BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE MANDATE REDETERMINATION: SECOND HEARING: NEW TEST CLAIM DECISION FOR: Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608; As added or amended by Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); Statutes 1996, Chapter 4 (AB 1496); *Sexually Violent Predators* (CSM-4509), As Modified by: Proposition 83, General Election, November 7, 2006 Filed on January 15, 2013 By the Department of Finance, Requester.	Case No.: 12-MR-01 *Sexually Violent Predators (CSM-4509)* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500, ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. [Gov. Code, § 17570; Cal. Code Regs., tit. 2, § 1190.05] (*Adopted December 6, 2013*) (*Served December 13, 2013*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this mandate redetermination during regularly scheduled hearings on September 27, 2013, and December 6, 2013, and adopted the new test claim decision on December 6, 2013. At the September 27, 2013 hearing, Susan Geanacou and Michael Byrne appeared for the Department of Finance, the requester; Hasmik Yaghobyan appeared for the County of Los Angeles, the original test claimant; Craig Osaki appeared on behalf of the Los Angeles County Public Defender's Office; Timothy Barry appeared on behalf of the San Diego County Sheriff's Office, District Attorney's Office, and Public Defender's Office; Geoffrey Neill appeared on behalf of the California State Association of Counties; and Todd Spitzer, Orange County Supervisor, appeared on behalf of the public. At the December 6, 2013 hearing, Hasmik Yaghobyan appeared for the County of Los Angeles, Craig Osaki appeared on behalf of the Los Angeles County Public Defender's Office, and Michael Byrne appeared for the Department of Finance.

Government Code section 17570 and section 1190 et seq. of the Commission's regulations establish the mandate redetermination process. In addition, the law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., title 2, California Code of Regulations 1181 et seq., and related case law.

The Commission granted the request for redetermination and partially approved the request to end reimbursement for the test claim activities by a vote of 4-1, with one member abstaining and one member absent, at the September 27, 2013 hearing. On December 6, 2013, the Commission determined that its findings are effective on July 1, 2011, pursuant to Government Code section 17570 and, thus six of the eight activities are no longer reimbursable effective July 1, 2011. The Commission adopted the statement of decision as its new test claim decision on December 6, 2013, by a vote of 6 to 1.

Summary of the Findings

The Commission finds that the state's liability pursuant to article XIII B, section 6(a) of the California Constitution for the *Sexually Violent Predators*, CSM-4509 mandate has been modified based on a subsequent change in law, and a new test claim decision is required. Specifically, Welfare and Institutions Code sections 6601, 6604, 6605, and 6608, as added or amended by Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); and Statutes 1996, Chapter 4 (AB 1496) impose duties expressly included in Proposition 83, adopted by the voters on November 7, 2006. Additionally the duties imposed by section 6603 are necessary to implement the requirements of Proposition 83. Government Code section 17556(f) provides that the Commission shall not find "costs mandated by the state" for costs incurred as a result of statutes that impose duties that are expressly included in or necessary to implement a ballot measure approved by the voters. Based on the filing date of this request, and pursuant to Government Code section 17570, the following activities are no longer reimbursable beginning July 1, 2011 (the numbering of the activities utilized in DOF's request for redetermination is adopted):

> **Activity 1** – Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)
>
> **Activity 2** – Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation. (Welf. & Inst. Code, § 6601(i).)
>
> **Activity 3** – Preparation and filing of the petition for commitment by the county's designated counsel. (Welf. & Inst. Code, § 6601(j).)
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> **Activity 5** – Preparation and attendance by the county's designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)
>
> **Activity 6** – Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6605(b-d), and 6608(a-d).)
>
> **Activity 7** – Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605(d).)

However, the preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing (**Activity 4**), and the portion of **Activity 8** that includes transportation of each sexually violent predator from a secured facility to the *probable*

cause hearing, remain reimbursable as state-mandated costs, as explained below. The activities related to holding a probable cause hearing are found to be neither expressly included in, nor necessary to implement Proposition 83, but are mandated by the state in section 6602 of the Welfare and Institutions Code.

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

> **Activity 4-** Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)
>
> **Activity 8** – Transportation ~~and housing~~ for each potential sexually violent predator from ~~at~~ a secured facility to the probable cause hearing ~~while the individual awaits trial~~ on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)

COMMISSION FINDINGS

Chronology

6/25/1998	The Commission adopted the test claim statement of decision for *Sexually Violent Predators*, (CSM-4509), approving reimbursement for certain activities under Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608.[1]
9/24/1998	The Commission adopted parameters and guidelines.[2]
11/08/2006	California voters approved Proposition 83, which amended and reenacted several sections of the Welfare and Institutions Code.[3]
10/30/2009	The Commission adopted amended parameters and guidelines, pursuant to the Controller's request to amend the boilerplate language of a number of existing parameters and guidelines.[4]
1/15/2013	The Department of Finance (DOF) filed a request for redetermination of CSM-4509.[5]
1/24/2013	Commission staff deemed the filing complete.
2/13/2013	The State Controller's Office (SCO) submitted comments.[6]
2/13/2013	The County of Los Angeles requested an extension of time to file comments.
2/13/2013	The California State Association of Counties (CSAC) requested an extension of time to file comments.

[1] Exhibit B, Test Claim Statement of Decision.

[2] Exhibit C, Test Claim Parameters and Guidelines.

[3] See Exhibit A, Request for Redetermination.

[4] Exhibit D, Test Claim Amended Parameters and Guidelines.

[5] Exhibit A, Request for Redetermination.

[6] Exhibit E, SCO Comments on Request for Redetermination.

2/14/2013	The County of San Diego requested an extension of time to file comments.
2/15/2013	The Executive Director granted an extension of time for the submittal of all comments until March 27, 2013, and set the matter for the first hearing on July 26, 2013.
3/19/2013	California District Attorneys' Association (CDAA) submitted comments on the request for redetermination.[7]
3/22/2013	CSAC submitted comments on the request for redetermination.[8]
3/25/2013	California Public Defenders' Association (CPDA) submitted comments on the request for redetermination.[9]
3/25/2013	District Attorney of San Bernardino County submitted comments on the request for redetermination.[10]
3/25/2013	County of San Bernardino submitted comments on the request for redetermination.[11]
3/26/2013	District Attorney of Sacramento County submitted comments on the request for redetermination.[12]
3/26/2013	District Attorney of Los Angeles County submitted comments on the request for redetermination.[13]
3/27/2013	County of Los Angeles submitted comments on the request for redetermination.[14]
3/27/2013	Alameda County Public Defender submitted comments on the request for redetermination.[15]
3/27/2013	County Counsel of San Diego County submitted comments on the request for redetermination.[16]

[7] Exhibit F, CDAA Comments on Request for Redetermination.

[8] Exhibit G, CSAC Comments on Request for Redetermination.

[9] Exhibit H, CPDA Comments on Request for Redetermination.

[10] Exhibit I, County of San Bernardino District Attorney Comments on Request for Redetermination.

[11] Exhibit J, County of San Bernardino Comments on Request for Redetermination.

[12] Exhibit K, County of Sacramento District Attorney Comments on Request for Redetermination.

[13] Exhibit L, Los Angeles County District Attorney Comments on Request for Redetermination.

[14] Exhibit M, County of Los Angeles Comments on Request for Redetermination.

[15] Exhibit N, Alameda County Public Defender Comments on Request for Redetermination.

[16] Exhibit O, County Counsel of San Diego Comments on Request for Redetermination.

3/29/2013	Alameda County District Attorney submitted comments on the request for redetermination.[17]
5/09/2013	Commission staff issued the draft staff analysis and proposed statement of decision.[18]
5/17/2013	DOF submitted comments on the draft staff analysis.[19]
5/28/2013	CPDA submitted comments on the draft staff analysis.[20]
5/31/2013	County of LA submitted late comments on the draft staff analysis.[21]
7/26/2013	The Commission determined that the requester made an adequate showing for redetermination and directed staff to set the matter for a second hearing.[22]
8/02/2013	Commission staff issued the draft staff analysis for the second hearing.[23]
8/22/2913	The County of Orange submitted comments on the draft staff analysis for the second hearing.[24]
8/27/2013	The District Attorney of Orange County submitted comments on the draft staff analysis for the second hearing.[25]
9/05/2013	The Public Defender of San Bernardino County submitted comments on the draft staff analysis for the second hearing.[26]
9/05/2013	The California State Association of Counties submitted comments on the draft staff analysis for the second hearing.[27]
9/05/2013	The County Counsel of San Diego submitted comments on the draft staff analysis for the second hearing.[28]

[17] Exhibit P, Alameda County District Attorney Comments on Request for Redetermination.

[18] Exhibit Q, Draft Staff Analysis and Proposed Statement of Decision.

[19] Exhibit R, DOF Comments on Proposed Statement of Decision.

[20] Exhibit S, CPDA Comments on Draft Staff Analysis.

[21] Exhibit T, County of LA Comments on Draft Staff Analysis.

[22] Exhibit U, Statement of Decision, First Hearing, July 26, 2013.

[23] Exhibit V, Draft Staff Analysis, Second Hearing, August 2, 2013.

[24] Exhibit W, County of Orange Comments on Draft Staff Analysis, Second Hearing.

[25] Exhibit Y, Orange County District Attorney Comments on Draft Staff Analysis, Second Hearing.

[26] Exhibit Z, San Bernardino County Public Defender Comments on Draft Staff Analysis, Second Hearing.

[27] Exhibit AA, CSAC Comments on Draft Staff Analysis, Second Hearing.

9/05/2013	The Department of Finance submitted comments on the draft staff analysis for the second hearing.[29]
9/05/2013	The County of Los Angeles submitted comments on the draft staff analysis for the second hearing.[30]
09/27/2013	The Commission approved staff's recommendation to adopt a new test claim decision, ending reimbursement for six of eight activities approved in the prior test claim decision, but postponed the adoption of the test claim decision pending resolution of a possible legal issue regarding the period of reimbursement.
10/11/2013	Commission staff issued a revised draft staff analysis addressing the period of reimbursement issue identified at the September 27, 2013 hearing.
11/01/2013	The Department of Finance submitted written comments on the draft staff analysis, concurring with staff's recommendation.

I. Background

The Sexually Violent Predators Program and the Subsequent Change in Law

The Sexually Violent Predators (SVP) program established civil commitment procedures for the civil detention and treatment of sexually violent predators (SVPs) following the completion of an individual's criminal sentence imposed for certain sex-related offenses. Before civil detention and treatment are imposed, the county counsel or district attorney is required to file a petition for civil commitment. A trial is then conducted to determine beyond a reasonable doubt if the person is an SVP. If the person alleged to be an SVP is indigent, the county is required to provide the indigent person with the assistance of counsel and experts necessary to prepare the defense.

The Commission concluded, in the CSM-4509 test claim statement of decision, that Welfare and Institutions Code sections 6601(i), 6602, 6603, 6604, 6605(b)-(d), and 6608(a)-(d) as enacted or amended by the 1995 and 1996 test claim statutes, imposed a reimbursable state-mandated program on counties within the meaning of article XIII B, section 6, of the California Constitution.[31]

On November 7, 2006, the voters approved Proposition 83, also known as "Jessica's Law." Proposition 83 effected a number of amendments to the Penal Code, including strengthening penalties for kidnapping and sexual offenses perpetrated upon children, and especially removing the requirement of "force, violence, duress, menace, or fear of immediate and unlawful bodily

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[28] Exhibit BB, County Counsel of San Diego Comments on Draft Staff Analysis, Second Hearing.

[29] Exhibit CC, Finance Comments on Draft Staff Analysis, Second Hearing.

[30] Exhibit DD, County of Los Angeles Comments on Draft Staff Analysis, Second Hearing.

[31] Exhibit B, Test Claim Statement of Decision, at p. 12.

injury" from the definitional elements of several crimes.[32] Proposition 83 also mandated consecutive sentences for a number of sexual offenses,[33] mandated a minimum 25 year sentence for a "habitual sexual offender," as defined,[34] and required persons released on parole from a "registerable sex offense" to be monitored for the duration of their parole by a global positioning system device, for which the parolee is responsible to pay unless granted a waiver by the Department of Corrections.[35]

As directly relevant here, Proposition 83 also amended and reenacted provisions of the Welfare and Institutions Code, including sections 6601, 6604, 6605, and 6608 which were among the test claim statutes approved by the Commission in CSM-4509.

Section 6601(k) was amended by Proposition 83 to provide that a civil commitment under article 4 *shall toll the term of an existing parole*, where applicable. Under the amended section, if a person were granted parole but subsequently civilly committed, that individual's parole would not run concurrently, but would be "tolled," and the remaining term of parole would be served after the civil commitment ends. The test claim statute, as approved in CSM-4509, provided that a civil commitment "*shall not toll, discharge or otherwise affect* the term of parole," meaning that a term of parole *could* run concurrently with a civil commitment, but that release from civil commitment would not discharge any remaining term of parole. The remainder of section 6601 was reenacted by Proposition 83 without amendment.

Section 6604 was amended by Proposition 83 to provide that if a court or jury determined that a person is a sexually violent predator, the person "shall be committed for an indeterminate term." The test claim statute, as approved in CSM-4509 had provided for a two year civil commitment, with an option for an extended commitment order from the court.

Section 6605 was amended by Proposition 83 to provide that if the Department of Mental Health (DMH) deems that the person's condition has changed, and that unconditional release or a conditional release to a less restrictive environment is appropriate and in the best interests of the person and conditions can be imposed to adequately protect the community, the Director "*shall authorize the person to petition the court*" for conditional release or unconditional discharge. The test claim statute, as approved by the Commission, required an annual notice to the person of his or her right to petition the court for release, and provided for an annual examination of his or her mental condition, but not, as the more recently amended section requires: "consideration of whether the committed person currently meets the definition of a sexually violent predator" and whether conditional release is appropriate in a particular case. Based on the plain language, the prior section 6605 was focused on the right of the individual to be annually evaluated for release, and to petition for release. As the section reads after Proposition 83, the focus is on the Department of State Hospitals making a determination that a person's condition has changed, and "authorizing" that person to petition for release.

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[32] See, e.g., Penal Code sections 209, 220, 269, as amended by Proposition 83 (adopted November 7, 2006).

[33] See Penal Code section 667.6, as amended by Proposition 83.

[34] Penal Code section 667.71, as amended by Proposition 83.

[35] Penal Code section 3000.07, as added by Proposition 83.

And finally, Proposition 83 amended section 6608 to provide that, notwithstanding the provisions of section 6605, a person may petition the court for "*conditional release or an unconditional discharge*" without approval from the director of the DMH. The test claim statute stated "conditional release *and subsequent* unconditional discharge."[36]

On January 15, 2013, DOF filed a request for redetermination of the *Sexually Violent Predator* program based on Proposition 83, arguing that the program no longer imposes costs mandated by the state.

Mandate Redetermination Process under Section 17570

Government Code section 17570 provides a process whereby a test claim decision may be redetermined and superseded by a new test claim decision if a subsequent change in law, as defined, has altered the state's liability for reimbursement. The redetermination process calls for a two stage hearing; at the first stage, the requester must make "an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to the prior the claim decision, that may modify the state's liability pursuant to Article XIII B, section 6, subdivision (a) of the California Constitution."[37] At the second stage, the Commission shall determine whether a new test claim decision shall be adopted to supersede the previously adopted test claim decision.[38]

A subsequent change in law is defined in section 17570 as follows:

> [A] change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to Section 17556, or a change in mandates law…[39]

On July 26, 2013, the Commission determined, pursuant to a hearing, that DOF had made an adequate showing that the state's liability had been modified based on a subsequent change in law. The Commission directed staff to set the matter for a second hearing to determine whether to adopt a new test claim decision.

On September 27, 2013, the Commission conducted the second hearing, and determined that the state's liability under the test claim statute had been modified by Proposition 83, and that a new test claim decision must be adopted. However, a substantive legal issue regarding the possible retroactive effect of Proposition 83 was raised at the hearing, and the Commission postponed adoption of the full statement of decision pending the resolution of that issue. The County of Los Angeles argued at the September 27, 2013 hearing that reimbursement should continue for the County of Los Angeles based on the California Supreme Court's ruling in *People v. Castillo*. Specifically, the county asserted, that a stipulation and agreement entered into by the District

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[36] Compare Penal Code sections 6601, 6604, 6605, and 6608 (as added or amended by Stats. 1995, ch. 762; Stats. 1995, ch. 763; Stats. 1996, ch. 4) with Penal Code sections 6601, 6604, 6605, and 6608, as amended by Proposition 83; full text of amended sections found in Exhibit X, 2006 Ballot Pamphlet, at pp. 136-138.

[37] Code of Regulations, Title 2, section 1190.05(a)(1).

[38] Government Code section 17570(d)(4) (as added by Stats. 2010, ch. 719 (SB 856)).

[39] Government Code section 17570(a)(2) (as added by Statutes 2010, chapter 719 (SB 856)).

Attorney, Public Defender, and the Los Angeles County Courts to apply the pre-Proposition 83 law to SVP commitment and recommitment petitions then-pending was enforceable against the People and therefore continued the operation of the mandated activities. The Commission continued the hearing on the matter to December 6, 2013, to consider the Supreme Court's ruling, and what, if any, effect it might have on mandate reimbursement for the County of Los Angeles and other counties similarly situated. Commission staff issued a revised draft staff analysis for comment on October 11, 2013.[40] For the December 6, 2013 hearing, the *only issue before the Commission* is whether the period of reimbursement ends on July 1, 2011 for *all counties*, for the six activities identified in the statement of decision.

II. Positions of the Requester, Test Claimant, and Interested Parties and Persons

A. Department of Finance, Requester

On January 15, 2013, DOF submitted a request to adopt a new test claim decision regarding Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608, pursuant to Government Code section 17570. DOF asserts that Proposition 83 constitutes a subsequent change in the law, as defined in section 17570, which, when analyzed in light of section 17556, results in the state's liability under the test claim statutes being modified. DOF argues that "the state's obligation to reimburse affected local agencies has ceased."[41] Specifically, DOF argues that because sections 6601, 6604, 6605, and 6608 were included in their entirety in Proposition 83, the voters reenacted the entirety of those sections, "including the portions not amended," and therefore the test claim statutes impose duties expressly included in the voter-enacted ballot measure. DOF also argues that "[t]he remainder of the mandate's Welfare and Institutions Code sections that were not expressly included in the ballot measure are, nevertheless, necessary to implement the ballot measure." DOF concludes that "all activities found to be reimbursable by the Commission in the *Sexually Violent Predator* mandate are no longer reimbursable pursuant to Government Code section 17556, subdivision f, as they are either: (1) expressly included in Prop 83 or, (2) necessary for the implementation of Prop 83."[42]

DOF filed comments on the draft staff analysis for the second hearing, in which DOF responded to the comments from some of the interested parties, as discussed below, and substantially agreed with staff's analysis.[43] DOF filed additional comments on the revised draft staff analysis and proposed statement of decsion, substantially concurring with staff's analysis regarding the period of reimbursement.[44]

B. County of Los Angeles, Claimant for CSM-4509

LA County filed comments on the redetermination request, summarized as follows:

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[40] Exhibit EE, Revised Draft Staff Analysis, Second Hearing.

[41] Exhibit A, Request for Redetermination, at p. 2.

[42] *Ibid*.

[43] Exhibit CC, DOF Comments on Draft Staff Analysis, Second Hearing.

[44] Exhibit FF, DOF Comments on Revised Draft Staff Analysis, Second Hearing.

> The County opposes the DOF's request to adopt a new test claim on the basis that: 1) the extraneous text included in the body of Prop 83 did not constitute a change in the law; 2) Prop 83 did not convert activities identified in the Commission's 1998 Statement of Decision to activities necessary to implement Prop 83, therefore, no longer reimbursable; and 3) Government Code Section 17570 is unconstitutional.[45]

LA County's position relies on its reasoning that Statutes 2006, chapter 337 (SB 1128), enacted as urgency legislation on September 20, 2006, made most of the same substantive amendments to the code that would be enacted by Proposition 83 less than two months later. LA County argues that because the law in effect immediately prior to the passage of Proposition 83 was substantially the same, Proposition 83 cannot constitute a subsequent change in law:

> The changes actually proposed by Prop 83 were few and narrow, particularly in light of revisions to SVP laws that had recently been codified by S8 1128. The Secretary of State's practice of giving textual context to a ballot proposal by including unaffected statutory provisions is a benign protocol intended to fully inform the voters. Affirmation of existing law most certainly does not give rise to the change in law contemplated by Section 17570.[46]

Thus, LA County also implies, in the excerpt above, that sections 6601, 6604, 6605, and 6608 were reproduced in the ballot measure in their entirety as a matter of "protocol," and not because the ballot measure was intended to effect substantive or pervasive changes. Finally, LA County argues that section 17570 is unconstitutional on separation of powers grounds, and because it is "an infringement of article XIII B, section 6, of the California Constitution."[47]

In response to the draft staff analysis and proposed statement of decision at the first hearing, LA County argued in late comments that DOF's delay of "nearly six and a half years after the passage of Proposition 83" in bringing this reconsideration request was unreasonable because the Legislature in 2008 directed the Commission to set aside and reconsider the SVPs mandate "upon final resolution of any pending litigation challenging the constitutionality of subdivision (f) of section 17556." LA County also states that the current redetermination process was made effective October 19, 2010, but that DOF "waited until January 2013." Finally, LA County argues that Proposition 83's standards for defining a person as an SVP and for releasing an SVP, once adjudicated, should not be applied to "pre Prop 83 offenders."[48] LA County argues that to end mandate reimbursement for offenders determined to be SVPs prior to the adoption of Proposition 83 would violate the rights of offenders and "nullify judges' sentencing orders." LA County concludes that "[r]etroactive application of the Prop 83 SVP law (a violation of Ex PostFacto Law) would be unconstitutional.

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[45] Exhibit M, County of Los Angeles Comments, at p. 1.

[46] Exhibit M, County of Los Angeles Comments, at pp. 1-2.

[47] Exhibit M, County of Los Angeles Comments, at p 5.

[48] Exhibit T, County of Los Angeles Comments, at pp. 1-2.

LA County filed comments on the draft staff analysis for the second hearing, in which it expressed disagreement with staff's conclusion that the subsequent change in law ends reimbursement for all but two of the eight original activities approved in the CSM-4509 test claim. The County continues to argue that "Prop. 83 did not convert activities identified in the Commission's 1998 SOD to activities necessary to implement Prop. 83 and therefore, are no longer reimbursable [*sic*]." In addition, the County continues to stress that "even if there was a change in the law, the new law should not be applied retroactively to pre Prop. 83 SVP's."[49]

At the second hearing on September 27, 2013, the County raised an issue regarding the period of reimbursement that would apply to the new test claim decision, if adopted. As pointed out by representatives of the County of Los Angeles, while Proposition 83 was pending enactment by the voters, and shortly after SB 1128 had been enacted to make certain changes to the Sexually Violent Predators Act, the District Attorney, the Public Defender, and the Presiding Judge of the Superior Court for the County of Los Angeles entered into a stipulation to continue operating under the SVPA as it existed prior to the amendments made by SB 1128 (which were essentially the same amendments that would be enacted by Proposition 83 a few weeks later). The stipulation was entered into "due to uncertainty in the retroactive application of this change," and was held to be enforceable against the People in *People v. Castillo* (2010) 49 Cal.4th 145. The County alleged that the California Supreme Court's finding that the stipulation was enforceable should be applied by the Commission to prevent an inappropriate retroactive application of the Proposition 83 and, thus, mandate reimbursement should therefore continue for those pending SVP cases in the County. The County further argues that applying the period of reimbursement of July 1, 2011 to the new test claim decision would essentially nullify the decision of the California Supreme Court.

C. State Controller's Office

The SCO agrees with DOF "that the eight activities previously determined to be reimbursable in the Statement of Decision adopted on June 25, 1998 cease to be reimbursable."[50]

D. Other Interested Parties and Persons

1. California District Attorneys' Association; San Bernardino County District Attorney's Office

The CDAA and the San Bernardino County DA argue that "[t]he application of Government Code § 17556(f) to Proposition 83 in order to terminate state subvention of mandated sexually violent predators is legally incorrect." CDAA continues:

> The Department of Finance contention that the mere recitation of any portion of a statute contained in a proposition, brings it within the "expressly included in" language of Government Code § 17556(f) regardless of whether the sections mandating local activity were amended or not, and whether or not the intent of the initiative and purpose of the initiative was to eliminate the subvention requirements of Article XIII B §6 by operation of Government Code § 17566(f),

[49] Exhibit DD, County of Los Angeles Comments on Draft Staff Analysis, Second Hearing.

[50] Exhibit E, SCO Comments, at p. 1.

> is not warranted. Such an interpretation would make the application of the statute so over broad and vague that no voter, local official, or legal analyst could accurately predict whether state mandated subvention would cease to exist as they voted to pass any ballot initiative that referenced existing law.[51]

They also argue that there is no evidence, including in the ballot materials, that the voters intended Proposition 83 to terminate the state's liability under article XIII B, section 6, to reimburse the test claim statutes. To support this argument they cite a letter from the Legislative Analyst's Office (LAO) and DOF to then-Attorney General Lockyer, in which "[t]he unequivocal conclusion of both officials is that the costs of the SVP program would remain a reimbursable by the state." They assert that this conclusion should be given great weight, "despite the Department of Finance's now changed opinion."[52]

2. California State Association of Counties

CSAC argues that the state's liability has not been affected by Proposition 83. Specifically, CSAC argues that the California Constitution mandates reimbursement for new programs or higher levels of service, subject to "four exceptions, but none of them are relevant in this case." CSAC argues that "[i]n particular, there is no exception for a ballot measure that voters pass years later that does not substantively amend any of the language that established the mandate in the first place."[53] CSAC further argues that the SVP program was unaffected by the passage of Proposition 83: "[b]ecause the ballot measure made no substantive changes to the reimbursable aspects of the program, the SVP program established by the Legislature would have remained in place whether voters approved or disapproved Proposition 83." CSAC also notes that "SB 1128, by Senator Alquist, amended Sections 6600, 6601, 6604, 6604.1, and 6605 of the Welfare and Institutions Code, among many others," less than two months prior to the election in which Proposition 83 was adopted, and that therefore Proposition 83 made no substantive changes to the law in effect at that time. Finally, CSAC argues that the request should be rejected because the Director of DOF "told the voters that counties would be reimbursed." CSAC cites the ballot materials and the analysis published leading up to the election:

> At the time Proposition 83 went to the ballot, the chief analysts representing both the Administration and the Legislature- the Director of Finance and the Legislative Analyst- agreed that all county costs related to the SVP commitment process would be reimbursed by the state. They stated the fact that counties would be reimbursed four times in their official fiscal analysis provided to the Attorney General, and voters decided the outcome of Proposition 83 based in part on that assurance.
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> In their official fiscal analysis of the ballot measure required by law, the Legislative Analyst and Director of Finance state unequivocally that Proposition

[51] Exhibit F, CDAA Comments, at p. 1; Exhibit I, San Bernardino County DA Comments, at p. 1.

[52] Exhibit F, CDAA Comments, at p. 4; Exhibit I, San Bernardino County DA Comments, at p. 4.

[53] Exhibit G, CSAC Comments, at p. 1.

> 83 would increase state costs to, among other things, "reimburse counties for their costs for participation in the SVP commitment process."[54]

CSAC implies that these analyses constitute evidence of voter intent, which in turn should be given substantial weight in evaluating whether a subsequent change in law has occurred.

CSAC filed further comments in response to the draft staff analysis for the second hearing, in which CSAC continues to argue that the state's liability under the test claim has not been modified. CSAC argues that Proposition 83, "merely amended irrelevant parts to the program the Legislature had long-before mandated." In addition, CSAC argues that based on this redetermination request, "the Department of Finance claims Government Code section 17556(f) applies so broadly as to make it no different than the interpretation already ruled unconstitutional by the courts" in CSBA v. State of California (2009) 171 Cal.App.4th 1183. Finally, CSAC argues that Proposition 83 does not constitute a reenactment of the unaffected portions of the statutes, stating that case law "is clear on the point that the mere recitation of unamended law to give context for proposed amendments does not constitute reenactment." CSAC maintains that Government Code 9605 controls, and that portions of a statute that are not amended are "not to be considered as having been repealed and reenacted in the amended form."[55]

3. California Public Defenders' Association and Alameda County Public Defender's Office

CPDA and Alameda County Public Defender's Office submitted substantially identical comments opposing the request for redetermination, in which they argue:

> (1) The 2012 legislative amendment and re-enactment of the Sexually Violent Predator Act (SVP A) either confirmed the viability of the Sexually Violent Predator Mandate (CSM-4509), or, *arguendo*, superseded any impact that Proposition 83 may have affected on the mandate; (2) Misrepresentation and the doctrines of estoppel and unclean hands bar the DOF's redetermination request; (3) Proposition 83 did not effectuate a "subsequent change in the law" as contemplated by Government Code section 17570; and (4) Government Code section17570 is unconstitutional.[56]

The comments note that in 2012, the Legislature enacted substantive amendments to the SVP program, which, it is argued, "superseded any impact" of Proposition 83. CPDA and the Alameda County Public Defender's Office argue that due to the 2012 amendments to the relevant codes sections "Proposition 83 is no longer the statutory authority supporting the SVPA; consequently the cost incurred by local agencies to comply with the 2012 legislatively enacted SVPA is a cost mandated by the state."[57] The comments cite the LAO and DOF analysis of

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[54] Exhibit G, CSAC Comments, at p. 3.

[55] Exhibit AA, CSAC Comments on Draft Staff Analysis, Second Hearing, at pp. 1-3.

[56] Exhibit H, CPDA Comments, at p. 1; Exhibit N, Alameda County Public Defender's Comments, at p. 2.

[57] Exhibit H, CPDA Comments, at p. 2; Exhibit N, Alameda County Public Defender's Comments, at p. 3.

Proposition 83, and argue that DOF should now be estopped from seeking redetermination of the SVP mandate because of the position taken prior to the election on Proposition 83.[58] The comments also focus on the 2006 legislative amendment to the SVP program, arguing that DOF's request for redetermination "is misleading because the statutory language quoted from the SVPA by the DOF's January 15,2013, request, as well as that include [sic] in the actual proposition, was not the statutory language in effect at the time Proposition 83 was passed on November 7, 2006."[59] The comments also assert that section 17570 is unconstitutional, because it is unconstitutionally vague, with respect to the term "subsequent change in law," and because it violates separation of powers doctrine.[60]

Finally, in comments submitted on the draft staff analysis for the first hearing, CPDA argues that prior reconsiderations conducted at the direction of the Legislature with respect to four prior test claims, and ultimately struck down by the court of appeal, demonstrate that a legal process or mechanism for reconsidering a test claim was in effect at the time Proposition 83 was adopted, and that therefore the analysis included in the ballot materials was incorrect and misleading to voters, and that estoppel principles, or unclean hands doctrine, should be applied to bar DOF from bringing its redetermination request under section 17570.[61]

4. County of San Bernardino

The County of San Bernardino argues that DOF's interpretation of section 17556 is legally incorrect. San Bernardino focuses on the intent of the voters in adopting Proposition 83, stating:

> The Department of Finance's flawed interpretation of the "expressly included" language of Government Code Section 17556(f) fails to consider whether the ballot language intended to enact or change the state reimbursement of mandated activities.

San Bernardino also implies that no subsequent change in law has occurred, reasoning that "[t]he statutory changes in the initiative did not relieve counties of their preexisting state mandated activities per Welfare and Institutions Code section 6601 through 6604."[62]

5. Sacramento County District Attorney's Office

The Sacramento County DA argues that no subsequent change in law has occurred, and that "the legislature still retains a true choice in whether to have the duties imposed on local government in the statute remain with local governments, or change the statutes so that the mandated duties are performed at the state level." The Sacramento County DA focuses on the fact that

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[58] Exhibit H, CPDA Comments, at pp. 3-4: Exhibit N, Alameda County Public Defender's Comments, at pp. 4-5.

[59] Exhibit H, CPDA Comments, at p. 4; Exhibit N, Alameda County Public Defender's Comments, at p. 5.

[60] Exhibit H, CPDA Comments, at p. 6; Exhibit N, Alameda County Public Defender's Comments, at p. 7.

[61] Exhibit S, CPDA Comments on Draft Staff Analysis.

[62] Exhibit J, County of San Bernardino Comments.

Proposition 83 permits the Legislature "to amend, by a statute passed by a roll call vote of two-thirds of each house," and implies that the failure to relieve local agencies of the duties imposed by Proposition 83 constitutes a reimbursable state mandate.

The Sacramento County DA argues further that "[t]he fact that pre-existing law has simply been recited again, either in a statute re-enacted by the legislature, or as part of a new ballot measure…does not amount to a change in the law for § 17570 purposes." The Sacramento County DA focuses on the fact that "the mandated activities at issue here were in place before the initiative was enacted," and concludes that "there has been no change in the applicable law."[63]

Finally, the Sacramento County DA argues that DOF's redetermination request was never intended by the voters, and that a new test claim decision eliminating reimbursement would provide a windfall to the state, and impose a hardship on local governments.[64]

6. Los Angeles County District Attorney's Office

The LA County DA argues that "[t]he activities for which the county is being reimbursed, the basis for the Commission's Statement of Decision, and the need for reimbursement from the State in order to comply with SVP laws have not changed since the Statement of Decision was adopted."

The LA County DA argues that Proposition 83 "simply reaffirmed many of the changes already effectuated by SB 1128," that "the changes actually proposed by Prop 83 were few and narrow," and that "[a]ffirmation of existing law certainly does not give rise to the change in law contemplated by Section 17570."[65] The LA County DA argues that "inclusion, within the text of an initiative, of language that is unaffected by proposed revisions to the law does not constitute a change in the law."[66] The LA County DA further asserts that "[a]n activity may not fairly be recharacterized as "necessary to implement" another activity simply because an antecedent activity may have been affected by a change in the law," and that "a reimbursable activity does not cease to be a reimbursable activity because it happens to have constitutional implications." And the LA County DA argues that "Prop 83's mere reaffirmation of legislative action does not constitute a change in the law."[67] Additionally, the LA County DA proffers a theory of equitable estoppel, based on the LAO and DOF analysis of Proposition 83 leading up to the election, discussed below, and the conclusion that Proposition 83 would not affect mandates.[68] Finally, LA County DA asserts that section 17570 is unconstitutional, as a violation of separation of powers doctrine.[69]

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[63] Exhibit K, Sacramento County District Attorney's Office Comments, at pp. 1-2.

[64] Exhibit K, Sacramento County District Attorney's Office Comments, at p. 3.

[65] Exhibit L, Los Angeles County District Attorney's Office Comments, at pp. 2-3.

[66] Exhibit L, Los Angeles County District Attorney's Office Comments, at pp. 4-5.

[67] Exhibit L, Los Angeles County District Attorney's Office Comments, at pp. 4-8.

[68] Exhibit L, Los Angeles County District Attorney's Office Comments, at pp. 8-10.

[69] Exhibit L, Los Angeles County District Attorney's Office Comments, at pp. 11-12.

7. County Counsel of San Diego

The County Counsel of San Diego argues that "Jessica's Law [Proposition 83] did not make any changes material to the relevant statutes as they existed immediately before the adoption of Jessica's Law," that the 2012 reenactment "supersedes any effects that Jessica's Law may have had on the state's obligation," that "DOF's request is based on the unconstitutionally broad language in Section 17556(f) that impermissibly directs the commission to apply the ballot measure exception to previously enacted legislation." The County Counsel of San Diego further argues that "DOF's Request relies on the unconstitutionally broad definition of what constitutes a 'subsequent change in the law' set forth in Section 17570."[70]

The County Counsel filed additional comments in response to the Commission's draft staff analysis for the second hearing, in which the County Counsel continued to stress that Proposition 83 "did not substantively alter any of the provisions of the Welfare and Institutions Code sections containing the mandated activities," and that therefore "Jessica's Law cannot be considered to have affected [*sic*] a subsequent change in law." In addition, the County Counsel argues that the draft staff analysis and proposed statement of decision "correctly concludes that certain costs relating to the probable cause hearing required pursuant to Welfare and Institutions Code section 6602 continue to be reimbursable," but that "the costs the county's designated counsel and indigent defense counsel incur for retention of necessary experts, investigators, and professionals for preparation and appearance at the probable cause hearing" should also be reimbursable. The County Counsel holds that "[e]ven though these costs are not expressly identified as reimbursable costs in the original test claim decision, these costs have been and should continue to be reimbursed to claimants by the state."[71,72]

8. Alameda County District Attorney's Office

The Alameda County DA argues that Proposition 83 did not make any material changes to the responsibilities of county counsel offices or district attorneys' offices; that DOF's interpretation

[70] Exhibit O, County Counsel of San Diego Comments, at p. 2.

[71] Exhibit BB, County Counsel of San Diego Comments on Draft Staff Analysis, Second Hearing, at pp. 2-3.

[72] These costs are not identified as reimbursable in the parameters and guidelines or the test claim decision previously adopted by the Commission. Neither are these costs required by the plain language of the test claim statutes. Therefore the appropriate course of action is for the Commission to address whether these activities are "reasonably necessary," within the meaning of section 17557, when amending the parameters and guidelines. The Commission cannot add reasonably necessary activities of its own motion, and therefore this will require a comment by an eligible claimant asserting that this is a reasonably necessary activity, and including evidence in the record to support that assertion. If factual representations are made to support such a claim in written comments, they must be supported with documentary evidence included with the comments must and be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge or information or belief.

of section 17556(f) "cannot be the correct interpretation;" and that DOF's request "should be rejected on common law principles of laches and estoppel."[73]

9. County of Orange Comments on Draft Staff Analysis, Second Hearing

The County of Orange argues that "[t]he proposed statement of decision will greatly impact Orange County's ability to continue providing the services associated with SVP laws."[74] The County argues that it is "a flawed and legally incorrect premise" that "the mere reiteration and non-substantive amendment in a ballot initiative of an existing statute enacted by the Legislature relieves the state of its constitutional obligation to reimburse the counties for the cost of implementing the statutory scheme." The County further argues restatement of several sections of the Welfare and Institutions Code within Proposition 83 was "meant to provide voters with additional context to inform their decisions," and that "the restatement and amendment of the statutory scheme by a ballot measure did not impact the State's subvention duties."[75] The County of Orange further warns of the "dangerous public policy precedent," in that the Attorney General "could lead the electorate down the primrose path by providing information to the electorate that ultimately results in the passage of a voter initiative." Meanwhile, the County argues, "another body of the state government is lying in wait to seek redetermination of a State Mandate on the basis that the voter initiative caused a change in law and thus the state should no longer be required to reimburse local governments for costs rightfully determined state mandated costs." The County concludes that approving this proposed statement of decision "would be providing the legislature with the ability to avoid previously determined fiscal obligations through by [*sic*] abusing the voter initiative process."[76]

10. District Attorney of Orange County Comments

The Orange County District Attorney argues in comments on the draft that Finance's request to adopt a new test claim decision ending reimbursement "would be inequitable and impose a financial hardship on the county." The District Attorney also argues that Proposition 83 "did not effectuate a 'subsequent change in law,'" as contemplated by section 17570, "because the ballot measure made no substantive changes to the reimbursable component of the program."[77]

11. San Bernardino County Public Defender Comments

The Public Defender of San Bernardino County argues that "[s]ince Proposition 83 mirrored many of the same provisions as cited in SB 1128 and effectuated changes that were procedural rather than substantive, its enactment did not constitute a 'subsequent change in law' as required under Government Code [section] 17570." The Public Defender argues also that "mere recitation of an existing law" should not be used "as a shield to negate [the State's] responsibility

[73] Exhibit P, Alameda County District Attorney's Comments, at pp. 2-5.

[74] Exhibit W, County of Orange Comments on Draft Staff Analysis, Second Hearing, at p. 1.

[75] *Id*, at pp. 4-5.

[76] *Id*, at p. 5.

[77] Exhibit Y, Orange County District Attorney Comments on Draft Staff Analysis, Second Hearing, at p. 1.

to reimburse local governments for activities that support a legislatively created state-mandated program." Finally, the Public Defender appeals to public policy:

> The fiscal impact to our county is significant. The Public Defender currently provides representation on 55 outstanding SVP petitions against individuals. A competent defense requires a significant investment of time from attorneys and investigators and the retention of qualified experts and other professionals. The state's reimbursement for services rendered under SVPA for FY 2010-2011 by the Public Defender was $846,339.[78]

III. Discussion

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the increased costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a successful test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[79] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[80] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[81]

Under Government Code section 17570, upon request, the Commission may consider the adoption of a new test claim decision to supersede a prior test claim decision based on a subsequent change in law, as defined, which modifies the state's liability. If the Commission adopts a new test claim decision that supersedes the previously adopted test claim decision, the Commission is required to adopt new parameters and guidelines or amend existing parameters and guidelines.

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[78] Exhibit Z, San Bernardino County Public Defender Comments on Draft Staff Analysis, Second Hearing, at p. 1.

[79] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487; Government Code sections 17551; 17552.

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

[81] *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.

A. Finance's Argument for the Adoption of a New Test Claim Decision to Supersede the Prior Decision in Test Claim (CSM-4509).

On May 28, 1998, the Commission heard the CSM-4509 test claim on the SVP program. That test claim alleged that the following Welfare and Institutions Code sections imposed reimbursable state-mandates: 6250, and 6600 through 6608, as amended by Statutes 1995, chapter 762; Statutes 1995, chapter 763; and Statutes 1996, chapter 4.[82]

The Commission approved reimbursement only for the following activities under sections 6601, 6602, 6603, 6604, 6605, and 6608:

1. Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)
2. Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation. (Welf. & Inst. Code, § 6601(i).)
3. Preparation and filing of the petition for commitment by the county's designated counsel. (Welf. & Inst. Code, § 6601(i).)[83]
4. Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)
5. Preparation and attendance by the county's designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)
6. Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6605(b-d), and 6608(a-d).)
7. Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605(d).)
8. Transportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)

All remaining provisions of the test claim statutes were denied.[84]

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[82] Exhibit B, Test Claim Statement of Decision.

[83] The Test Claim Statement of Decision cites subdivision (j), but subdivision (j) addresses time limits, not a petition for commitment. The Commission therefore assumes that this is a typographical error, and that the citation intended is to subdivision (i).

[84] Exhibit B, Test Claim Statement of Decision, at p. 12. The numbers attached to the activities above are assigned by DOF, in its request for redetermination; the same numbering is adopted in this analysis, for purposes of expedience and clarity, rather than utilizing the bulleted list adopted by the Commission in the test claim statement of decision.

DOF asserts that activities 1, 2, 3, and 6, approved in the test claim statement of decision, were expressly included in Proposition 83. Activities 1, 2, and 3 involve the county's role in filing and litigating a civil commitment hearing on behalf of the state. These activities are required by section 6601(i), and while DOF concedes that Proposition 83 did not make amendments to subdivision (i), specifically, it amended and reenacted the entirety of section 6601, including the activities approved under subdivision (i). Activity 6 is required by sections 6605 and 6608. The sections encompassing these activities were reenacted and amended also by Proposition 83.[85] DOF asserts that the reenactment of sections 6601, 6604, 6605, and 6608 is sufficient to implicate the "expressly included in" limitation of section 17556(f), prohibiting the Commission from finding "costs mandated by the state," and in turn supporting the adoption of a new test claim decision.

DOF asserts as well that Activities 4, 5, 7 and 8 are "necessary to implement" Proposition 83, within the meaning of section 17556(f), and therefore these requirements also have been superseded by the ballot initiative.[86] DOF therefore brings this request to adopt a new test claim decision, in accordance with the provisions of section 17570.

B. Section 17556(f) Prohibits the Commission from Finding Costs Mandated by the State for Most of the Duties Imposed by the Test Claim Statutes Because Those Duties are Necessary to Implement or Expressly Included in a Ballot Measure Approved by the Voters in a Statewide Election.

Government Code section 17556(f) provides that the Commission "shall not find" costs mandated by the state if:

> The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.[87]

CSBA I makes clear that this statutory exclusion from reimbursement is consistent with the subvention requirements of article XIII B, section 6.[88] The court in *CSBA I* reasoned that the subvention requirement applies to mandates imposed by the Legislature, not by the voters; the voters' powers of initiative and referendum are reserved powers, not vested in the Legislature, and are therefore not limited by article XIII B, section 6. *CSBA I* holds that the reimbursement

[85] Exhibit A, Redetermination Request, at pp. 1-2.

[86] See Exhibit A, Redetermination Request, at pp. 2-3, and Exhibit R, DOF Comments on Draft Staff Analysis, at p. 1., wherein DOF corrected the original inadvertent omission of activity number 8.

[87] As amended by Statutes 2010, chapter 719 (SB 856).

[88] *California School Boards Association v. State of California* (*CSBA I*) (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, 1206-1207; 1210.

requirement applies only to *state-mandated* costs, not costs incurred by way of "the people acting pursuant to the power of initiative."[89]

"Having established that costs imposed on local governments by ballot measure mandates need not be reimbursed by the state," and thus approving the statutory exclusion to the extent of statutes imposing duties "expressly included in" a ballot measure, the court considered also whether reimbursement is required for activities embodied in a test claim statute that are "necessary to implement" a voter-enacted ballot measure. In *San Diego Unified*, costs that were incidental to a federal mandate were not reimbursable under section 17556(c), because those costs were imposed under Education Code provisions "adopted to implement a federal due process mandate." [90] The *CSBA I* court therefore concluded that "[t]he language of [section 17556(f)] relieving the State of the obligation to reimburse a local government for duties 'necessary to implement' a ballot measure is *unobjectionable* because it corresponds to the Supreme Court's holding in *San Diego Unified* that state statutes codifying federal mandates are not reimbursable."[91] The court rejected, however, the "reasonably within the scope of" test, also provided in subdivision (f) at that time, as being overbroad, and the Legislature amended the code section the following year to excise the offending language.[92]

Section 17556(f) also states that the rule "applies regardless of whether the statute or executive order was adopted prior to or after the date on which the statute or executive order was enacted or issued." This provision, like the "reasonably within the scope of," and "necessary to implement" tests, first appeared in section 17556 in 2005.[93] This last provision, stating that the order of enactment is not material to the analysis under section 17556(f), has not yet been tested in the courts,[94] but the Commission must presume that the statutes enacted by the Legislature are constitutional until the courts declare otherwise.[95]

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[89] *Ibid.*

[90] *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859.

[91] *California School Boards Association v. State, supra,* (*CSBA I*) (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, at p. 1213 [emphasis added], citing *San Diego Unified*, *supra*, (2004) 33 Cal.4th 859.

[92] Government Code section 17556(f) (Stats. 2010, ch. 719 (SB 856) [amended to remove "reasonably within the scope of," as an alternative test to "expressly included in," or "necessary to implement," consistent with the court's decision in *CSBA I*, *supra*]).

[93] As discussed above, the "reasonably within the scope of" test has been disapproved by the courts and removed from the code; compare Statutes 2004, chapter 895 (AB 2855) to Statutes 2005, chapter 72 (AB 138).

[94] The constitutionality of Government Code sections 17570, in conjunction with section 17556, is being challenged in *California School Boards Assoc., et al. v. State of California, Commission on State Mandates, John Chiang, as State Controller, and Ana Matosantos, as Director of the Department of Finance,* Alameda County Superior Court, Case No. RG11554698.

[95] *California School Boards Association v. State of California,* (*CSBA II*) (Cal. Ct. App. 4th Dist. 2011) 192 Cal.App.4th 770, 795; *Porter v. City of Riverside* (1968) 261 Cal.App.2d 832, 837.

For the following reasons, the Commission finds that section 17556(f) applies in this case to end reimbursement for most of the activities, as specified, beginning July 1, 2011.

1. The Test Claim Statutes Impose Duties that are Expressly Included in Proposition 83

The original test claim decision assumed jurisdiction over Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608, as amended by Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); and Statutes 1996, Chapter 4 (AB 1496).[96] Here, the Commission's jurisdiction is confined to the statutes pled in the original test claim, and any effect that the alleged subsequent change in law, Proposition 83, may have had on those original test claim statutes, as pled in CSM-4509.[97] Proposition 83 amended and reenacted, wholesale, sections 6601, 6604, 6605, and 6608 of the Welfare and Institutions Code, and made other changes which likely impact the operation of the remaining sections. By amending the code sections, Proposition 83 does not *expressly include the test claim statutes* exactly as amended by Statutes 1995, chapters 762 and 763, and Statutes 1996, chapter 4; but the focus of Government Code section 17556(f) is not whether *the test claim statute* is expressly included in a ballot measure, but whether the *duties imposed by the test claim statute* are expressly included in a voter-enacted ballot measure.[98] Therefore it is incumbent upon the Commission to consider the activities approved (duties imposed by the statute) in the earlier test claim, and whether those activities have been subsumed within the requirements of Proposition 83. If so, then the *duties imposed by the test claim statute*, as determined in the original test claim decision, are *expressly included* in the approved ballot measure. All of the local government commenters have challenged this theory; many have argued that "recitation" of the code sections in a ballot measure does not constitute a subsequent change in law because the law was not amended. But the issue is not whether the statutes in the original test claim have been changed substantively, but *whether the test claim statutes, as those statutes were pled in the original test claim, impose duties that are necessary to implement or expressly included in a voter-enacted ballot measure*.

In the original test claim statement of decision, the Commission approved reimbursement for the following activities, numbered one through eight for purposes of this analysis:

> **Activity 1** – Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)
>
> **Activity 2** – Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation. (Welf. & Inst. Code, § 6601(i).)
>
> **Activity 3** – Preparation and filing of the petition for commitment by the county's designated counsel. (Welf. & Inst. Code, § 6601(j).)

[96] Exhibit B, Test Claim Statement of Decision.

[97] Exhibit A, Redetermination Request.

[98] Government Code section 17556(f).

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

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

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

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

Activity 8 – Transportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)[99]

Activities 1, 2, and 3 derive from section 6601, as amended by Statutes 1995, chapter 762 (SB 1143); Statutes 1995, chapter 763 (AB 888); and Statutes 1996, chapter 4 (AB 1496), and are expressly included in section 6601, as amended by Proposition 83. Section 6601, as amended, provides, in pertinent part:

> (h) If the State Department of Mental Health determines that the person is a sexually violent predator as defined in this article, the Director of Mental Health shall forward a request for a petition to be filed for commitment under this article to the county designated in subdivision (i). Copies of the evaluation reports and any other supporting documents shall be made available to the attorney designated by the county pursuant to subdivision (i) who may file a petition for commitment in the superior court.
>
> (i) If the county's designated counsel concurs with the recommendation, a petition for commitment shall be filed in the superior court of the county in which the person was convicted of the offense for which he or she was committed to the jurisdiction of the Department of Corrections. The petition shall be filed, and the proceedings shall be handled, by either the district attorney or the county counsel of that county. The county board of supervisors shall designate either the district attorney or the county counsel to assume responsibility for proceedings under this article.[100]

Section 6601(i) requires the county board of supervisors to designate counsel to assume responsibility for proceedings "under this article." Activity 1 is the requirement that the county designate counsel to assume responsibility for civil commitment proceedings.[101] Activity 1 is thus expressly included in Proposition 83. Sections 6601(h) and 6601(i) provide for a

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[99] Exhibit B, Test Claim Statement of Decision, at p. 13.

[100] Exhibit X, Ballot Pamphlet, November 7, 2006, at p. 137.

[101] Exhibit B, Test Claim Statement of Decision, at p. 13.

recommendation to be made by DMH, and copies of mental health evaluations and other documents to be made available to the designated counsel, who, if he or she concurs with the recommendation, shall file a petition.[102] Activity 2 is the requirement that the designated counsel review the reports and records to determine whether he or she agrees with the recommendation of DMH.[103] Activity 2 is thus expressly included in the provisions of Proposition 83. Section 6601(i) requires the designated counsel to file a petition and "assume responsibility for proceedings." Activity 3 is the requirement that designated counsel prepare and file a petition for civil commitment.[104] Thus, Activity 3 is expressly included in Proposition 83.

Activities 6 and 7 are also expressly included in the provisions of Proposition 83. Activity 6 requires "[p]reparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator."[105] Sections 6605 and 6608, as amended by Proposition 83, provide for a subsequent hearing to determine whether a person continues to fit the definition of a sexually violent predator, and whether release to a less-restrictive environment is appropriate. That hearing is triggered in one of two ways: either by a petition from the person committed, or by the recommendation of DMH. In either case, the designated counsel identified in section 6601(i) is required to represent the state, and the committed person is entitled to the assistance of counsel.

Section 6605, as amended by Proposition 83, provides, in pertinent part:

> (b) If the Department of Mental Health determines that either: (1) the person's condition has so changed that the person no longer meets the definition of a sexually violent predator, or (2) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the director shall authorize the person to petition the court for conditional release to a less restrictive alternative or for an unconditional discharge.
>
> ¶…¶
>
> (d) *At the hearing, the committed person shall have the right to be present and shall be entitled to the benefit of all constitutional protections that were afforded to him or her at the initial commitment proceeding. The attorney designated by the county pursuant to subdivision (i) of Section 6601 shall represent the state and shall have the right to demand a jury trial and to have the committed person evaluated by experts chosen by the state.* The committed person also shall have the right to demand a jury trial and to have experts evaluate him or her on his or

[102] Exhibit X, Ballot Pamphlet, November 7, 2006, at p. 137.

[103] Exhibit B, Test Claim Statement of Decision, at p. 13.

[104] Ibid.

[105] Exhibit B, Test Claim Statement of Decision, at p. 13.

> her behalf. The court shall appoint an expert if the person is indigent and requests an appointment...[106]

And section 6608, as amended by Proposition 83, provides:

> Nothing in this article shall prohibit the person who has been committed as a sexually violent predator from petitioning the court for conditional release or an unconditional discharge without the recommendation or concurrence of the Director of Mental Health…The person petitioning for conditional release and unconditional discharge under this subdivision shall be entitled to assistance of counsel.
>
> ¶…¶
>
> The court shall give notice of the hearing date to the attorney designated in subdivision (i) of Section 6601, the retained or appointed attorney for the committed person, and the Director of Mental Health at least 15 court days before the hearing date.[107]

Thus Activity 6, as approved in the original test claim decision, is expressly included in Proposition 83: the preparation and attendance of both the county's designated counsel and indigent defense counsel are expressly included in the voter-approved ballot measure.

Activity 7 includes "[r]etention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator."[108] Activity 7 is expressly included in Proposition 83 *to the extent* of retaining experts for *subsequent hearings* recommended by DMH, or requested by an indigent SVP. Section 6605, as amended by Proposition 83, provides:

> At the hearing, the committed person shall have the right to be present and shall be entitled to the benefit of all constitutional protections that were afforded to him or her at the initial commitment proceeding. The attorney designated by the county pursuant to subdivision (i) of Section 6601 shall represent the state and shall have the right to demand a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person also *shall have the right* to demand a jury trial and *to have experts evaluate him or her on his or her behalf*. The court *shall appoint an expert if the person is indigent* and requests an appointment.[109]

Similar language regarding the appointment of an expert to evaluate the person on his or her behalf is not found in section 6608, with respect to a hearing initiated on petition of the committed person. But the California Supreme Court held, in *People v. McKee*, that "[w]e do not believe, however, that the statute needs to be interpreted in this narrow manner." The court

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[106] Exhibit X, Ballot Pamphlet, November 7, 2006, at p. 137.

[107] Exhibit X, Ballot Pamphlet, November 7, 2006, at p. 138.

[108] Exhibit B, Test Claim Statement of Decision, at p. 13.

[109] Exhibit X, Ballot Pamphlet, November 7, 2006, at p. 137.

held that "[a]lthough section 6605, subdivision (a) does not explicitly provide for the appointment of the expert in conjunction with a section 6608 petition, such appointment may be reasonably inferred."[110] The court concluded that "[t]here is no indication that the Legislature that authorized these expert appointments on behalf of an indigent SVP believed that such experts should be disallowed from testifying at an SVP's section 6608 hearing, nor that an SVP's indigence should serve as an obstacle to such testimony."[111] Therefore, to the extent of retaining experts *for subsequent hearings only*, activity 7, as approved in the original test claim decision, is expressly included in the provisions of Proposition 83.

Based on the foregoing, the Commission finds that the following requirements of the test claim statutes are expressly included in Proposition 83, and therefore do not constitute a reimbursable state mandate within the meaning of article XIII B, section 6 and Government Code section 17556(f), beginning July 1, 2011:

- Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings.[112]
- Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation.[113]
- Preparation and filing of the petition for commitment by the county's designated counsel.[114]
- Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator.[115]
- Retention of necessary experts, investigators, and professionals for preparation *for subsequent hearings* regarding the condition of the sexually violent predator.[116]

2. Civil Commitments Provided for Under Proposition 83 Implicate Significant Due Process Considerations, and to the Extent the Test Claim Statutes Satisfy Due Process Requirements Triggered by Proposition 83, Those Statutes Impose Duties That are Necessary to Implement a Voter-Enacted Ballot Measure

Activities 4, 5, 8, and the remaining elements of activity 7, above, are not expressly included in Proposition 83, but some of these activities are necessary to implement Proposition 83.

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[110] *People v. McKee* (2010) 47 Cal.4th 1172, at p. 1192.

[111] *Id*, at p. 1193.

[112] Welfare and Institutions Code section 6601(i) (as amended by Proposition 83 (2006)).

[113] Welfare and Institutions Code section 6601(i) (as amended by Proposition 83 (2006)).

[114] Welfare and Institutions Code section 6601(i) (as amended by Proposition 83 (2006)).

[115] Welfare and Institutions Code sections 6605(b-d); 6608(a-b) (as amended by Proposition 83 (2006)).

[116] Welfare and Institutions Code section 6605(d) (as amended by Proposition 83 (2006)).

Activities 4 and 5, as approved in the original test claim decision, require the preparation and attendance of counsel designated by the county pursuant to section 6601(i), and of indigent defense counsel, at the probable cause hearing and at trial. These activities were found to arise from Welfare and Institutions Code sections 6602, 6603, and 6604, as amended by Statutes 1995, chapter 762 (SB 1143); Statutes 1995, chapter 763 (AB 888); and Statutes 1996, chapter 4 (AB 1496).[117] Activity 8, as approved in the original test claim decision, requires the local government to provide "[t]ransportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator." That activity was found by the Commission to arise from section 6602, as amended by Statutes 1995, chapters 762 and 763, and Statutes 1996, chapter 4.[118] And the portion of activity 7 not expressly included in Proposition 83, as discussed above, requires local government to retain experts, investigators, and professionals for trial to testify on the issue of whether an individual is or is not a sexually violent predator. That activity is attributed, in the test claim statement of decision, to section 6603, as amended by Statutes 1995, chapters 762 and 763.

Welfare and Institutions Code section 6602, as amended by Statutes 1995, chapter 763 (AB 888) and Statutes 1996, chapter 4 (AB 1496), provides:

> A judge of the superior court shall review the petition and shall determine whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release. The person named in the petition shall be entitled to assistance of counsel at the probable cause hearing. If the judge determines there is not probable cause, he or she shall dismiss the petition and any person subject to parole shall report to parole. If the judge determines that there is probable cause, the judge shall order that the person remain in custody in a secure facility until a trial is completed and shall order that a trial be conducted to determine whether the person is, by reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence upon his or her release from the jurisdiction of the Department of Corrections or other secure facility.

And Section 6603, as amended by Statutes 1995, chapters 762 and 763, provides:

> A person subject to this article shall be entitled to a trial by jury, the assistance of counsel, the right to retain experts or professional persons to perform an examination on his or her behalf, and have access to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall appoint counsel to assist him or her, and, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf.

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[117] Exhibit B, Test Claim Statement of Decision, at p. 13.

[118] *Ibid.*

These sections were not amended and reenacted by Proposition 83, and therefore continue to provide a statutory requirement that a person alleged to be a sexually violent predator be accorded a probable cause hearing, and trial by jury, and shall be entitled to the assistance of counsel. Section 6603 also requires that the person alleged to be a sexually violent predator is entitled to experts or professional persons to perform an examination on his or her behalf.

The issue is whether those requirements, as approved in the test claim statement of decision, constitute duties *necessary to implement* Proposition 83, or are additional requirements imposed as a matter of policy by the Legislature, thus requiring a finding that the requirements remain reimbursable under article XIII B, section 6. As discussed above, where mandated activities are imposed by the voters, not the Legislature, the courts have held that those activities are not reimbursable under article XIII B, section 6.[119] In this context, reimbursement is required, consistent with article XIII B, section 6, only if the requirements of the test claim statutes go beyond what is necessary to implement the ballot initiative.

The due process clause of the United States Constitution provides that the state shall not "deprive any person of life, liberty, or property without due process of law."[120] When an individual's liberty or property interest is impacted by governmental action, due process protections attach, and require that certain procedural safeguards be provided to the individual. Although the SVPs program entails a *civil* commitment, not a *criminal conviction*, the person identified as a sexually violent predator is subject to a deprivation of liberty. And under Proposition 83, that deprivation is highly significant, being of indeterminate duration, rather than a two year commitment as provided under the prior statutes. Proposition 83 provides for indeterminate civil commitment of a person found to be a sexually violent predator, as follows:

> The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct that the person be released at the conclusion of the term for which he or she was initially sentenced, or that the person be unconditionally released at the end of parole, whichever is applicable. *If the court or jury determines that the person is a sexually violent predator, the person shall be committed for an indeterminate term to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health.* The facility shall be located on the grounds of an institution under the jurisdiction of the Department of Corrections.[121]

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[119] *California School Boards Association v. State of California* (*CSBA I*) (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, 1206-1207; 1210.

[120] U.S. Constitution, 5th and 14th Amendments; see also, due process provisions in the California Constitution, article 1, sections 7 and 15.

[121] Welfare and Institutions Code section 6604, as amended by Proposition 83 (2006); Exhibit X, Ballot Pamphlet, at p. 137.

It is well-settled law that even temporary deprivations of an individual's liberty or property interest trigger due process protections. The length or severity of the deprivation must be weighed in determining what kind of process is due—not *whether* process is due.[122]

In *San Diego Unified*,[123] the California Supreme Court addressed whether procedures instituted to provide a hearing and some modicum of due process to public school students under threat of expulsion constituted a reimbursable state mandate, or merely codified federal law, rendering such procedures not subject to reimbursement under article XIII B, section 6. The court reasoned as follows:

> [T]he Legislature, in adopting specific statutory procedures to comply with the general federal mandate [to provide due process protections], reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they did not significantly increase the cost of compliance with the federal mandate. The Court of appeal in *County of Los Angeles II*[124] concluded that, for purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added cost, should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable under Government Code, section 17556, subdivision (c).

Also in *San Diego Unified*, *supra*, the California Supreme Court considered whether due process procedures involved in a *state-mandated* pre-expulsion hearing were fully reimbursable, or whether the procedures merely implemented federal due process requirements.[125] The court held that even though some of the requirements of the test claim statute, "the parties agree, codif[ied] requirements of federal due process,"[126] " a school district would not automatically incur the due process hearing costs that are mandated by federal law" in the absence of the test claim statute triggering the due process requirements.[127] The court therefore concluded that all hearing costs

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[122] See *Fuentes v. Shevin* (1972) 407 U.S. 67, p. 86 ("The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property"); *Goss v. Lopez* (1975) 419 U.S. 565, p. 576 (holding that a 10-day suspension from school is a cognizable deprivation of liberty and property). Note that due process standards apply equally to liberty and property deprivations. See *Wolff v. McDonnell* (1974) 418 U.S. 539, p. 558 and *Zinermon v. Burch* (1990) 494 U.S. 113, p. 131.

[123] *San Diego Unified School District v. Commission on State Mandates, supra*, (2004) 33 Cal.4th 859.

[124] *County of Los Angeles v. Commission on State Mandates* (Cal. Ct. App. 2d Dist. 1995) 32 Cal.App.4th 805.

[125] *San Diego Unified*, *supra*, 33 Cal.4th 859.

[126] Id, at p. 868.

[127] Id, at p. 880.

associated with the mandatory expulsion provisions of the test claim statutes were state-mandated, as follows:

> Because it is state law,…and not federal due process law, that requires the District to take steps that in turn require it to incur hearing costs, it follows, contrary to the view of the Commission and the Department, that we cannot characterize any of the hearing costs incurred by the District, triggered by the mandatory provision of Education Code section 48915, as constituting a federal mandate (and hence being nonreimbursable).[128]

The court concluded that: "state rules or procedures that are intended to implement an applicable federal law – and whose costs are, in context, de minimis – should be treated as part and parcel of the underlying federal mandate."[129] *CSBA I*[130] "established that costs imposed on local governments by ballot measure mandates need not be reimbursed by the state," and concluded that the "necessary to implement" test of section 17556(f) is "even more restrictive" than the "adopted to implement" language of *San Diego Unified, supra*.[131]

Therefore, the analysis that results from the two findings in *San Diego Unified, supra*, and the holding in *CSBA I, supra*, that section 17556(f) is applied similarly to, if more restrictively than, section 17556(c), is as follows: if costs incurred to satisfy due process protections are triggered by a state statute or executive order, reimbursement is required, whether or not the due process protections exceed federal due process requirements; but if costs incurred to satisfy due process protections are triggered by other than a state statute or executive order (such as a voter-enacted ballot measure), then reimbursement is required only if the state's due process requirements truly exceed federal due process requirements and are not part and parcel of the federal requirements.

Activities 4, 5, 7, and 8, discussed below, were determined to be imposed by state law in the prior test claim decision.[132] However, elements of these activities may also be required to satisfy the due process protections implicated by Welfare and Institutions Code sections 6601, 6604, 6605, and 6608, as those sections were adopted by the voters in Proposition 83. This is so because even due process protections expressly included in the test claim statutes intended to satisfy federal due process requirements were triggered, prior to Proposition 83, entirely by a state-mandated local program. Thus, requirements of the code sections not expressly included in Proposition 83 may nevertheless be "necessary to implement" the provisions of Proposition 83 to the extent that due process protections must be satisfied in order to validly enforce and administer the voter-approved SVP program consistently with the Constitution.

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[128] Id, at p. 881.

[129] Id, at p. 890.

[130] *California School Boards Association v. State of California, supra,* (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183.

[131] Id, at pp. 1210; 1214.

[132] Exhibit B, Test Claim Statement of Decision, at p. 13.

a. Activity 4, preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing, is not necessary to implement Proposition 83, and is therefore reimbursable.

Penal Code section 6602 establishes a probable cause hearing requiring the court to determine whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release. The person named in the petition shall be entitled to assistance of counsel at the probable cause hearing.

As discussed above, the liberty interest at stake in implementing the SVP program triggers due process protections; but what process is due can vary depending on the importance of the governmental interest, and the severity of the deprivation. The Supreme Court of California has held that "[t]here is no question that civil commitment itself is constitutional so long as it is accompanied by the appropriate constitutional protections."[133] In criminal cases, the appropriate constitutional protections have been explored and defined through decades of case law, but in the case of a civil commitment for the safety of the public and treatment of the committed person, due process requirements remain less defined. In *People v. Dean*,[134] the court of appeal articulated the appropriate constitutional protections, holding that due process in proceedings under the Sexually Violent Predators Act (SVPA) requires application of a balancing test, rather than strict adherence to the constitutional rights commonly afforded criminal defendants:

> The measure of due process that is due in civil proceedings, including proceedings under the SVPA, is a complex determination that depends upon several factors: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; and (4) the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official." [135]

Activity 4, as cited above, requires the "[p]reparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing." A probable cause hearing is required by Welfare and Institutions Code section 6602, one of two sections of the test claim statutes *not adopted by the voters in Proposition 83*. Proposition 83 makes *no other reference to a probable cause hearing*, such as would render such a hearing necessary to implement the program. In addition, no case law on point, nor any other reference to state or federal due process jurisprudence, provides a clear and unambiguous statement that a probable cause hearing is required to satisfy due process in this context.

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[133] *People v. McKee* (2010) 47 Cal.4th 1172, at p. 1188 [internal citations and quotations omitted].

[134] *People v. Dean* (Cal. Ct. App. 4th Dist. 2009) 174 Cal.App.4th 186.

[135] 174 Cal.App.4th 186, at p. 204 [citing *People v. Otto* (2001) 26 Cal.4th 200].

Applying the balancing test above, the liberty interest at stake is significant, but the risk of an erroneous deprivation of that liberty is less so, given that each person held must be screened and evaluated at several levels before a petition is filed,[136] and the process is required to begin before an individual's prison term is expired; moreover, the deprivation of liberty absent a probable cause hearing would be of limited duration, because a trial would still follow after, pursuant to section 6604, as amended by Proposition 83 (2006); furthermore, the government's interest in holding persons suspected to be SVPs is compelling, and the administrative burdens involved in providing a due process hearing and counsel for that hearing are significant: counsel must be appointed, and the county's designated counsel must prepare for and attend the hearing. Finally, the "dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official" will be fully vindicated at trial, and does not necessitate substantial consideration. This balancing test shows that whether a probable cause hearing is required by due process is a close issue.

A number of cases of the California courts of appeal and the Supreme Court address due process requirements of providing counsel and expert witnesses, furnished at the state's expense, to indigent persons alleged to be sexually violent predators.[137] Another slate of precedents address the due process requirements of analogous civil commitment programs, such as committing persons who are "mentally disordered" for treatment and confinement in a secured mental health facility.[138] But in none of those cases is there any direct statement that the probable cause

[136] Welfare and Institutions Code section 6601, as amended by Proposition 83 (2006) [Director of Corrections refers a person for evaluation who may be a sexually violent predator; person is "screened by the Department of Corrections and the Board of Prison Terms," the screening instrument to be "developed and updated by the State Department of Mental Health;" Department of Mental Health "shall evaluate the person in accordance with a standardized assessment protocol;" two practicing psychiatrists or psychologists must concur, or further evaluation must be ordered by independent professionals, who must also concur, or a petition cannot be filed; county's designated counsel only files the petition "[i]f the county's designated counsel concurs with the recommendation."].

[137] E.g., *People v. Otto* (2001) 26 Cal.4th 200, at p. 210 [outlining four part test of due process applicable to Sexually Violent Predators Act proceedings]; *People v. Fraser* (Cal. Ct. App. 6th Dist. 2006) 138 Cal.App.4th 1430, at pp. 1449-1451 [assuming, without deciding, that SVPs have a right to counsel pursuant to the four part test of *Otto*, *supra*, but holding that there is no right to self-representation]; *People v. Dean*, *supra*, 174 Cal.App.4th 186, at p. 204 [Based on balancing test concluding: "Here, even though an SVPA proceeding is a civil proceeding, due process requires the provision of a qualified expert for defendant."];

[138] E.g., *People v. McKee* (2010) 47 Cal.4th 1172, at pp. 1188-1192 [SVP determination "functional equivalent" of not guilty by reason of insanity commitment, for due process purposes]; *Vitek v. Jones* (1980 445 U.S. 480, at pp. 494-495 [United States Supreme Court found a right to counsel for mentally disordered offenders, furnished by the state.]

hearing provided for under section 6602 is necessary to satisfy due process.[139] Given the lack of precedent supporting a probable cause hearing as an essential feature of due process, and the fact that the activity is not part and parcel of either the federal mandate or the voter-enacted ballot measure or that the costs would most obviously not be "de minimis," the Commission must conclude that provision of a probable cause hearing is not necessary to implement the civil commitment procedures outlined in Proposition 83.

Based on the foregoing, the Commission finds that Activity 4, preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing, is not necessary to implement Proposition 83, and remains reimbursable state-mandated cost.

In addition to seeking reimbursement for the express requirements of activity 4, the County Counsel of San Diego argues that "[t]he same rationale should apply to the costs the county's designated counsel and indigent defense counsel incur for retention of necessary experts, investigators, and professionals for preparation and appearance at the probable cause hearing." The County Counsel argues that probable cause hearings require thorough preparation, "which includes in many cases the retention of experts, investigators and/or other professionals, necessary to provide individuals with an adequate defense." The County Counsel maintains that "[e]ven though these costs are not expressly identified as reimbursable costs in the original test claim decision, these costs have been and should continue to be reimbursed to claimants by the state."

However, as the County Counsel acknowledges, retention of experts or investigators was not an approved activity in the original test claim decision or parameters and guidelines. Nor is the retention of experts an activity required by the plain language of the statutes. The retention of experts or investigators is an issue for the parameters and guidelines, and will require further evidence and legal argument at that stage to show that those costs are "reasonably necessary" under section 17557 to comply with the mandate related to probable cause hearings. If factual representations are made to support such a claim in written comments, they must be supported with documentary evidence included with the comments must and be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge or information or belief. Government Code section 17570(i) requires the Commission to amend existing parameters and guidelines if a new test claim decision is adopted. Therefore the Commission declines to make findings at this stage regarding the retention of experts or investigators for probable cause hearings.

b. Activity 5, preparation and attendance by the county's designated counsel and indigent defense counsel at trial, is necessary to implement Proposition 83.

Penal Code section 6603, as amended by Statutes 1995, chapter 762 and 763, provides:

> A person subject to this article shall be entitled to a trial by jury, the assistance of counsel, the right to retain experts or professional persons to perform an examination on his or her behalf, and have access to all relevant medical and

[139] See *Cooley v. Superior Court* (2002) 29 Cal.4th 228, at p. 246 [discussing standards of proof for probable cause hearing under section 6602, but relying only on section 6602, and not federal or state due process jurisprudence].

> psychological records and reports. In the case of a person who is indigent, the court shall appoint counsel to assist him or her, and, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf.

In the test claim statement of decision, the Commission attributed activity 5, the preparation and attendance by the county's designated counsel and indigent defense counsel at trial, and activity 7, the retention of necessary experts, investigators, and professionals for preparation for trial, to section 6603, as amended by Statutes 1995, chapters 762 and 763. However, there is precedent indicating that the provision of counsel and of an expert to assist a person alleged to be an SVP is required in order to satisfy due process.

The involuntary civil commitment of a person determined to be a sexually violent predator, as defined, is not meaningfully distinct from involuntary detention for medical treatment, insofar as the liberty interests thereby imperiled. The United States Supreme Court has held, in cases involving the involuntary detention for medical treatment, that due process requires the individual be given written notice; an opportunity to be heard before a neutral decision maker; the ability to review and challenge the evidence supporting the action; a written statement of reasons for the decision; the availability of legal counsel, furnished by the state if the individual is indigent; and timely notice of these rights.[140] This finding applies equally to commitments under the SVPA; the indeterminate civil commitments provided for by Proposition 83 implicate significant due process protections including the right to counsel, furnished by the state if a person is indigent.[141] Therefore, the provision of indigent defense counsel is required to satisfy federal due process requirements, as those requirements are triggered by the voter-enacted Proposition 83.

Furthermore, Proposition 83 provides specifically that a "court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator,"[142] and requires the county to designate counsel to "assume responsibility for proceedings under this article."[143] Thus the county's designated counsel is clearly expected to prepare for and attend the trial that is necessary to "determine whether, beyond a reasonable doubt, the person is a sexually violent predator." Although there is no apparent *due process* consideration met by requiring that the state's representative prepare for and attend the trial, that requirement is "necessary to implement" other express provisions of Proposition 83.

The County of Los Angeles argues that "Proposition 83 did not amend the trial provisions of the prior SVP Act." The County argues that the amendment made by Proposition 83 should be held

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[140] *Vitek v. Jones* (1980) 445 U.S. 480, 494-495. See also, *People v. Hayes* (Cal. Ct. App. 1st Dist. 2006) 137 Cal.App.4th 34, at pp. 42-44 [describing probable cause hearing as "mandatory," but relying only on section 6602].

[141] See *People v. Fraser* (Cal. Ct. App. 6th Dist. 2006) 138 Cal.App.4th 1430, at pp. 1449-1451 [assuming, without deciding, that SVPs have a right to counsel pursuant to the four part test of *Otto, supra*, but holding that there is no right to self-representation].

[142] Section 6604, as amended by Proposition 83 (2006).

[143] Section 6601(i), as amended by Propostion 83 (2006).

in isolation: the change from two year terms to a possible indeterminate term of commitment if a person is adjudged an SVP: "[a] trial is not necessary to implement the indeterminate provisions of Proposition 83."[144] This argument is without foundation. The courts have clearly established that commitment under the SVPA implicates due process concerns, due to the serious deprivation of liberty; a trial, conducted with all the trappings of due process, and all reasonable protections owed to the person alleged to be a sexually violent predator, is clearly required to satisfy due process. Moreover, section 6604, which requires that a "court or jury" determine beyond a reasonable doubt whether a person is a sexually violent predator, was amended by Proposition 83, and it is immaterial to the analysis under section 17556 how narrow that amendment may have been; the only consideration for purposes of activity 5 is whether a trial, and accordingly preparation and attendance of counsel, is expressly included in or necessary to implement Proposition 83.

Based on the foregoing, Activity 5, preparation and attendance by the county's designated counsel and indigent defense counsel at trial, is necessary to implement Proposition 83, and is not reimbursable.

c. Activity 7, retention of necessary experts, investigators, and professionals for preparation for trial regarding the condition of the sexually violent predator, is necessary to implement Proposition 83.

In *People v. Dean, supra*, the court of appeal articulated the appropriate constitutional protections, holding:

> Here, *even though an SVPA proceeding is a civil proceeding, due process requires the provision of a qualified expert for defendant.* An SVP commitment *directly affects a defendant's liberty interest*. The provision of an expert allows a defendant the opportunity to present his side of the story before the trier of fact, which in turn reduces the risk of an erroneous deprivation of defendant's liberty. (Emphasis added.)[145]

The court thus held, pursuant to the balancing test borrowed from *People v. Otto*,[146] that an expert witness, furnished by the state, is required to satisfy due process in conducting proceedings under the SVP program.

As discussed above, the portion of Activity 7 that requires experts, investigators, and professionals for "subsequent hearings" is expressly included in section 6605, as amended by Proposition 83. The remaining portion of the approved Activity 7 under consideration here is only the provision of experts or investigators for trial, which is not expressly provided for in any of the provisions amended and reenacted by Proposition 83, but which has been clearly held by the courts to be necessary to satisfy due process.

The County of Los Angeles seizes upon this analysis to argue that due process requirements should remain reimbursable:

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[144] Exhibit DD, County of Los Angeles Comments, at p. 3.

[145] *People v. Dean, supra* (Cal. Ct. App. 4th Dist. 2009) 174 Cal.App.4th 186.

[146] *People v. Otto* (2001) 26 Cal.4th 200, at p. 210.

> CSM staff argues that providing constitutional right to SVPs is a necessary component to the implementation of Prop. 83 and is thus not reimbursable. Department of Finance also insists that this activity, which pertains exclusively to trials and subsequent hearings (Welf. & Inst. Code, § 6602), is no longer reimbursable because Prop. 83 amended a code section (Welf. & Inst. Code, § 6604) that changed commitment terms from renewable two year periods to indeterminate terms.
>
> The need for the County to provide constitutional protections was the basis of the Commission's 1998 finding that State reimbursement was necessary and appropriate. As noted by the Commission, "case law is clear that where there is a right to representation by counsel, necessary ancillary services, such as experts and investigative services, are within the scope of that right." (Statement of Decision, at p. 11, Citing Mason v. State of Arizona (9th Cir. 1974) 504 F.2d 1345; People v. Worthy (1980) 109 Cal.App.3d 514). The Commission continued: "[L]ocal agencies would not be compelled to provide defense and ancillary services to indigent persons accused of being a sexually violent offender following completion of their prison term if the new program had not been created by the state." Therefore, this activity should be reimbursable.[147]

However, what the County fails to acknowledge here is that the program triggering the due process requirements is now a *voter-enacted* program. With respect to Activity 7 specifically, due process requires provision of an expert for the SVP trial, according to *People v. Dean*, *supra*, and conduct of the trial itself is a duty expressly included in the provisions approved by the voters in Proposition 83. Specifically, section 6604 of the Welfare and Institutions Code was amended by the voters, and provides that a "court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." Therefore, a trial is implicated, and the courts have held that that trial necessarily includes the provision of experts in order to satisfy due process.[148] All of this is now triggered by the voter-enacted program, which calls for a trial, and therefore Activity 7, as approved in the original test claim, is necessary to implement the ballot measure.

In addition, the County of Los Angeles argues that Activity 7 is "necessary for performing Activity 4," which the Commission found, as discussed above, remains reimbursable. However, the plain language of section 17556 holds that the Commission "shall not find" costs mandated by the state if the duties imposed by the test claim statute are necessary to implement or expressly included in a ballot measure. There is no reason to read into that language a limitation if the duties are also necessary to implement a statutory program, or, in other words, a Legislative mandate rather than a voter-enacted mandate. Even if, as the County suggests, Activity 7 is an essential component of both Activity 4 and the trial required by section 6604, as amended by Proposition 83, the fact of that activity's dual origin does not preserve reimbursement with respect to preparation for trial.

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[147] Exhibit DD, County of Los Angeles Comment on Draft Staff Analysis, Second Hearing, at pp. 2-3.

[148] *People v. Dean, supra* (Cal. Ct. App. 4th Dist. 2009) 174 Cal.App.4th 186.

Based on the foregoing, the Commission finds that Activity 7, retention of necessary experts, investigators, and professionals for preparation for trial regarding the condition of the sexually violent predator, is necessary to implement Proposition 83, and is not reimbursable.

d. Activity 8, transportation and housing of each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator, is necessary to implement Proposition 83.

The purpose and intent of Proposition 83 is to protect the public from dangerous felony offenders with mental disorders and to provide mental health treatment for their disorders.[149] The efficient operation of the program requires therefore that persons must be held in custody while awaiting trial to determine whether long-term (or permanent) commitment is appropriate. To release persons alleged to be dangerous and unable to control their violent sexual impulses would seriously blunt the effectiveness of the program. Accordingly, a more recent addition to the chapter (over which the Commission does not have jurisdiction) provides that if a judge of the superior court determines that the petition supports a finding of probable cause, the judge "shall order that person be detained in a secure facility until a hearing can be completed pursuant to section 6602" (the probable cause hearing). The same section also provides that the probable cause hearing "shall commence within 10 calendar days," in respect of a person's right to a speedy trial.[150] And, because persons so situated generally have a right to be present at trial and other hearings,[151] they must be transported to and from the courthouse. Given the dual purpose of Proposition 83, to provide mental health treatment to SVPs, and to protect the public, there is ample reason to hold individuals awaiting trial, rather than releasing those individuals to parole.

However, as discussed above, holding a probable cause hearing for each alleged SVP is a requirement mandated by the Legislature, and not necessary to implement Proposition 83. Therefore, while holding an individual pending trial is considered necessary to implement Proposition 83, and transportation to and from the court for trial is necessary as well, transportation to and from the court for a *state-mandated probable cause hearing* is not necessary to implement the ballot measure approved by the voters, and must remain a reimbursable state-mandated cost.

Based on the foregoing, the Commission finds that Activity 8, the transportation and housing of each potential sexually violent predator at a secured facility *while the individual awaits trial* on the issue of whether he or she is a sexually violent predator, is necessary to implement Proposition 83, and is not reimbursable; but transportation to and from the courthouse *for a probable cause hearing* required by the statute remain reimbursable state-mandated costs.

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[149] *People v. McKee* (2010) 47 Cal.4th 1172, at p. 1203.

[150] See Welfare and Institutions Code section 6601.5 (added, Stats. 1998, ch. 19 (SB 536); amended, Stats. 2000, ch. 41 (SB 451)).

[151] Section 6605, as amended by Proposition 83 ["the committed person shall have the right to be present at the [subsequent] hearing"]; California Constitution, article 1, section 15 ["defendant in a criminal case has the right to…be personally present with counsel"]. As discussed above, the Sexually Violent Predators Act provides for civil commitments, not criminal conviction, but the due process protections are nearly as strong under the balancing test.

C. The Comments of Parties, Interested Parties, and Interested Persons have not Raised Adequate Grounds to Deny this Request.

As discussed at length in the statement of decision on the first hearing, the original test claimant, the County of Los Angeles, joined by numerous other counties, public defenders' offices, district attorneys' offices, and county counsels' offices, raised a number of arguments against approving this request for redetermination. Most of the legal arguments raised are not applicable to mandates law, and several commenters misapplied or misconstrued the plain language of section 17570. The comments on this request are addressed below, but none provide adequate grounds to deny Finance's request for redetermination.

1. Changes to the Test Claim Statutes Enacted Before or After Voter Approval of the Subject Ballot Measure are Not Relevant to the Determination Whether Proposition 83 is Modifies the State's Liability as Determined in CSM-4509

a. Statutory Changes Prior to the Ballot Measure (SB 1128)

As discussed in the statement of decision for the first hearing,[152] several commenters argue that most of the amendments to the Welfare and Institutions Code outlined by Proposition 83 were earlier enacted by SB 1128 (Statutes 2006, chapter 337), which was enacted September 20, 2006. The commenters maintain that Proposition 83 therefore does not constitute a "subsequent change in the law" in accordance with section 17570:

> S.B. 1128 contained many of the same or substantially similar amendments to the SVPA as did Proposition 83, for example, providing for indeterminate commitments and expansion of the list of qualifying offenses. Therefore, Proposition 83 does not constitute a "subsequent change in the law" as contemplated by Government Code section 17570.[153]

The LA County District Attorney's Office's comments are representative, stating that "[i]n 2006, the legislature passed Senate Bill 1128 (SB 1128), urgency legislation that went into effect on September 20, 2006…[l]ess than two months later, the electorate passed Prop 83, commonly known as "Jessica's Law"…[which] simply reaffirmed many of the changes already effectuated by SB 1128." And, the District Attorney of Orange County made similar comments, also representative of the recurring theme: "[t]he SVP reimbursement program should not have been affected by Prop 83 because the ballot measure made no *substantive changes* to the reimbursable component of the program."[154] In addition, CSAC continues to stress, in its comments on the draft staff analysis for the second hearing, that the mandated activities under the SVPA were unaffected by Proposition 83:

> Of the fourteen sections and subsections that formed the basis of the Commission's 1998 Statement of Decision, Proposition 83 purported to amend only three, although even in these three cases the Legislature had already made

[152] Exhibit U, First Hearing Statement of Decision, at p. 18, and following.

[153] Exhibit H, CPDA Comments, at p. 4. See also, Exhibit G, CSAC Comments, at pp. 2-3; Exhibit AA, CSAC Comments on Draft Staff Analysis, Second Hearing, at p. 2.

[154] Exhibit Y, Orange County District Attorney Comments, at p. 1 [emphasis added].

> substantially the same changes in the months prior to the ballot measure's passage (SB 1128).[155]

Accordingly, the Public Defender for the County of San Bernardino argues in comments submitted on the draft staff analysis for the second hearing that because "Proposition 83 mirrored many of the same provisions as cited in SB 1128 and effectuated changes that were procedural rather than substantive, its enactment did not constitute a subsequent change in law, as required under Government Code [section] 17570."[156]

However, it is irrelevant to the analysis of Proposition 83 whether there were *substantive changes to the law in effect immediately prior to its enactment*, or whether Proposition 83 made any substantive changes at all to the SVP code sections. The analysis of whether a subsequent change in law has occurred turns on whether, under 17556(f), there are now any costs mandated by the state, where a ballot measure expressly includes some of the same activities as the test claim statutes that were found to impose a reimbursable mandate in CSM-4509. Or, to consider the issue in the alternative: do the test claim statutes, as pled (in the CSM-4509 test claim) impose duties that are necessary to implement or expressly included in a voter-enacted ballot measure? Here, with respect to the code sections reenacted in Proposition 83, it must be said that the test claim statutes, *as those statutes were pled in the earlier test claim decision*, impose duties that are expressly included in a voter-enacted ballot measure.[157] The text of the Welfare and Institutions Code immediately prior to the adoption of Proposition 83 is immaterial, as is the extent and degree of substantive amendments made by Proposition 83. The only issue is whether the activities imposed by the test claim statutes, as pled, are expressly included in or necessary to implement Proposition 83. Given that Proposition 83 amended and reenacted wholesale most of the code sections that gave rise to the mandated activities found in the CSM-4509 test claim (section 6601, requiring the county's designated counsel to file a petition for commitment if he or she agrees with the recommendation of the Department of Mental Health; section 6604, requiring a court or jury to determine whether a person is a sexually violent predator; section 6605, requiring annual reevaluation and possible subsequent hearing if recommended by the Department; and section 6608, providing for a subsequent hearing at the request of the person adjudged to be a sexually violent predator), it must be said that most of the activities activities approved in the test claim are expressly included in or necessary to implement the voter-enacted ballot measure.

b. Statutory Changes After Approval of the Ballot Measure (2012 Legislative Reenactment)

In a line of argument similar to that discussed above, CPDA asserts that the 2012 statutes superseded the ballot proposition, as follows:

> The enactment of A.B. 1488, A.B. 1470, and S.B. 760 in 2012 pertaining to the SVPA result in a cost mandated by the state as defined by Government Code section 17514. The entire text of the sections amended by legislation in 2012,

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[155] Exhibit AA, CSAC Comments on Draft Staff Analysis, Second Hearing, at p. 2.

[156] Exhibit Z, San Bernardino County Public Defender Comments, at p. 1.

[157] See Government Code section 17556(f).

> including the portions not amended, was reenacted by the Legislature pursuant to Article IV, section 9, of the California Constitution. The remainder of the SVPA sections that were not expressly included in the 2012 legislation are, nevertheless, necessary to implement the 2012 legislation under Government Code section 17556, subdivision (f), and therefore are mandated by statute and thus reimbursable under California Constitution Article XIII B, section 6. Therefore, Proposition 83 is no longer the statutory authority supporting the SVPA; consequently the cost incurred by local agencies to comply with the 2012 legislatively enacted SVPA is a cost mandated by the state.[158]

The CPDA comments demonstrate a misunderstanding of the operation of section 17556. There is no indication from the plain language, or from the broader statutory framework, that section 17556 is meant to operate in this alternative respect; where a ballot measure removes a mandate from the reimbursement requirement, a subsequent statute on the same program can only be subject to the reimbursement requirement if it imposes duties *beyond* those which are expressly included in or necessary to implement the ballot measure. An enactment of the voters may trigger the exclusionary provisions of section 17556(f), but subsequent amendment and reenactment by the *Legislature* does not defeat the application of section 17556(f) in the same manner. The analysis turns on only whether the test claim *statute* imposes duties expressly included in or necessary to implement the *ballot measure*. If so, those duties are not reimbursable, irrespective of any subsequent reenactment.

2. Equitable Defenses Raised are not Applicable to this Request for Redetermination

a. Misrepresentation, Unclean Hands, Equitable Estoppel

Several comments have raised equitable defenses against Finance's request, suggesting that because Finance's analysis of Proposition 83 leading up to the election on the measure gave no indication that mandate reimbursement would be in peril, Finance's request for a new decision on the SVP mandate should be rejected.

CPDA argues that "misrepresentation, unclean hands, and estoppel bar the DOF's redetermination request." CPDA cites "a letter dated September 2, 2005, addressed to the honorable Bill Lockyer, California Attorney General, issued pursuant to Elections Code section 9005, authored by Elizabeth G. Hill, Director of the Legislative Analyst's Office (LAO) and Tom Campbell, Director of the DOF," in which it is stated that Proposition 83 would have no effect on state reimbursement." CPDA argues that "[g]iven the DOF's stated position that the passage of Proposition 83 would not affect state reimbursement to counties, the DOF has "unclean hands" and should be estopped from currently asserting the Sexually Violent Predator mandate (CSM-4509) is no longer a cost mandated by the state." CPDA concludes that the voters were misled by the ballot pamphlet, prepared in reliance on the letter cited.[159]

The LA County DA argues, for its part, that "the Legislative Analyst's Office (LAO), in association with the Department of Finance, sent California Attorney General Bill Lockyer a fiscal analysis of the initiative eventually known as Prop 83," in which the LAO stated that there

[158] Exhibit H, CPDA Comments, at p.2.

[159] Exhibit H, CPDA Comments, at pp. 3-4.

would be no impact on state reimbursement. The LA County DA argues that "[a]s the electorate is presumed to have relied upon the state's broadly publicized assurances regarding the state's assumption of the fiscal costs associated with Prop 83 were it to pass, the state is foreclosed from using Prop 83 as the basis of its invocation of Section 17570 and request for a new test claim decision."[160]

The defenses of unclean hands and misrepresentation are not neatly applied in this case. Unclean hands doctrine in this context assumes that the alleged "misrepresentation" induced the electorate to adopt Proposition 83, which is now alleged to impose harm upon the claimants, or to have conferred a benefit upon Finance. There is, obviously, no evidence as to what voters might have chosen had they been given different information with respect to mandate reimbursement in the voter information pamphlet. More importantly, there is no evidence that local government officials would have had any impact on the outcome, had they not "been lulled into a false sense of security."[161]

CPDA's argument also assumes that Finance, as the requesting party, should be barred from "relief." But unclean hands, as an equitable doctrine, should not be applied where another injustice would result; moreover, "[i]t is well settled that public policy may favor the nonapplication of the doctrine as well as its application."[162] Here, the denial of Finance's request on the basis of unclean hands could result in the imposition of a subvention requirement, even if no state-mandated program exists. Article XIII B, section 6 requires reimbursement for state-mandated new programs or higher levels of service that impose *costs mandated by the state*, as defined. To deny "relief" to DOF on the basis of an unclean hands defense would be to ignore article XIII B, section 6 of the California Constitution and the implementing statutes of the Government Code.

Additionally, what all of the above comments fail to acknowledge is that in 2006 the conclusion that Proposition 83 would have no fiscal effect on local government was correct, and was not a misrepresentation of the facts as they existed at that time. When Proposition 83 was enacted, there was no process for redetermining a test claim; thus there would have been no effect on mandate reimbursement. Only after the mandate redetermination process embodied in section 17570 was *added to the code in 2010* was there any possibility of utilizing Proposition 83 to change a prior mandate finding.[163] Therefore, any representation that might be alleged to have misled the voters was provided in good faith, and cannot now support a defense of 'unclean hands.'

In comments filed in response to the draft staff analysis in the first hearing, CPDA strenuously disputes this point, arguing that the draft "erroneously rejects the equitable defense of unclean hands," and that the draft "incorrectly states" that when Proposition 83 was adopted, no

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[160] Exhibit L, LA County DA Comments, at pp. 8-10. See also, Exhibit F, CDAA Comments, at p. 4

[161] Exhibit H, CPDA Comments, at pp. 3-4.

[162] *Health Maintenance Network v. Blue Cross of Southern California* (Cal. Ct. App. 2d Dist. 1988) 202 Cal.App.3d 1043, at p. 1061.

[163] Statutes 2010, chapter 719 (SB 856).

mechanism or process for redetermination existed." CPDA argues that "[d]uring the relevant periods surrounding the passage of Proposition 83 (2005 through 2006), [former] Government Code sections 17570 and 17556, subdivision (f), *expressly provided* for the redetermination of test claims."[164] CPDA cites to former Government Code section 17570, as that section appeared in 1986, which provided:

> On November 30 of each year the Legislative Analyst shall submit a report to the Legislature regarding each unfunded statutory or regulatory mandate for which claims have been approved by the Legislature pursuant to a claims bill during the preceding fiscal year. The *Legislative Analyst shall review* each such statute or regulation in light of its estimated future costs recoverable through the claims process *and recommend, in each case, whether the Legislature should reconsider its original enactment of that statute or the state agency should reconsider its adoption of the regulation to repeal, modify, or make permissive its provisions*. The Legislative Analyst shall submit the report to the Joint Legislative Budget Committee, the chairs of the fiscal committees, and the chairs of the policy committees in each house which have jurisdiction over the subject matter of these statutes or regulations.[165]

CPDA's argument presumes that former section 17570 might be read to provide for a process of reconsideration or redetermination of a prior test claim decision; but nothing in the language of former section 17570 provides authority for the Commission to reconsider a test claim. Former section 17570 only required the Legislative Analyst's Office to *provide recommendations* to the Legislature regarding possible amendments to the underlying test claim statutes or regulations. It did not provide authority for the Commission to reconsider a prior final test claim decision based on a subsequent change in the law.

Additionally, CPDA argues that the "regardless of…before or after" language of section 17556, as amended by AB 138 in 2005, evidences inherent authority for the Commission to reconsider a test claim. CPDA argues that "[p]ursuant to Legislative directive [*sic*] contained in A.B. 138 the CSM redetermined and set aside the 'Open Meetings Act' and 'Brown Reform Act' test claims in September, 2005."[166] CPDA also cites the reconsideration of "School Accountability Report Cards" in 2005,[167] and concludes:

> When Proposition 83 took effect on November 8, 2006, the CSM had completed reconsideration of the foregoing three test claim redeterminations. The assertion that there was "no process or mechanism by which to redetermine a test claim" during the time period of 2005 through 2006 is disingenuous. Although the court

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[164] Exhibit S, CPDA Comments on Draft Staff Analysis, at p. 2 [emphasis added].

[165] Statutes 1986, chapter 879, section 13 [emphasis added].

[166] Exhibit S, CPDA Comments on Draft Staff Analysis, at p. 2. See also, Statutes 2005, chapter 72 (AB 138) section 17 [directing the Commission to set aside and reconsider Open Meeting Act (CSM-4257) , and Brown Act Reform (CSM-4469)].

[167] See Statutes 2004, chapter 895 (AB 2855) section 18 [directing the Commission to reconsider School Accountability Report Cards (97-TC-21)].

> in California School Boards reversed these redeterminations, the ruling was not handed down until March 9, 2009, nearly three years after the passage of Proposition 83. Therefore, the Draft Staff Analysis erroneously and inaccurately portrayed the state of the law vis-a-vis redetermination of test claims during the relevant period of 2005 through 2006 surrounding the passage of Proposition 83.[168]

CPDA implies that the fact of these other test claims being reconsidered shows that a process or mechanism existed when Proposition 83 was adopted and, thus, statements that Proposition 83 would have no fiscal effect on local government was either in error or constituted an intentional misrepresentation.

CPDA's conclusion falters, however, because in the case of each of the mandates that CPDA cites, the Legislature *directed the Commission* (i.e., expressly required the Commission) to reconsider those specific test claims by statute.[169] AB 138 amended section 17556 to include the "before or after" language regarding a test claim statute implementing a ballot measure mandate, as discussed above, and also directed the Commission to reconsider three mandates decisions, in light of the amended Government Code provisions.[170] Absent such action by the Legislature, the Commission did not have authority to reconsider a prior decision. However, as CPDA points out, the court of appeal eventually rejected the actions of the Commission, on the ground that the Legislature's directive to the Commission to reconsider these prior claims was not consistent with separation of powers principles.[171]

As discussed at length above, section 17556 is not self executing; it requires some process or mechanism by which the test claim can come before the Commission. In the case of a ballot measure adopted after the test claim decision addressing a particular program, the proper mechanism is the mandate redetermination process provided in section 17570. It is well-settled that administrative agencies, such as the Commission, are entities of limited jurisdiction. Administrative agencies have only the powers that have been conferred on them, expressly or by implication, by statute or constitution. An administrative agency may not substitute its judgment for that of the Legislature. When an administrative agency acts in excess of the powers conferred upon it by statute or constitution, its action is void.[172] The Government Code gives the Commission jurisdiction only over those statutes or executive orders pled by an eligible claimant in a test claim and grants the Commission a single opportunity to make a final decision on the test claim. Government Code section 17559 grants the Commission statutory authority to reconsider prior final decisions, if a request to reconsider is made within 30 days after the

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[168] Exhibit S, CPDA Comments on Draft Staff Analysis, at p. 3.

[169] See Statutes 2005, chapter 72 (AB 138) section 17; Statutes 2004, chapter 895 (AB 2855) section 18.

[170] Statutes 2005, chapter 72 (AB 138) section 17 [directing the Commission to reconsider Mandate Reimbursement Process (CSM-4202)].

[171] *California School Boards Association v. State of California* (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183.

[172] *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103-104.

Statement of Decision is issued based on an error of law, but no other section, until the addition of section 17570 in 2010, provided standing authority and a process to redetermine a prior final Commission decision.

The Alameda County District Attorney's Office argues that "[t]he Department of Finance request for a new test claim, filed some six and one-half years after the passage of Proposition 83, is untimely and should be rejected on common law principles of laches and estoppel."[173] The doctrine of estoppel is misplaced in this case. The essence of an estoppel, "if it is applicable at all in these circumstances, is that the party to be estopped has by false language or conduct led another to do that which he would not otherwise have done and as a result thereof that he has suffered injury."[174] Estoppel is applied "where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts."[175] Estoppel generally binds "not only the immediate parties but also those in privity with them;" and as applicable here, agents of the same government are held to be in privity with one another.[176] And, estoppel is available against the government, but "estoppel will not be applied against the government if the result would be to nullify a strong rule of policy adopted for the benefit of the public or to contravene directly any statutory or constitutional limitations."[177]

As discussed above, whatever representations were made regarding the effect on mandate reimbursement prior to the adoption of Proposition 83, and however local governments might have detrimentally relied on those representations, they were *true when made*, and only later did the circumstances allow for mandate reimbursement to be modified. Moreover, to apply estoppel against DOF in this case would "contravene directly" the statutory and constitutional limitations on reimbursement, and would effectively "nullify" the mandate redetermination process created in the Government Code.[178] Furthermore, the premise that counties have detrimentally relied upon reimbursement is tenuous at best. Even if this redetermination results in discontinuance of mandate reimbursement, the activities required under the test claim statutes will continue to be required. There cannot be detrimental reliance unless a party alters its behavior; here, the existence of the required activities, and the counties' acquiescence, does not turn on whether those activities are reimbursed.

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[173] Exhibit P, Alameda County DA Comments, at p. 5.

[174] *In re Lisa R.* (1975) 13 Cal.3d 636, at p. 645.

[175] *Nicolopulos v. Superior Court* (Cal. Ct. App. 2d Dist. 2003) 106 Cal.App.4th 304, at p. 311 [citing *Brookview Condominium Owners' Ass'n v. Heltzer Enterprises-Brookview* (Cal. Ct. App. 4th Dist. 1990) 218 Cal.App.3d 502, at p. 512.

[176] *Hartway v. State Board of Control*, (Cal. Ct. App. 1st Dist. 1976) 69 Cal.App.3d 502 See also *Carmel Valley Fire Protection Dist. v. State of California* (Cal. Ct. App. 2d Dist. 1987) 190 Cal.App.3d 521, at p. 535 [citing *Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, at p. 398].

[177] *Transamerica Occidental Life Insurance Co. v. State Board of Equalization* (Cal. Ct. App. 2d Dist. 1991) 232 Cal.App.3d 1048, at p. 1054 [internal citations omitted].

[178] *Ibid.*

Accordingly, the arguments alleging misrepresentation, unclean hands, and equitable estoppel do not apply in this case.

b. Laches, or Unreasonable Delay of Cause of Action

The Alameda County District Attorney's Office and LA County also argue that DOF was not required to delay this request for reconsideration "nearly six and a half years after the passage of Proposition 83." During this time, counties relied on mandate reimbursement from the state to perform the required duties. As a result, the counties argue that the DOF's request is untimely and that under the equitable doctrine of laches, the claim should be denied.

As raised by the Alameda County DA, the defense of laches is based on an assertion that the plaintiff unreasonably delayed bringing an action, and that the defendant has been prejudiced by the delay, such that granting relief would be inequitable. The Alameda County DA asserts that a delay of more than six years after the passage of Proposition 83 is unreasonable. But as discussed above, the mandate redetermination process was only added to the Government Code in 2010.[179] Prior to that, even if Proposition 83 were *known* to have undermined the 1998 mandate finding regarding the SVP program, there was no mechanism in place to bring the issue before the Commission. Therefore, any delay that might be attributed to DOF cannot be said to begin until such mechanism was provided, in Government Code section 17570, as added by Statutes 2010, chapter 719 (SB 856).

In comments filed in response to the draft staff analysis, LA County disputes this conclusion. LA County argues that a mechanism or process was put in place by Statutes 2008, chapter 751, section 75 (AB 1389), which directed the Commission to reconsider the Sexually Violent Predators test claim (CSM-4509). However, the 2008 statute that County of LA cites clearly and unambiguously directed the Commission to wait until the *CSBA* decision was finalized:

> Notwithstanding any other provision of law, the Commission on State Mandates, *upon final resolution of any pending litigation* challenging the constitutionality of subdivision (f) of Section 17556 of the Government Code, shall reconsider its test claim statement of decision in CSM-4509 on the Sexually Violent Predator Program to determine whether Chapters 762 and 763 of the Statutes of 1995 and Chapter 4 of the Statutes of 1996 constitute a reimbursable mandate under Section 6 of Article XIIIB of the California Constitution in light of ballot measures approved by the state's voters, federal and state statutes enacted, and federal and state court decisions rendered since these statutes were enacted.[180]

This statute was enacted as an urgency statute on September 30, 2008. The *CSBA* decision was handed down March 9, 2009, and addressed both the constitutionality of section 17556(f), and the statutes that directed the Commission to reconsider the prior test claim decisions in *Open Meetings Act, Brown Act Reform* and *School Accountability Report Cards*. Because the statute cited above directed the Commission to reconsider the SVP mandate only after final resolution of the *CSBA* matter, which ultimately declared that the Legislature's attempt to force a reconsideration of a final decision of the Commission, on a case by case basis, violates

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[179] Government Code section 17570 (Stats. 2010, ch. 719 (SB 856)).

[180] Statutes 2008, chapter 751 (AB 1389) section 75 [emphasis added].

separation of powers principles,[181] no "mechanism and process"[182] to reconsider this particular test claim existed at any time prior to the enactment of section 17570 in Statutes 2010, chapter 719 (SB 856).[183]

LA County also points out that the *current* statute providing a process for redetermination was enacted, in response to *CSBA*, in Statutes 2010, chapter 719 (SB 856). The County *implies*, but does not clearly state, that failing to take advantage of that process until January of 2013 constitutes an unreasonable delay.[184] A new *test claim* must be filed by June 30 of the fiscal year following the year in which the test claim statute at issue became effective, or the year in which the claimant first incurred costs under the statute. But section 17570 only requires that a redetermination request be filed "on or before June 30 following a fiscal year in order to establish eligibility for reimbursement or loss of reimbursement for that fiscal year."[185] It does not contain a statute of limitations.

Moreover, laches requires, in addition to an unreasonable delay in bringing an action, either acquiescence or prejudice to the other party resulting from the delay. Here, it is difficult to identify any prejudice that results from DOF's delay. As discussed, DOF would have had no right or ability to bring this matter before 2010. And from the effective date of section 17570 to the time of filing this request, in the intervening two years and three months, the claimants have continued to receive reimbursement. The statute provides that if DOF prevails, reimbursement will be ended beginning in the 2011-2012 fiscal year, based on the filing date of this redetermination request.[186] Had DOF filed this request two years earlier, the potential reimbursement period affected would have begun in the 2009-2010 fiscal year. Therefore, eligible claimants for the CSM-4509 mandate have not been harmed by DOF's delay in filing this request for redetermination, and may have, in fact, benefited from it.

c. Equitable defenses are not applicable to mandates law

Ultimately, the proffered equitable arguments of misrepresentation, unclean hands, equitable estoppel, laches, and unreasonable delay, are inapplicable to this case. The Commission is vested, pursuant to the Government Code, with sole and exclusive jurisdiction to determine mandates claims. Whether a statute requires reimbursement is a question of law, to be decided by the Commission, or the courts on review, and "legislative disclaimers, findings, and budget control language are not determinative."[187] Thus the question of reimbursement must be

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[181] *CSBA v. State of California* (2009), 171 Cal.App.4th 1183, p.p. 1202-1203.

[182] Exhibit T, County of LA Comments on Draft Staff Analysis, at p. 2.

[183] Government Code section 17570 (Stats. 2010, ch. 719 (SB 856)).

[184] Exhibit T, County of LA Comments on Draft Staff Analysis, at p. 2.

[185] Government Code section 17570(f) (Stats. 2010, ch. 719 (SB 856)).

[186] Section 17570(f) (Stats. 2010, ch. 719 (SB 856)) ["A request for adoption of a new test claim decision shall be filed on or before June 30 following a fiscal year in order to establish eligibility for reimbursement or loss of reimbursement for that fiscal year."]

[187] *County of Los Angeles v. Commission on State Mandates*, (Cal. Ct. App. 2d Dist. 2003) 110 Cal.App.4th 1176, 1186; 1194. See also, Government Code section 17552, which states that

evaluated by the Commission, exclusively, pursuant to article XIII B, section 6 of the California Constitution, on the basis of the statutes and case law that guide Commission decisions generally, and legislative declarations are irrelevant to the Commission's determination of whether a state mandate exists.[188] The Commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state-mandate exists.[189]

As has been said by the courts of appeal, "[i]n making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[190] The purpose of the mandates process is to enforce the Constitution, by way of its implementing statutes, including Government Code section 17556. If a local government is not entitled to reimbursement pursuant to the operation of the statutes and the Constitution, public policy cannot support application of equitable defenses or remedies.

3. Retroactivity of Proposition 83

In *People v. Litmon,*[191] the court reversed an order imposing an indeterminate term of commitment *retroactive to the date appellant was first committed* as an SVP under the pre-Proposition 83 SVPA. Addressing the retroactivity issue, the court held that "Proposition 83's declaration of intent does not explicitly make indeterminate terms retroactive and is equally consistent with the intent to impose indeterminate terms of commitment in future commitment proceedings."[192] The court concluded that "the most reasonable interpretation … is that an indeterminate term of commitment may be ordered only following a trial in which a person is determined to be an SVP and that term commences on the date upon which the court issues its order pursuant to this current version of section 6604."[193]

LA County argues in its comments on the draft staff analysis for the second hearing that Proposition 83's amendments to the SVP program should be applied prospectively only, as follows:

> Under the SVP law, individuals were subject to a 2-year commitment. When SB1128 and Prop. 83 passed, the recommitment provisions of Welf. & and [*sic*] Inst. Code § 6604 were deleted. Currently, under Prop. 83, there is no provision to recommit someone after the 2-year term. Thus recommitments are not

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"This chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution."

[188] *CSBA v. State of California* (2009), 171 Cal.App.4th 1183, p. 1203; see also, *County of Los Angeles v. Commission on State Mandates, supra., p.* 1194.

[189] *Id.*

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

[191] (Cal. Ct. App. 6th Dist. 2008) 162 Cal.App.4th 383.

[192] *Id.*, at p. 410.

[193] *Id.*, at p. 412.

> mandated by Prop. 83. Recommitments would thus be mandated under the SVP Law. SVP should not be applied to the pre Prop. 83 offenders until they leave the program.
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> Retroactive application of Prop. 83 (a violation of Ex Post facto Law) [*sic*] to pre Prop. 83 SVP's would be unconstitutional. In adopting new Parameters and Guidelines for Chapter 641, Statutes of 1995, CSM stated:
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> Chapter 641/95, eliminated diversion as a domestic violence sentencing for those arrested on or after January 1, 1996, under prior law, (Chapter 221/93, and Chapter 1158/80) was not terminated by chapter 641/95 and continues until the period of diversion has been completed. Such completion and resultant closeout costs, for the period January 1, 1996 through June 30, may be claimed as provided. CSM-4447A. Page 1
>
> To eliminate the right of the pre Prop. 83 SVP's from the pre Prop. 83 (2006) applicable laws would be *nullifying the sentencing judges' orders.* Our interpretation of statutes declares all laws are to commence in the future and operate prospectively. Therefore, reimbursement should continue on all pre Prop. 83 SVP's in accordance with the SVP Law until jurisdiction is terminated.[194]

LA County raises several distinct issues in these few sentences: first, the concept of "Ex Post Facto Law" is raised, but ex post facto is not a singular law to be violated; it is a proscription found in Article I, section 10 of the United States Constitution against the states passing laws that have an effect of retroactively altering the consequences of a criminal act or omission.[195] The United States Supreme Court has held that the prohibition against the enactment of ex post facto laws applies only in the realm of *crimes* and *criminal sanctions*.[196] In the case of SVP commitment, the California Supreme Court has held that "the commitment authorized by the Act is not excessive and is designed to last only as long as that person meets the definition of an SVP," and that therefore the SVPA is "essentially nonpunitive."[197] Therefore, because the SVPA is a civil commitment, not a criminal punishment, and is held not to be punitive, the proscription of ex post facto laws in Article I, section 10 is not applicable.

With respect to retroactivity generally, the courts have held that an indeterminate commitment may not be made retroactive to an individual's *initial* commitment, but that any pending or new petitions for commitment or recommitment may be treated as petitions for indeterminate commitment.

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[194] Exhibit DD, County of LA Comments, at p. 4 [emphasis in original].

[195] Article I, section 9 prohibits Congress from doing the same.

[196] *Calder v. Bull* (1798) 3 U.S. 386 [Ex post facto laws, prohibited by the Constitution, are "only those that create, or aggravate, the crime; or encrease [*sic*] the punishment, or change the rules of evidence, for the purpose of conviction." Emphasis added.]

[197] *People v. McKee* (2010) 47 Cal.4th at pp. 1193; 1195 [internal citation omitted].

In *People v. Litmon*,[198] the individual at the center of the case had been committed as an SVP on May 2, 2000, and recommitted effective May 2, 2002, but when the trial court ordered an additional recommitment on March 15, 2007, it determined that the recommitment under Proposition 83 should be retroactive to the initial date of commitment. The appellate court concluded that amended sections 6604 and 6604.1 "did not authorize an order imposing an indeterminate term of commitment retroactive to the date upon which appellant was first committed as an SVP under predecessor law."[199]

However, in *Borquez v. Superior Court*[200]the appellate court found "application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was completed before the law's effective date." The court continued: "Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date." For purposes of determining whether a person is an SVP, "the last event necessary is the person's mental state *at the time of the commitment*." (Emphasis added.) Therefore, "[b]ecause a proceeding to extend commitment under the SVPA focuses on the person's current mental state, applying the indeterminate term of commitment of Proposition 83 does not attach new legal consequences to conduct that was completed before the effective date of the law."[201]

Then, in *People v. Taylor*[202] the court of appeal held that because a petition to extend commitment "requires a new determination of the individual's status as a SVP, [section 6604, as amended by Proposition 83] it may be applied prospectively to all pending and future commitment proceedings." At the same time, the court concluded that an automatic retroactive conversion of the defendants commitments from renewable two year terms to indeterminate commitment terms without a hearing "was erroneous, and that the proper procedure is to impose the indeterminate term in conjunction with the initiation of proceedings to extent a SVP commitment."[203]

Based on the foregoing case law, the Commission finds that the indeterminate commitment provisions of section 6604, as amended by Proposition 83, may be applied to all pending and future commitment or recommitment petitions without violating the prohibition against ex post facto laws in the United States Constitution, or the due process rights of individuals determined to be SVPs, and without violating principles of retroactivity generally.

Finally, there is no evidence that "sentencing orders" are affected by the application of Proposition 83 in any way. The result of a commitment petition under SVPA is not a "sentence," in the criminal sense, and the "order" that an individual be committed, at least prior to

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[198] *People v. Litmon* (Cal. Ct. App. 6th Dist. 2008) 162 Cal.App.4th 383.

[199] *Id*, at p. 412.

[200] *Borquez v. Superior Court* (Cal. Ct. App. 3d Dist. 2007) 156 Cal.App.4th 1275.

[201] *Id*, at pp. 1288-1289.

[202] *People v. Taylor* (Cal. Ct. App. 4th Dist. 2009) 174 Cal.App.4th 920.

[203] *Id*, at pp. 932-933.

Proposition 83, was designed to expire in two years. The courts have held that each recommitment petition is a new cause of action, and requires the People to meet their burden of proving a person is an SVP, independent of any prior findings.[204] Accordingly, any new petition for a commitment order under Proposition 83 must be considered in isolation from any earlier commitment order issued under prior law, and the courts have held that pending or new petitions for commitment may be treated as petitions for indeterminate commitment.[205]

However, at the September 27, 2013 hearing, the county raised an issue regarding a stipulation entered into by the District Attorney, the Public Defender, and the Presiding Judge of the Superior Court for the County of Los Angeles, which had been held enforceable by the California Supreme Court in *People v. Castillo* (2010) 49 Cal.4th 145. The County alleged that because the stipulation, and the order of the court upholding the stipulation, required the County to apply the provisions of the pre-Proposition 83 SVPA to all individuals subject to SVP petitions prior to the date the amendments were enacted, the activities performed in accordance with the test claim statutes should remain reimbursable. Based on the following analysis, the Commission finds that (1) the California Supreme Court's finding does not bind the Commission to deny the request for redetermination, or to limit the applicability of its findings; and (2) this decision is effective on July 1, 2011, pursuant to Government Code section 17570 and, thus reimbursement for six of the eight activities are no longer reimbursable effective July 1, 2011.

SB 1128 (Stats. 2006, ch. 337), was enacted as an urgency statute on September 20, 2006, several weeks prior to the November 7, 2006 general election in which Proposition 83 would be adopted, and made most, if not all, of the same substantive changes.[206] SB 1128 and Proposition 83 both enacted reforms to the SVPA to bring the state's program in line with other states, including changing two year commitments to indeterminate commitments, thus eliminating the need for re-commitment procedures. But neither addressed how the new law applied to persons who were currently being held on a two year commitment, and would have to be re-committed, or persons subject to *pending* petitions for initial two year commitments or re-commitments.[207] Due to the absence of any language regarding retroactive application of the law to pending petitions, or any reference to recommitment under the new indeterminate-commitment regime, the Attorney General of California issued a memorandum to district attorneys' offices, stating that "[i]n our opinion, the indeterminate term language applies to any *verdict or court finding rendered after September 20, 2006*." This memorandum was dated September 26, 2006.[208]

On October 11, 2006 the District Attorney, the Public Defender, and the Presiding Judge of the Superior Court for the County of Los Angeles entered into a stipulation, which stated that "[d]ue

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[204] See. *Borquez, supra*, at pp. 1288-1289; *Taylor, supra*, at p. 932.

[205] *Ibid*.

[206] See, e.g., Exhibit G, CSAC Comments on Request for Redetermination; Exhibit H, CPDA Comments on Request for Redetermination; Exhibit K, Sacramento County DA Comments on Request for Redetermination.

[207] Exhibit X, *People v. Castillo* (2010) 49 Cal.4th 145, at pp. 148-150.

[208] *Id,* at p. 153, Fn 7 [emphasis added].

to uncertainty in the retroactive application of this change, it is the intention of the Los Angeles County District Attorney's Office to apply the current two year commitment period to all currently pending initial commitment petitions…" The stipulation stated that the District Attorney's Office "will apply the two year commitment period to pending initial petitions for 24 months [after the effective date of SB 1128]," and that "[c]ases which are pending for initial commitment or are evaluated for recommitment prior to the effective date of the legislation and/or initiative will be evaluated based upon criteria *currently present* in the SVP statutes."[209]

The California Supreme Court considered this stipulation in *People v. Castillo*.[210] Castillo had been determined to be an SVP, and ordered committed on August 10, 2007 "for three consecutive two-year periods – one for each of the three consolidated [petitions]" that had been pending at the time SB 1128 and Proposition 83 were enacted.[211] Castillo appealed the commitment order, and on appeal the People were represented by the Attorney General, who "sought to contravene the contentions raised in Castillo's brief," but also "argued that the court's order, committing Castillo to a series of two year terms ending October 2007 (consistently with the stipulation signed by the parties and the superior court), *was invalid because it was in derogation of the indeterminate commitment term specified by [SB 1128] and Proposition 83*."[212] The court of appeal sided with the Attorney General and modified the commitment order to reflect an indeterminate commitment.[213] The California Supreme Court thereafter granted review, at the urging of the Public Defender and the District Attorney of the County of Los Angeles, both of whom filed amicus curiae briefs supporting Castillo's position that the stipulation should be enforced.[214]

The court found that "[a]s alluded to in the stipulation itself…and, indeed, continuing until at least early 2008 – there existed substantial legal uncertainty concerning the status of, and procedures to be employed in, proceedings (such as the one here at issue) to extend the commitment of a person already adjudged to be an SVP."[215] Citing *People v. Shields*,[216] *Borquez v. Superior Court*,[217] *People v. Carroll*,[218] *People v. Whaley*,[219] and *People v. Taylor*,[220] the court explained:

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[209] *Id*, at pp. 150-152 [emphasis added].

[210] Exhibit X, *People v. Castillo* (2010) 49 Cal.4th 145.

[211] *Id*, at p. 153.

[212] *Id*, at pp. 153-154 [emphasis added].

[213] *Id*, at p. 154.

[214] *Ibid*.

[215] *Id*, at p. 159

[216] (2007) 155 Cal.App.4th 559.

[217] (2007) 156 Cal.App.4th 1275.

[218] (2007) 158 Cal.App.4th 503.

[219] (2008) 160 Cal.App.4th 779.

> Eventually, of course, appellate decisions, construing over the course of the years the 2006 amendments, have resolved these problems and uncertainties. But at the time the stipulation was negotiated and signed in 2006…no one could predict with any degree of certainty how the amendments would be construed as applied to persons in Castillo's circumstances. It was simply uncertain, and unknowable, how courts eventually would resolve these and related questions.[221]

And, "in addition to the legal uncertainties created by the 2006 amendments to the SVPA, at the same time there existed a reasonable possibility that Castillo and others who were being represented by the Public Defender, and who were subject to pending SVP trials, might succeed in having their petitions dismissed – hence releasing these individuals from the strictures of the SVPA – based upon the state's failure to bring the matters to trial in a reasonably timely fashion."[222] "Furthermore," the court stated, "unlike the more typical cases involving stipulations, in this case the trial court did not merely accept and enforce a stipulation agreed to by the parties; the court actually signed the stipulation as a participant in the agreement." Therefore, the California Supreme Court in *People v. Castillo* concluded that the stipulation entered into by the District Attorney of the County of Los Angeles, the Public Defender for the County of Los Angeles, and the Presiding Judge of the Superior Court for the County of Los Angeles should be enforceable by its terms. The Supreme Court therefore reinstated the two-year commitment order of the trial court.

As discussed above, in *Borquez v. Superior Court*[223] the appellate court found that "the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date." For purposes of determining whether a person is an SVP, "the last event necessary is the person's mental state *at the time of the commitment*."[224] The California Supreme Court in *Castillo, supra*, cited *Borquez* as one of several appellate cases handed down after the stipulation at issue was negotiated and signed, but which would come to aid in clarifying the "legal uncertainties created by the 2006 amendments to the SVPA."[225] However, ultimately the court in *Castillo* held that despite *Borquez's* conclusion that no retroactivity problem in fact existed, the stipulation was enforceable against the County of Los Angeles because the stipulation was entered into in good faith, and reflected a then-existing uncertainty in the application of the law. Therefore, despite the holding in *Borquez*, the County of Los Angeles is bound by the stipulation to apply two year commitment terms for those individuals subject to SVP petitions pending at the time the changes were enacted, and for 24 months thereafter, based on the plain language of the stipulation.

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[220] (2009) 174 Cal.App.4th 920.

[221] Exhibit X, *Castillo, supra*, at pp. 161-162; Fn. 17.

[222] *Id*, at p. 163 [citing *People v. Litmon* (2008) 162 Cal.App.4th 383, which held that the SVPA does not attach a "speedy trial" right, but a person alleged by petition to be an SVP has a right to be heard at a meaningful time.]

[223] *Borquez v. Superior Court* (Cal. Ct. App. 3d Dist. 2007) 156 Cal.App.4th 1275.

[224] *Id*, at pp. 1288-1289 [emphasis added].

[225] Exhibit X, *Castillo, supra*, at p. 163.

People v. Castillo makes clear that the County is bound by the terms of the stipulation in any remaining SVP cases that were pending at the time the changes to the SVPA were enacted. However, the court's finding that the stipulation is binding on the County has no effect on the Commission's determination of whether reimbursement is required pursuant to article XIII B, section 6. The related doctrines of res judicata and collateral estoppel may apply if certain elements are met, and injustice would not result. The California Supreme Court has described the elements of res judicata and collateral estoppel as follows:

> As generally understood, the doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy…The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.[226]

In this case, the doctrine is asserted against the Department of Finance, as the real party in interest representing the state. In *Castillo*, which the County would hold to be "the prior proceeding," the Attorney General was a party. The courts have long held that "the agents of the same government are in privity with each other, since they represent not their own rights but the right of the government."[227] Therefore, the element of privity is established, with respect to the party against whom collateral estoppel is now asserted, the state.

However, the issue raised in the present action is not identical to the issue litigated in the prior proceeding, and, accordingly, the prior proceeding did not result in a judgment on the merits of whether reimbursement was required pursuant to article XIII B, section 6 of the California Constitution. In *People v. Castillo*, there was no discussion of mandate reimbursement, and no finding that the stipulation constituted a reimbursable state-mandate. Accordingly, the judgment in *People v. Castillo* was limited to approving, and deeming enforceable against the County and the state, the stipulation entered into by the District Attorney, the Public Defender, and the Presiding Judge of the Superior Court. Therefore, collateral estoppel does not control the Commission's finding on this request for redetermination. Rather, the period of reimbursement must be analyzed and determined based on an analysis grounded purely in mandates law, including section 17570 of the Government Code. Government Code section 17570 establishes the period of reimbursement, based on the January 15, 2013 filing date, as the beginning of the prior fiscal year, or July 1, 2011. That period of reimbursement is unaffected by the Supreme Court's holding in *Castillo*, *supra*.

Based on the foregoing, the Commission finds that that (1) the California Supreme Court's finding does not bind the Commission to deny the request for redetermination, or to limit the

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[226] *Boeken v. Phillip Morris USA* (2010) 48 Cal.4th 788, at p. 797 [internal quotations and citations omitted] [Citing *People v. Barragan* (2004) 32 Cal.4th 236, 252–253].

[227] *Carmel Valley Fire Protection Dist. v. State of California* (Cal. Ct. App. 2d Dist. 1987) 190 Cal.App.3d 521, at p. 535 [citing *Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, at p. 398].

applicability of its findings; and (2) this decision is effective on July 1, 2011, pursuant to Government Code section 17570 and, thus reimbursement for six of the eight activities are no longer reimbursable effective July 1, 2011.

4. Constitutionality of Section 17570

Several comments have raised the constitutionality of section 17570.[228] In particular, the County Counsel of San Diego argues that "[t]he overly broad definition of subsequent change in law contained in Section 17570 is contrary to the purpose and intent of Article XIII B, section 6."[229] CSAC, in turn, maintains that the Constitution "requires, regardless of any contradicting statute, that the Legislature must either appropriate fund [*sic*] the mandate in the Budget Act or suspend its operation."[230]

The Commission, however, must presume that the Government Code statutes pertaining to the Commission's processes are constitutional, including section 17570, pursuant to article III, section 3.5 of the California Constitution.[231] The Commission therefore finds that the redetermination statutes are presumed constitutional and declines to address the specific constitutional concerns of the interested parties and persons.

IV. CONCLUSION

Based on the foregoing, the Commission partially approves the request for redetermination and concludes that the following activities do not constitute reimbursable state-mandated activities within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17556(f), beginning July 1, 2011:

- Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)
- Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation. (Welf. & Inst. Code, § 6601(i).)
- Preparation and filing of the petition for commitment by the county's designated counsel. (Welf. & Inst. Code, § 6601(i).)[232]

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[228] See Exhibit M, County of LA Comments, at p. 5; Exhibit H, CPDA Comments at p. 6; Exhibit N, Alameda County Public Defender's Comments; Exhibit L, LA County DA Comments, at pp. 11-12; and Exhibit O, County Counsel of San Diego Comments at p. 2.

[229] Exhibit BB, County Counsel of San Diego Comments at p. 2.

[230] Exhibit AA, CSAC Comments on Draft Staff Analysis, Second Hearing, at p. 3.

[231] *CSBA II, supra*, 192 Cal.App.4th 770, 795; *Porter v. City of Riverside* (1968) 261 Cal.App.2d 832, 837.

[232] The Test Claim Statement of Decision cites subdivision (j), but subdivision (j) addresses time limits, not a petition for commitment. The Commission therefore assumes that this is a typographical error, and that subdivision (i) was the intended citation for this activity.

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

The Commission further finds that the activity of preparation and attendance of county's designated counsel and indigent defense counsel at the probable cause hearing is not expressly included in or necessary to implement Proposition 83, and therefore remains a reimbursable state-mandated activity. Additionally, the transportation to and from court *for a probable cause hearing* on whether the person is a sexually violent predator is not expressly included in or necessary to implement Proposition 83, and remains a reimbursable state-mandated activity.

Therefore the following activities, required for purposes of probable cause hearings, remain reimbursable state-mandated costs.

- Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)
- Transportation for each potential sexually violent predator to and from a secured facility only to the *probable cause hearing* on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)

  This activity does not include transportation for purposes other than the probable cause hearing for potential sexually violent predators awaiting trial.

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RE: **Adopted Statement of Decision**

Mandate Redetermination Request, 12-MR-01
Sexually Violent Predators, (CSM-4509)
Welfare and Institutions Code Sections 6601, 6602, 6603, 6604, 6605, and 6608
Statutes 1995, Chapter 762; Statutes 1995, Chapter 763; Statutes 1996, Chapter 4
As Modified by Proposition 83, General Election, November 7, 2006
California Department of Finance, Requester

On December 6, 2013, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

Heather Halsey, Executive Director

Dated: December 13, 2013