimination of a crime, the same principle applies here. Under prior law, everyone who has been convicted of a registerable offense was guilty of a misdemeanor or felony if they do not register as a sex offender. But going from a system in which all registrants were expected to register for life to a tiered system that gives a clear path to be relieved of the duty to register eliminates a crime, because it is no longer a crime for a person to not register as a sex offender once they have successfully petitioned to have their registration requirement terminated.

Accordingly, the Commission finds that the test claim statute does not result in costs mandated by the state.

V. Conclusion

Based on the foregoing analysis, the Commission denies this Test Claim and finds that the test claim statutes do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

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[160] Exhibit F (5), Commission on State Mandates, Test Claim Decision on *Sex Offenders Disclosure by Law Enforcement Officers*, 97-TC-15, adopted on August 23, 2001, https://csm.ca.gov/decisions/sod502.pdf (accessed on January 31, 2023), page 4-6.

[161] Exhibit F (5), Commission on State Mandates, Test Claim Decision on *Sex Offenders Disclosure by Law Enforcement Officers*, 97-TC-15, adopted on August 23, 2001, https://csm.ca.gov/decisions/sod502.pdf (accessed on January 31, 2023), page 6.

[162] Exhibit F (5), Commission on State Mandates, Test Claim Decision on *Sex Offenders Disclosure by Law Enforcement Officers*, 97-TC-15, adopted on August 23, 2001, https://csm.ca.gov/decisions/sod502.pdf (accessed on January 31, 2023), page 6.

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 October 27, 2023, I served the:

- **Current Mailing List dated October 23, 2023**
- **Decision adopted October 27, 2023**

  Sex Offenders Registration: Petitions for Termination, 21-TC-03
  Statutes 2017, Chapter 541, Section 12 (SB 384), effective January 1, 2018, operative July 1, 2021
  County of Los Angeles, Claimant

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 27, 2023 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 10/23/23

Claim Number: 21-TC-03

Matter: Sex Offenders Registration: Petitions for Termination

Claimant: County of Los Angeles

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