ITEM 4

TEST CLAIM
FINAL STAFF ANALYSIS

Penal Code Section 13519.4

Statutes 2000, Chapter 684

Racial Profiling: Law Enforcement Training
(01-TC-01)

County of Sacramento, Claimant

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Statu 2000, Chapter 684

Racial Profiling: Law Enforcement Training
(01-TC-01)

County of Sacramento, Claimant

EXECUTIVE SUMMARY

Background

This test claim addresses legislation that prohibits law enforcement officers from engaging in racial profiling and establishes racial profiling training requirements for law enforcement officers, with the curriculum developed by the Commission on Peace Officer Standards and Training ("POST").

Law enforcement officers are required to take a basic training course prior to exercising their duties as peace officers, and must subsequently complete 24 hours of continuing professional training every two years. The test claim statute, as interpreted by POST, required a five-hour initial racial profiling training course and a two-hour refresher course every five years. Both of these courses can be certified by POST to allow local agencies to apply the training hours towards the 24-hour continuing professional training requirement. Since POST can certify a course retroactively, it is possible for racial profiling courses that were developed and presented prior to the time POST developed its curriculum to be certified to meet the requirements of the test claim statute.

The test claim presents the following issues:

- Is the test claim statute subject to article XIII B, section 6 of the California Constitution?
- Does the test claim statute impose a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?
- Does the test claim statute impose "costs mandated by the state" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

The Test Claim Statute Imposes a Partially Reimbursable State-Mandated Program on Local Agencies

Because the initial five-hour racial profiling training was incorporated into the basic training course for law enforcement officers as of January 1, 2004, and there is no state mandate for local agencies to provide basic training to new recruits, the initial five-hour training can only

be required of incumbent officers who completed basic training on or before January 1, 2004. The activity is a mandate on the local agency because the Fair Labor Standards Act requires employers to compensate their employees for work-related mandatory training when such training occurs during the employees' regular working hours. Additionally, a Memorandum of Understanding between the employer and employee organization, in effect as of January 1, 2001, can require the employer to compensate the employee for work-related mandatory training when it occurs outside the employee's regular working hours.

However, the test claim statute imposes costs mandated by the state *only* to the extent that attending the initial five-hour racial profiling training course causes the officer to exceed his or her 24-hour continuing education requirement, when the two-year cycle that included the initial five-hour racial profiling course occurs between January 1, 2002 and July 2004, and the continuing education for that cycle was attended *prior to* the initial racial profiling course.

The two-hour racial profiling refresher course does not impose costs mandated by the state since that course is only required every five years, beginning after the initial course is provided, and officers can readily incorporate the two-hour course into their 24-hour, two-year continuing education requirement.

Conclusion

Staff concludes that Penal Code section 13519.4, subdivision (f), which mandates the five-hour initial racial profiling training, imposes a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, for up to five hours of initial racial profiling training under the following conditions:

1. the training is provided to incumbent law enforcement officers who completed basic training on or before January 1, 2004;
2. the training is certified by POST;
3. the training is attended during the officer's regular work hours, or training is attended outside the officer's regular work hours *and* there is an obligation imposed by an MOU existing on January 1, 2001, which requires that the local agency pay for continuing education training; and
4. the training causes the officer to exceed his or her 24-hour continuing education requirement, when the two-year continuing education cycle that included the initial five-hour racial profiling training occurs between January 1, 2002 and July 2004, and the continuing education for that cycle was attended *prior to* the initial racial profiling course.

Staff further concludes that Penal Code section 13519.5, subdivision (i), which mandates the two-hour refresher racial profiling training, does not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, because it does not impose "costs mandated by the state."

Recommendation

Staff recommends the Commission adopt this analysis and partially approve this test claim.

STAFF ANALYSIS

Claimant

County of Sacramento

Chronology

08/13/01	County of Sacramento filed test claim with the Commission on State Mandates (Commission)
09/14/01	The Department of Finance (DOF) submitted comments on test claim with the Commission
09/24/01	POST filed comments on test claim with the Commission
06/18/02	County of Sacramento filed reply to DOF comments
08/03/05	Commission staff requested additional comments on test claim from POST
08/10/05	POST filed additional requested comments on test claim with the Commission
08/16/06	Commission staff issued draft staff analysis
09/05/06	DOF submitted comments to the Commission
10/13/06	Commission staff issued final staff analysis

Background

This test claim addresses legislation that prohibits law enforcement officers from engaging in racial profiling, as defined, and establishes racial profiling training requirements for law enforcement officers, with the curriculum developed by POST.

POST was established by the Legislature in 1959 to set minimum selection and training standards for California law enforcement.[1] The POST program is funded primarily by persons who violate the laws that peace officers are trained to enforce.[2] Participating agencies agree to abide by the standards established by POST and may apply to POST for state aid.[3]

In enacting the test claim statute (Stats. 2000, ch. 684), the Legislature found that racial profiling[4] is a practice that presents a great danger to the fundamental principles of a democratic society, is abhorrent and cannot be tolerated.[5] The Legislature further found that

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[1] Penal Code section 13500 et seq.

[2] *About California POST*, <http://www.POST.ca.gov>

[3] Penal Code sections 13522 and 13523.

[4] Racial profiling is defined as "the practice of detaining a suspect based on a broad set of criteria which casts suspicion on an entire class of people without any individualized suspicion of the particular person being stopped." (Pen. Code § 13519.4, subd. (d), as enacted in Stats. 2000, ch. 684.)

[5] Penal Code section 13519.4, subdivision (c)(1) (as enacted in Stats. 2000, ch. 684).

motorists who have been stopped by the police for no reason other than the color of their skin or their apparent nationality or ethnicity are the victims of discriminatory practices.[6]

The test claim statute required every law enforcement officer in the state to participate in expanded training regarding racial profiling, beginning no later than January 1, 2002.[7] The training shall be prescribed and certified by POST, in collaboration with a five-person panel appointed by the Governor, Senate Rules Committee and Speaker of the Assembly.[8]

Once the initial training on racial profiling is completed, each law enforcement officer in California, as described in subdivision (a) of Penal Code section 13510, who adheres to the standards approved by POST, is required to complete a two-hour refresher course every five years thereafter, or on a more frequent basis if deemed necessary.[9]

POST developed a five-hour approved curriculum to meet the initial training required by Penal Code section 13519.4, subdivision (f). The curriculum was designed to be presented in-house by a trained instructor within the law enforcement agency, who must complete a Racial Profiling Train-the-Trainer Course prior to facilitating the training. That course is given on an ongoing basis by the Museum of Tolerance in Los Angeles at no cost to the law enforcement agency, and the newly-trained instructor is provided with all necessary course material to train his or her own officers.[10]

The five-hour initial racial profiling training was incorporated into the Regular Basic Course[11] for peace officer applicants after January 1, 2004,[12] and POST suggested that incumbent peace officers complete the five-hour training by July 2004.[13] POST can certify a course retroactively,[14] thus it is possible for racial profiling courses that were developed and presented prior to the time POST developed its curriculum to be certified as meeting the requirements of Penal Code section 13519.4. Additionally, both the five-hour racial profiling course and the

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[6] Penal Code section 13519.4, subdivision (c)(2).

[7] Penal Code section 13519.4, subdivision (f); Statutes 2004, chapter 700 (SB 1234) renumbered subdivision *(f)* to subdivision *(g)*. Commission staff makes no findings regarding any substantive changes which may have been made in the 2004 legislation since it was not pled in the test claim. Accordingly, staff will continue to refer to this provision as "subdivision (f)" as originally set forth in the test claim statute.

[8] Penal Code section 13519.4, subdivision (f).

[9] Penal Code section 13519.4, subdivision (i).

[10] Comments filed by POST, August 10, 2005.

[11] Penal Code section 832.3 requires peace officers to complete a course of training prescribed by POST before exercising the powers of a peace officer.

[12] California Code of Regulations, title 11, section 1081, subdivision (a)(33).

[13] POST Legislative Training Mandates, updated August, 2004.

[14] California Code of Regulations, title 11, section 1052, subdivision (d).

two-hour refresher course can be certified by POST to allow agencies and officers to apply the training hours toward their 24-hour Continuing Professional Training requirement.[15, 16]

Prior Test Claim Decisions

In the past, the Commission has decided six other test claims addressing POST training for peace officers that are relevant for this analysis.

1. Domestic Violence Training

In 1991, the Commission denied a test claim filed by the City of Pasadena requiring new and veteran peace officers to complete a course regarding the handling of domestic violence complaints as part of their basic training and continuing education courses (*Domestic Violence Training*, CSM-4376). The Commission reached the following conclusions:

- the test claim statute does not require local agencies to implement a domestic violence training program and to pay the cost of such training;
- the test claim statute does not increase the minimum number of basic training hours, nor the minimum number of advanced officer training hours and, thus, no additional costs are incurred by local agencies; and
- the test claim statute does not require local agencies to provide domestic violence training.

2. Domestic Violence and Incident Reporting

In January 1998, the Commission denied a test claim filed by the County of Los Angeles requiring veteran law enforcement officers below the rank of supervisor to complete an updated course of instruction on domestic violence every two years (*Domestic Violence Training and Incident Reporting*, CSM-96-362-01). Although the Commission recognized that the test claim statute imposed a new program or higher level of service, the Commission found that local agencies incurred *no* increased "costs mandated by the state" in carrying out the two-hour course for the following reasons:

- *immediately before and after* the effective date of the test claim statute, POST's minimum required number of continuing education hours for the law enforcement officers in question *remained the same at 24 hours*. After the operative date of the test claim statute these officers must still complete at least 24 hours of professional training every two years;
- the two-hour domestic violence training update may be credited toward satisfying the officer's 24-hour minimum;
- the two-hour training is *neither* "separate and apart" *nor* "on top of" the 24-hour minimum;
- POST does not mandate creation and maintenance of a separate schedule and tracking system for this two-hour course;

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[15] Letter from POST, dated August 10, 2005.

[16] Title 11, section 1005(d)(1) requires peace officers to complete 24 hours of POST-qualifying training every two years.

- POST prepared and provides local agencies with the course materials and video tape to satisfy the training in question; and
- of the 24-hour minimum, the two-hour domestic violence training update is the only course that is legislatively mandated to be continuously completed every two years by the officers in question. The officers may satisfy their remaining 22-hour requirement by choosing from *the many elective courses* certified by POST.

That test claim was subsequently litigated and decided in the Second District Court of Appeal (*County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176 [*County of Los Angeles II*]), where the Commission's decision was upheld and reimbursement was ultimately denied.

3. Sexual Harassment Training in the Law Enforcement Workplace

In September 2000, the Commission approved in part and denied in part a test claim filed by the County of Los Angeles regarding sexual harassment training for peace officers (*Sexual Harassment Training in the Law Enforcement Workplace*, 97-TC-07). The test claim statute required POST to develop complaint guidelines to be followed by local law enforcement agencies for peace officers who are victims of sexual harassment in the workplace. The statute also required the course of basic training for law enforcement officers to include instruction on sexual harassment in the workplace, and veteran peace officers that had already completed basic training were required to receive supplementary training on sexual harassment in the workplace. The Commission reached the following conclusions:

- the sexual harassment complaint guidelines to be followed by local law enforcement agencies developed by POST constituted a reimbursable state-mandated program;
- the modifications to the course of basic training did not constitute a reimbursable state-mandated program since it did not impose any mandated duties on the local agency; and
- the supplemental training that required veteran peace officers to receive a one-time, two-hour course on sexual harassment in the workplace constituted a reimbursable state-mandated program when the training occurred during the employee's regular working hours, or when the training occurred outside the employee's regular working hours and was an obligation imposed by a Memorandum of Understanding existing on the effective date of the statute which required the local agency to provide or pay for continuing education training.[17]

[17] Reimbursable "costs mandated by the state" for this test claim included: 1) salaries, benefits, and incidental expenses for each veteran officer to receive a one-time, two-hour course on sexual harassment in the workplace; and 2) costs to present the one-time, two-hour course in the form of materials and trainer time.

4. Law Enforcement Racial and Cultural Diversity Training

In October 2000, the Commission denied a test claim filed by the County of Los Angeles regarding racial and cultural diversity training for law enforcement officers (*Law Enforcement Racial and Cultural Diversity Training,* 97-TC-06). The test claim statute required that, no later than August 1, 1993, the basic training course for law enforcement officers include adequate instruction, as developed by POST, on racial and cultural diversity. The Commission found that the test claim statute did not impose any mandated duties or activities on local agencies since the requirement to complete the basic training course on racial and cultural diversity is a mandate imposed only on the individual who seeks peace officer status.

5. Elder Abuse Training

In January 2001, the Commission approved in part and denied in part a test claim filed by the City of Newport Beach regarding elder abuse training for city police officers and deputy sheriffs (*Elder Abuse Training,* 98-TC-12). The test claim statute required city police officers or deputy sheriffs at a supervisory level and below who are assigned field or investigative duties to complete an elder abuse training course, as developed by POST, by January 1, 1999, or within 18 months of being assigned to field duties. The Commission reached the following conclusions:

- The elder abuse training *did constitute* a reimbursable state-mandated program when the training occurred during the employee's regular working hours, or when the training occurred outside the employee's regular working hours and was an obligation imposed by a Memorandum of Understanding existing on the effective date of the statute, which requires the local agency to provide or pay for continuing education training.[18]
- The elder abuse training *did not constitute* a reimbursable state-mandated program when applied to city police officers or deputy sheriffs hired after the effective date of the test claim statute, since such officers could apply the two-hour elder abuse training course towards their 24-hour continuing education requirement.

6. Mandatory On-The-Job Training For Peace Officers Working Alone

In July 2004, the Commission denied a consolidated test claim, filed by the County of Los Angeles and Santa Monica Community College District, regarding POST Bulletin 98-1 and POST Administrative Manual Procedure D-13, in which POST imposed field training requirements for peace officers that work alone and are assigned to general law enforcement patrol duties (*Mandatory On-The-Job Training For Peace Officers Working Alone*, 00-TC-19/02-TC-06). The Commission found that these executive orders do not impose a reimbursable

[18] Reimbursable "costs mandated by the state" for this test claim included: 1) costs to present the one-time, two-hour course in the form of trainer time and necessary materials provided to trainees; and 2) salaries, benefits and incidental expenses for each city police officer or deputy sheriff to receive the one-time, two-hour course on elder abuse in those instances where the police officer or deputy sheriff already completed their 24 hours of continuing education at the time the training requirement was imposed on the particular officer, and when a new two-year training cycle did not commence until after the deadline for that officer or deputy to complete elder abuse training.

state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the following reasons:

- state law does not require school districts and community college districts to employ peace officers and, thus, POST's field training requirements do not impose a state mandate on school districts and community college districts; and
- state law does not require local agencies and school districts to participate in the POST program and, thus, the field training requirements imposed by POST on their members are not mandated by the state.

Claimant's Position

The claimant contends that the test claim statute constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Claimant asserts that costs for the following activities will be incurred and are reimbursable:

- Development costs for the racial profiling training beginning in fiscal year 2000-2001, including travel, training, salary and benefit costs.
- Implementation costs beginning in fiscal year 2001-2002 for over 1,000 incumbent police officers to receive an eight-hour racial profiling class during regular business hours, and may include some overtime pay at one and one-half pay rates for a total of least $65,269.
- Set up and preparation time for instructors at an additional $3,000.
- Ongoing racial profiling training for new officers, as they are hired, which includes the eight-hour class during regular business hours and may include some overtime pay at one and one-half pay rates.
- Ongoing training for the refresher course.

Position of Department of Finance

DOF stated in its comments that the test claim is without merit because the test claim statute does not impose an obligation on any *law enforcement agency* to provide training; rather the statute imposes the requirement on the *law enforcement officer*. Further, no duty is imposed on any local government entity to pay the expense of training law enforcement officers, since the local agency has the option when hiring new law enforcement officers to hire only those persons who have already obtained the training. Finally, since the test claim statute specifies that refresher courses are required only of each law enforcement officer who adheres to the standards imposed by POST, there is no mandate because local agency participation in and compliance with POST programs and standards is optional.

DOF subsequently filed comments agreeing with the draft staff analysis.

Position of POST

In its September 17, 2001 comments, POST stated the following:

> Pursuant to the passage of Senate Bill 1102, [POST] is presently in the process of developing a prescribed course that will meet the intent of Senate

Bill 1102, as well as the needs of all law enforcement agencies that participate in the POST program.

> Local agencies participate in the POST program on a voluntary basis. There is no requirement for any department to present this training. Because the prescribed curriculum for this training is still in the design phase, it is not possible to calculate the cost of presenting such training or the fiscal impact on agencies in the POST program. Suffice it to say that POST is desirous of finding a cost-efficient means of presenting the training so that fiscal impact on the field is not onerous.

In its August 10, 2005 comments, POST stated that subject matter experts from throughout the state in concert with the Governor's Panel on Racial Profiling developed the *Racial Profiling: Issues and Impact* curriculum. This curriculum was designed to be presented in-house by a trained instructor within the law enforcement agency. The comments further stated:

> It is believed that in-house instructors provide validity to the training and can relate the material directly to agency policies.
>
> The curriculum was designed as a "course-in-a-box" and includes an instructor guide, facilitated discussion questions, class exercises, and a companion training video. … The course was designed to ensure training consistency throughout the State.
>
> Due to the complexity and sensitivity of the topic, POST regulation requires that each instructor complete the 24-hour Racial Profiling Train-the-Trainer Course prior to facilitating the training. The Training for Trainers course is presented on an on-going basis by the Museum of Tolerance in Los Angeles. The course is presented under contract and is of no cost to the [local law enforcement] agency. At the completion of the training, the instructor is provided with all necessary course material to train their own officers.

The mandated basic curriculum is five hours, and the refresher course is two hours. Both courses can be certified by POST to allow agencies to apply the training hours towards the 24-hour Continuing Professional Training requirement.

DISCUSSION

The courts have found that article XIII B, section 6 of the California Constitution[19] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[20] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[21] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[22] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[23]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[24] To determine if the program is new or imposes a higher level of service, the test claim statute must be compared with the legal requirements in effect immediately before the enactment of the test claim statute.[25] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[26]

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

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

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

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

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

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

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

[26] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878.

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[27]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[28] 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."[29]

The analysis addresses the following issues:

- Is the test claim statute subject to article XIII B, section 6 of the California Constitution?
- Does the test claim statute impose a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?
- Does the test claim statute impose "costs mandated by the state" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

Issue 1: Is the test claim statute subject to article XIII B, section 6 of the California Constitution?

A. Does the test claim statute mandate any activities?

In order for the test claim statute to impose a reimbursable state-mandated program under article XIII B, section 6, the statutory language must mandate an activity or task upon local governmental agencies. If the language does not mandate or require local agencies to perform a task, then article XIII B, section 6 is not triggered.

The test claim statute, Statutes 2000, chapter 684, amended Penal Code section 13519.4 by adding subdivisions (c)(1) through (c)(4), and subdivisions (d) through (j). Each of these new provisions is summarized below.

Subdivisions (c)(1) through (c)(4): These subdivisions state the Legislature's findings and declarations regarding racial profiling and do not mandate any activities.

Subdivision (d): This subdivision provides a definition for racial profiling and does not mandate any activities.

Subdivision (e): This subdivision states that law enforcement officers "shall not engage in racial profiling" and thus prohibits, rather than mandates, an activity.

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

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

[29] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Subdivision (f): This subdivision states that every law enforcement officer in the state shall participate in expanded racial profiling training that is prescribed and certified by POST, to begin no later than January 1, 2002; it further sets forth requirements for POST to collaborate with a five-person panel appointed by the Governor and the Legislature in developing the training. Thus, the provision does mandate an activity on local law enforcement officers. Whether this mandates an activity on local agencies is analyzed below.

Subdivision (g): This subdivision states that members of the panel established pursuant to subdivision (f) shall not be compensated except for reasonable per diem related to their work for panel purposes, and does not mandate any activities on local government agencies.

Subdivision (h): This subdivision specifies that certain requirements be incorporated into the racial profiling curriculum, but does not mandate any activities on local agencies.

Subdivision (i): This subdivision requires that once the initial racial profiling training is completed, each law enforcement officer as described in Penal Code section 13510, subdivision (a), who adheres to the standards approved by POST, complete a refresher course every five years thereafter or on a more frequent basis if deemed necessary. Thus, the provision does mandate an activity on specified law enforcement officers. Whether this mandates an activity on local agencies is analyzed below.

Subdivision (j): This provision requires the Legislative Analyst to conduct a study of data being voluntarily collected on racial profiling and provide a report to the Legislature. It does not mandate any activities on local agencies.

The Requirement for Initial Racial Profiling Training Mandates Activities on Local Agencies for Incumbent Officers Only

Penal Code section 13519.5, subdivision (f), states in pertinent part:

> Every law enforcement officer in this state shall participate in expanded training [in racial profiling] as prescribed and certified by [POST]. Training shall begin being offered no later than January 1, 2002.

The plain meaning of this provision requires that law enforcement officers participate in expanded training regarding racial profiling, that the training is prescribed and certified by POST, and that such training was required to begin being offered no later than January 1, 2002.

Claimant contends that subdivision (f) requires local agencies to develop a racial profiling course and is seeking reimbursement for travel, training, salary and benefit costs for developing an eight-hour racial profiling curriculum. The plain language of subdivision (f) does not require local agencies to develop the training; instead, the statute requires *POST*, in collaboration with a designated panel, to prescribe and certify the training. Thus, the activity of local agencies developing the racial profiling training is not mandated by the test claim statute and, therefore, is not reimbursable pursuant to article XIII B, section 6 of the California Constitution.

Claimant also contends that subdivision (f) requires local agencies to provide an initial racial profiling course to both its new recruits and incumbent officers, and is seeking reimbursement for salary and benefit costs, in some instances at overtime rates, for the time taken by these employees to attend an *eight-hour* course. However, POST states that it developed a *five-hour* course to meet the "expanded training" requirement in Penal Code section 13519.4,

subdivision (f). Moreover, as of January 1, 2004, that five-hour racial profiling curriculum was incorporated into the Regular Basic Course requirements established by POST.

For the reasons cited below, staff finds that there is no requirement for new recruits, i.e., employees who have not yet received basic training, to participate in racial profiling training. Furthermore, there is no requirement for the local agency to provide basic training to its new recruits.

New recruits who have not received basic training are not yet considered "law enforcement officers."[30] Since 1971, Penal Code section 832 has required "every *person* described in this chapter as a peace officer" to satisfactorily complete an introductory course of training prescribed by POST before they can exercise the powers of a peace officer.[31] Any "person" completing the basic training course "who does not become employed as a peace officer" within three years is required to pass an examination developed or approved by POST.[32] Since 1994, POST has been authorized to charge a fee for the basic training examination to each "applicant" who is not sponsored or employed by a local law enforcement agency.[33]

For those "persons" who have acquired prior equivalent peace officer training, POST is required to provide the opportunity for testing instead of the attendance at a "basic training academy or accredited college."[34] Moreover, "each *applicant* for admission to a basic course of training certified by [POST] who is *not* sponsored by a local or other law enforcement agency … shall be required to submit written certification from the Department of Justice … that the *applicant* has no criminal history background…."[35] [Emphasis added.]

Thus, until an employee completes basic training, he or she is not a "law enforcement officer" for purposes of the test claim statute, and there is no requirement on the individual to attend racial profiling training.

With regard to new recruits, DOF states that there is no mandate on the local agency to provide the racial profiling training or pay for it, but rather the requirement is on the new recruit alone. DOF further asserts that the claimant has the option of hiring officers already trained in racial profiling as part of the required basic training for peace officers. Staff agrees there is no mandate on local agencies to provide basic training to their law enforcement recruits.

Staff determined that there is no provision in statute or POST regulations that requires local agencies to provide basic training. Since 1959, Penal Code section 13510 et seq. required

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[30] Penal Code section 13510 establishes that, for the "purpose of raising the level of competence of local law enforcement officers," POST sets minimum standards governing the recruitment of various types of "peace officers." Thus, the terms "law enforcement officer" and "peace officer" are used interchangeably in the Penal Code.

[31] See also POST's regulation, Title 11, California Code of Regulations, section 1005, subdivision (a)(1).

[32] Penal Code section 832, subdivision (e).

[33] Penal Code section 832, subdivision (g).

[34] *Ibid.*

[35] Penal Code section 13511.5.

POST to adopt rules establishing minimum standards relating to the physical, mental and moral fitness governing the recruitment of new local law enforcement officers.[36] In establishing the standards for training, the Legislature instructed POST to permit the required training to be conducted by *any* institution approved by POST.[37] In fact, there are 39 POST-certified basic training academies in California.

Staff acknowledges that some local law enforcement agencies hire persons who have not yet completed their basic training course, and then sponsor or provide the training themselves. However, other agencies require the successful completion of the POST Regular Basic Course before the applicant will be considered for the job.[38] There are several community colleges approved by POST to offer the Regular Basic Course, that are open to any interested individual, whether or not employed or sponsored by a local agency.

Thus, staff further finds that since the initial five-hour racial profiling training is, as of January 1, 2004, a required element of the basic training curriculum, and there is no state mandate for local agencies to provide to new recruits their basic training, the test claim statute does not mandate local agencies to incur costs to send their new recruits to racial profiling training as part of the basic training course.

With regard to claimant's incumbent law enforcement officers who *had* completed basic training on or before January 1, 2004, and thus did not receive the initial racial profiling training in their basic training, DOF asserts that the test claim statute does not impose any obligations on local agencies to provide the training. Instead, DOF contends, the statute imposes a training obligation on law enforcement officers alone.

Subdivision (f) requires "every law enforcement officer in this state" to attend expanded training in racial profiling. The plain language of the test claim statute does not mandate or require local agencies to provide or pay for the racial profiling training, and there are no other state statutes, regulations, or executive orders requiring local agencies to pay for continuing education training for every law enforcement officer in the state.

However, with regard to the POST-prescribed and certified initial five-hour racial profiling course, POST states the following:

> The curriculum was designed to be presented in-house by a trained instructor within the law enforcement agency. It is believed that in-house instructors provide validity to the training and can relate the material directly to agency policies....
>
> Due to the complexity and sensitivity of the topic, POST regulation requires that each instructor complete the 24-hour Racial Profiling Train-the-Trainer Course prior to facilitating the training. The Training for Trainers course is presented on an on-going basis by the Museum of Tolerance in Los Angeles. The course is presented under contract and is of no cost to the agency. At

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[36] These standards are set forth in Title 11, California Code of Regulations.

[37] Penal Code section 13511.

[38] See Job Bulletin for Police Officer for City of San Carlos.

> the completion of the training, the instructor is provided with all the necessary course material to train their own officers.
>
> The course was originally planned to be four hours in length. After two pilot presentations it was determined that the material could not be covered sufficiently in four hours; therefore, an additional hour was added, which extended the mandated curriculum to five hours.

Thus, there is evidence in the record that to implement the training requirement, there is an expectation on the local agency to be involved with providing the racial profiling training.[39] Although claimant states that it developed an *eight-hour* racial profiling course, POST's initial racial profiling curriculum is a *five-hour course* and represents both the minimum and maximum number of hours mandated by the state. Any hours exceeding five for this training is within the discretion of the local agency, and therefore cannot be considered an activity mandated by the state.

Claimant asserts that even if the training requirement is imposed upon the *officer*, the *employer* is responsible for compensating the employee for the training time — as if he or she is working — pursuant to the Fair Labor Standards Act ("FLSA"). Staff agrees that, where law enforcement officers are *employees* of local agencies, the FLSA is relevant to this claim.

The FLSA generally provides employee protection by establishing the minimum wage, maximum hours and overtime pay under federal law. In 1985, the United States Supreme Court found that the FLSA applies to state and local governments.[40] The FLSA is codified in Title 29 of the Code of Federal Regulations (CFR).

Claimant contends that since racial profiling training is required by the state and is not voluntary, training time needs to be counted as compensable working time under 29 CFR section 785.27, and treated as an obligation imposed on the local agency. Section 785.27 states the following:

> Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:
>
> (a) Attendance is outside of the employee's regular working hours;
>
> (b) Attendance is in fact voluntary;
>
> (c) The course, lecture or meeting is not directly related to the employee's job; and
>
> (d) The employee does not perform any productive work during such attendance.

All four criteria must be met for the employer to avoid paying the employee for time spent in training courses. Here, attendance at the initial course is *not* voluntary, and the racial

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[39] POST regulation requires trainers from the local agency to attend a 24-hour "Train-the-Trainer Racial Profiling Course" prior to providing the initial five-hour racial profiling course. The claimant has not requested reimbursement for this activity, and staff therefore makes no finding on it.

[40] *Garcia v. San Antonio Metropolitan Transit Authority et al.* (1985) 469 U.S. 528.

profiling course *is* directly related to the employee's job. Therefore, staff agrees with the claimant that, pursuant to this section, local agencies are required to compensate their employees for racial profiling training *if the training occurs during the employee's regular working hours.*

Accordingly, staff finds that local agencies are mandated by the state through Penal Code section 13519.4, subdivision (f), to compensate incumbent officers for attendance at the initial racial profiling training *if* the training occurs during regular work hours. However, because POST has designated five hours as the necessary amount of time to present the curriculum, any claims must be based on a five-hour course.

In 1987, an exception to the FLSA was enacted which provides that time spent by law enforcement officer employees of state and local governments in training required for certification by a higher level of government that occurs *outside of the employee's regular working hours* is noncompensable. The relevant provisions, located in 29 CFR section 553.226, state in pertinent part the following:

> (a) The general rules for determining the compensability of training time under the FLSA are set forth in §§ 785.27 through 785.32 of this title.
>
> (b) While time spent in attending training required by an employer is normally considered compensable hours of work, following are situations where time spent by employees of State and local governments in required training is considered to be noncompensable:
>
> ...
>
> *(2) Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of government (e.g., where a State or county law imposes a training obligation on city employees), does* ***not*** *constitute compensable hours of work.* (Emphasis added.)

Staff finds that 29 CFR section 553.226, subdivision (b)(2), applies when the racial profiling training is conducted outside the employee's regular working hours. In such cases, the local agency is not required to compensate the employee. Rather, the cost of compensating officers attending racial profiling training *becomes a term or condition of employment subject to the negotiation and collective bargaining* between the local agency and the employee.

Collective bargaining between local agencies and their employees is governed by the Meyers-Milias-Brown Act. (Gov. Code, §§ 3500 et seq.) The Act requires the governing body of the local agency and its representatives to meet and confer in good faith regarding wages, hours and other terms of employment with representatives of employee organizations. If an agreement is reached, the parties enter into a collective bargaining agreement, or memorandum of understanding (MOU). Only upon the approval and adoption by the governing board of the local agency, does the MOU become binding on the local agency and its employees.[41]

Although paying for racial profiling training conducted outside the employee's regular working hours is an issue negotiated at the local level, staff recognizes that the California Constitution

[41] Government Code sections 3500, 3503, and 3505.1.

prohibits the Legislature from impairing obligations or denying rights to the parties of a valid, binding contract absent an emergency.[42] In the present case, the test claim statute became effective on January 1, 2001, and was not enacted as an urgency measure.

Accordingly, staff finds that compensating the officer for the initial racial profiling training outside the employee's regular working hours is an obligation imposed on those local agencies that, as of January 1, 2001 (the effective date of the statute), are bound by an existing MOU, which requires the agency to pay for continuing education training.

However, when the existing MOU terminates, or in the case of a local agency that is not bound by an existing MOU on January 1, 2001, requiring that the agency pay for continuing education training, the initial racial profiling training conducted outside the employee's regular working hours becomes a negotiable matter subject to the discretion of the local agency. Under those circumstances, staff finds that the requirement to pay for the initial racial profiling training is not an obligation imposed by the state on a local agency.

As a final matter, the test claim statute states that the training shall begin *no later than* January 1, 2002, which does not preclude the agency from providing racial profiling training sooner than that date. Where a local agency conducted the training *prior to* POST releasing its "prescribed and certified" racial profiling training, up to five hours of such training could be considered a mandated activity if the curriculum is approved and certified by POST as meeting the POST specifications for the racial profiling topic. POST can certify such training curriculum *retroactively*, pursuant to California Code of Regulations, title 11, section 1052.

In conclusion, staff finds that Penal Code section 13519.4, subdivision (f), mandates *up to five hours* of racial profiling training under the following conditions:

1. the training is provided to incumbent law enforcement officers who completed basic training on or before January 1, 2004;
2. the training is certified by POST; and
3. the training is attended during the employee's regular working hours, or the training occurs outside the employee's regular working hours *and* there is an obligation imposed by an MOU existing on January 1, 2001 (the effective date of the test claim statute), which requires that the local agency pay for continuing education training.

<u>The Requirement for Refresher Racial Profiling Training Mandates an Activity on Local Agencies</u>

Penal Code section 13519.4, subdivision (i), states the following:

> Once the initial basic training [for racial profiling] is completed, each law enforcement officer in California as described in subdivision (a) of Section 13510 who adheres to the standards approved by [POST] shall be required to complete a refresher course every five years thereafter, or on a more frequent basis if deemed necessary, in order to keep current with changing racial and cultural trends.

[42] California Constitution, article 1, section 9.

Claimant is requesting reimbursement for salary and benefit costs, in some instances at overtime rates, for the officers' time spent in attending the refresher racial profiling course. POST has certified that two hours is needed for this refresher racial profiling course.

Since this requirement is applicable to law enforcement officers of specified local agencies that adhere to the standards approved by POST, DOF asserts there is no mandate because belonging to POST is *voluntary* on the part of local agencies. However, in *County of Los Angeles II*, a recent California Second District Court of Appeal case regarding reimbursement for peace officer training mandated by state statute, the court stated that "[w]e agree that POST certification is, for all practical purposes, not a 'voluntary' program..."[43]

Additionally, as with the five-hour racial profiling course for incumbent law enforcement officers, FLSA similarly requires local agencies to compensate their officers for racial profiling training when it occurs during regular work hours and in some cases outside the employee's regular working hours depending on the MOU negotiated between the employees and the local agency.

Thus, staff finds that Penal Code section 13519.4, subdivision (i), does mandate up to two hours of refresher racial profiling training for incumbent law enforcement officers under the conditions set forth under the subdivision (f) analysis of this issue.

B. Does the test claim statute constitute a "program?"

The test claim statute must also constitute a "program" in order to be subject to article XIII B, section 6 of the California Constitution. Courts have defined a "program" as one that carries out the governmental function of providing a service to the public, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[44]

The *County of Los Angeles I* case further explained that the term "program" as it is used in article XIII B, section 6, "was [intended] to require reimbursement to local agencies for the costs involved in carrying out functions *peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities." (Emphasis added.)[45] Accordingly, the court found that no reimbursement was required for increases in workers' compensation and unemployment insurance benefits applied to all employees of private and public businesses.[46]

Here, on the other hand, the requirements imposed by the test claim statute are carried out by state and local law enforcement agencies. Although both state and local entities are involved, these requirements do not apply "generally to all residents and entities in the state," as did the requirements for workers' compensation and unemployment insurance benefits in the *County of Los Angeles I* case.

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[43] *County of Los Angeles II, supra,* 110 Cal.App.4th 1176, 1194.

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

[45] *County of Los Angeles I, supra,* 43 Cal.3d 46, 56-57.

[46] *County of Los Angeles I, supra,* 43 Cal.3d 46, 57-58.

Therefore, staff finds that the test claim statute imposes requirements peculiar to government to implement a state policy which does not apply generally to all residents and entities in the state, and thus constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.

Issue 2: Does the test claim statute impose a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

The courts have held that a test claim statute imposes a "new program or higher level of service" when: a) the requirements are new in comparison with the preexisting scheme; *and* b) the requirements were intended to provide an enhanced service to the public.[47] Both of these conditions must be met in order to find that a "new program or higher level of service" was created by the test claim statute. The first step in making this determination is to compare the test claim statute with the legal requirements in effect immediately before the enactment of the test claim statute.

In 1990, the Legislature established requirements for law enforcement officers to be instructed in racial and cultural diversity.[48] As stated above, the test claim statute imposed additional requirements in Penal Code section 13519.4, subdivisions (f) and (i), to provide and compensate incumbent law enforcement officers for attending racial profiling training under certain circumstances. Those requirements are new in comparison to the preexisting scheme.

Furthermore, the test claim statute was intended to help prevent the "pernicious" practice of racial profiling by law enforcement officers,[49] which demonstrates the intent to provide an enhanced service to the public. Thus, the test claim statute does impose a "new program or higher level of service."

Issue 3: Does the test claim statute impose "costs mandated by the state" on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

For the mandated activities to impose a reimbursable, state-mandated program, two additional elements must be satisfied. First, the activities must impose costs mandated by the state pursuant to Government Code section 17514. Second, the statutory exceptions to reimbursement listed in Government Code section 17556 cannot apply.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service.

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

[48] Statutes 1990, Chapter 480; Penal Code section 13519.4.

[49] Penal Code section 13519.4, subdivision (c).

The Initial Racial Profiling Training Requirement Imposes "Costs Mandated by the State"

The test claim alleged costs of $65,269 for providing the initial racial profiling training for incumbent officers pursuant to subdivision (f). Thus, there is evidence in the record, signed under penalty of perjury, that there are increased costs as a result of the test claim statute.

However, POST stated that the initial racial profiling course can be "certified by POST which would allow agencies to apply the training hours towards the 24-hour Continuing Professional Training requirement."[50] POST regulations provide that local law enforcement officers must receive at least 24 hours of Advanced Officer continuing education training every two years.[51] Thus, the issue is whether there are *increased costs* as a result of the test claim statute, or whether any costs can be absorbed into *existing* 24-hour continuing education requirement.

In 1998, the Commission analyzed whether a statute that required continuing education training for peace officers imposed "costs mandated by the state" in the *Domestic Violence Training and Incident Reporting* (*"Domestic Violence"*) test claim. That test claim statute included the following language: "The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local government."

The issue was whether the domestic violence training could be absorbed into the 24-hour requirement which would ultimately result in no increased costs. The Commission determined that if the domestic violence training course caused an increase in the total number of required continuing education hours, then the increased costs associated with the new training course were reimbursable as "costs mandated by the state." On the other hand, if there was no overall increase in the total number of continuing education hours, then there were no increased training costs associated with the training course. Instead, the cost of the training course was accommodated or absorbed by local law enforcement agencies within their existing resources available for training.

The Commission found that there were no "costs mandated by the state" in the *Domestic Violence* test claim. The claim was denied for the following reasons:

- Immediately before and after the effective date of the test claim statute, POST's minimum required number of continuing education hours for the law enforcement officers in question remained the same at 24 hours. After the operative date of the test claim statute these officers must still complete at least 24 hours of professional training every two years.
- The two-hour domestic violence training update may be credited toward satisfying the officer's 24-hour minimum.
- The two-hour training is neither "separate and apart" nor "on top of" the 24-hour minimum.

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[50] Letter from POST, dated August 10, 2005.

[51] California Code of Regulations, title 11, section 1005, subdivision (d).

- POST does not mandate creation and maintenance of a separate schedule and tracking system for this two-hour course.
- POST prepared and provides local agencies with the course materials and video tape to satisfy the training in question.
- Of the 24-hour minimum, the two-hour domestic violence training update is the only course that is legislatively mandated to be continuously completed every two years by the officers in question. The officers may satisfy their remaining 22-hour requirement by choosing from the many elective courses certified by POST.

That test claim was subsequently litigated and decided in the Second District Court of Appeal (*County of Los Angeles II, supra*), where reimbursement was ultimately denied. The court stated the following:

> POST training and certification is ongoing and extensive, and local law enforcement agencies may chose from a menu of course offerings to fulfill the 24-hour requirement. Adding domestic violence training obviously may displace other courses from the menu, or require the adding of courses. Officer downtime will be incurred. However, merely by adding a course requirement to POST's certification, the state has not shifted from itself to the County the burdens of state government. Rather, it has directed local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training.
>
> ...
>
> While we are mindful that legislative disclaimers, findings and budget control language are not determinative to a finding of a state mandated reimbursable program, [citations omitted], our interpretation is supported by the hortatory statutory language that, "The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local government."[52]

Here, staff finds the initial five-hour racial profiling course, when demonstrated that it exceeds the 24-hour continuing education requirement, does impose "costs mandated by the state" for the following reasons.

First, unlike the domestic violence training statute, the test claim statute did not establish legislative intent that racial profiling training be funded from existing resources and that annual training costs of local government should not be increased. Moreover, although POST states it is *possible* to certify the initial racial profiling training and make it part of the 24-hour continuing education, it did not interpret the test claim statute to *require its inclusion* within the 24-hour continuing education requirement as it did with the *Domestic Violence* test claim.

Second, the test claim statute requires a one-time initial five-hour racial profiling training to begin by January 1, 2002, and the Legislative Training Mandates document issued by POST suggests that incumbent officers complete the initial racial profiling course by July 2004.

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[52] *County of Los Angeles II, supra,* 110 Cal.App.4th 1176, 1194-1195.

Thus, although not mandated, POST recommends the initial training be completed within a specified period of time. Such administrative interpretations of statutes are accorded great weight and respect.[53]

Third, claimant asserts that "an officer can readily exceed the 24 hours mandatory training required every two years, even prior to this new training mandate."[54] It is possible that some law enforcement officers could have already met or been close to meeting their 24-hour continuing education requirements within their particular two-year continuing education cycle *before* they were required to take the initial racial profiling training.

Based on the foregoing, staff finds that Penal Code section 13519.4, subdivision (f), imposes "costs mandated by the state" to the extent that the initial racial profiling course causes law enforcement officers to exceed their 24-hour continuing education requirement, when the two-year cycle that included the initial five-hour racial profiling course occurs between January 1, 2002 and July 2004, and the continuing education for that cycle was attended *prior to* the initial racial profiling course.

<u>None of the Exceptions in Government Code Section 17556 Are Applicable to Deny Reimbursement for the Initial Racial Profiling Training</u>

For the reasons stated below, staff finds that none of the exceptions apply to deny the portion of the test claim dealing with Penal Code section 13519.4, subdivision (f).

Government Code section 17556, subdivision (c), states that the Commission shall not find costs mandated by the state if, after a hearing, the Commission finds that:

> The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government…

Here, because the federal FLSA requires employee training time to be compensated under certain circumstances, this raises the issue of whether the obligation to pay for racial profiling training is an obligation imposed by the state, or an obligation arising out of existing federal law through the provisions of the FLSA.

Staff finds that there is no federal statutory or regulatory scheme requiring local agencies to provide racial profiling training to incumbent officers. Rather, what triggers the provisions of the FLSA requiring local agencies to compensate incumbent officers for racial profiling training is the test claim statute. If the state had not created this program, incumbent officers would not be required to receive racial profiling training, and local agencies would not be obligated to compensate those officers for such training. Therefore, Government Code section 17556, subdivision (c), is inapplicable to deny the claim.

Government Code section 17556, subdivision (e), states that the Commission shall not find costs mandated by the state if, after a hearing, the Commission finds that:

> The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that

[53] *Hoechst Celanese Corp. V. Franchise Tax Board* (2001) 25 Cal.4th 508.

[54] Declaration of Deputy Alex Nishimura, dated June 18, 2002.

> result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

The Penal Code provides authority for POST to allocate from the Peace Officers' Training Fund state aid to cities, counties or districts which have applied and qualified for aid.[55] Although any aid provided under the Penal Code for racial profiling training must be considered an offset to reimbursable amounts, there is no evidence in the record that this provision does not result in "no net costs" or "sufficient" funding for the mandated activities. Therefore, Government Code section 17556, subdivision (e), is inapplicable to deny the claim.

<u>The Racial Profiling Refresher Training Does Not Impose "Costs Mandated by the State"</u>

Claimant asserted in the test claim that it would incur ongoing costs in employee salaries and benefits to provide the refresher course "every five years, or on a more frequent basis if deemed necessary, in order to keep current with changing racial and cultural trends."

However, POST stated that the two-hour racial profiling refresher course can be "certified by POST which would allow agencies to apply the training hours towards the 24-hour Continuing Professional Training requirement."[56] Thus, the issue is whether there are *increased costs* as a result of the requirement for a racial profiling refresher course, or whether those costs can be absorbed into the *existing* 24-hour continuing education requirement.

Unlike the five-hour initial racial profiling course required under subdivision (f), staff finds the two-hour racial profiling refresher course required under subdivision (i) *does not* impose "costs mandated by the state" for the following reasons.

As determined by POST, the two-hour racial profiling refresher course, required to be completed every five years, applies to the existing 24-hour continuing education training requirement imposed on officers. In *County of Los Angeles II*, the court focused on the fact that any increased costs resulting from the two-hour domestic violence update training, required only every *two* years, were "incidental" to the cost of administering the POST certification. The court stated:

> Thus, while the County may lose some flexibility in tailoring its training programs, such loss of flexibility does not rise to the level of a state mandated reimbursable program because the loss of flexibility is incidental to the greater goal of providing domestic violence training. Every increase in cost that results from a new state directive does not automatically result in a valid subvention claim where, as here, the directive can be complied with by a minimal reallocation of resources within the entity seeking reimbursement.[57]

Since the two-hour racial profiling refresher training is only required every *five* years, beginning after the initial course is provided, officers can more readily plan for incorporating the training into their 24-hour, two-year continuing education requirement.

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[55] Penal Code section 13523.

[56] Letter from POST, dated August 10, 2005.

[57] *County of Los Angeles II, supra,* 110 Cal.App.4th 1176, 1194-1195.

Based on the foregoing, staff finds that Penal Code section 13519.4, subdivision (i), does not impose "costs mandated by the state."

Conclusion

Staff finds that Penal Code section 13519.4, subdivision (f), imposes a reimbursable state-mandated program within the meaning of article XIII, section 6 of the California Constitution, and Government Code section 17514, for *up to five hours* of initial racial profiling training under the following conditions:

1. the training is provided to incumbent law enforcement officers who completed basic training on or before January 1, 2004;
2. the training is certified by POST;
3. the training is attended during the officer's regular work hours, or training is attended outside the officer's regular work hours *and* there is an obligation imposed by an MOU existing on January 1, 2001, which requires that the local agency pay for continuing education training; and
4. the training causes the officer to exceed his or her 24-hour continuing education requirement, when the two-year continuing education cycle that included the initial five-hour racial profiling training occurs between January 1, 2002 and July 2004, and the continuing education for that cycle was attended *prior to* the initial racial profiling course.

Staff further finds that Penal Code section 13519.5, subdivision (i), which mandates the two-hour refresher racial profiling training, does not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, because it does not impose "costs mandated by the state."

Recommendation

Staff recommends the Commission adopt this analysis and partially approve the test claim.

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EXHIBIT A

State of California
COMMISSION ON STATE MANDATES
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Sacramento, CA 95814
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Claim No. 01-TC-01

TEST CLAIM FORM

Local Agency or School District Submitting Claim

County of Sacramento

Contact Person

Nancy Gust, SB-90 Coordinator

Telephone No.

(916) 874-6032
Fax (916) 874-5263

Address

711 G Street
Sacramento, CA 95814

Representative Organization to be Notified

California State Association of Counties

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

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

Chapter 684, Statutes of 2000

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

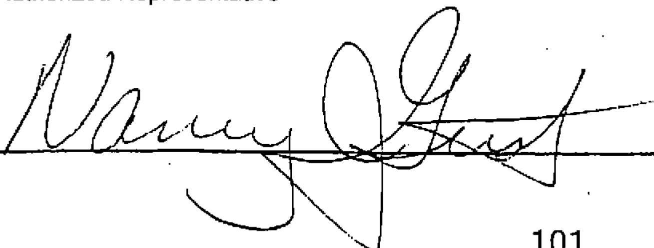
Name and Title of Authorized Representative

Nancy Gust, SB-90 Coordinator

Telephone No.

(916) 874-6032

Signature of Authorized Representative



Date

8/13/01

BEFORE THE
COMMISSION ON STATE MANDATES

Test Claim of:
County of Sacramento

Racial Profiling: Law Enforcement Training

Chapter 684, Statutes of 2000

STATEMENT OF THE CLAIM

A. MANDATE SUMMARY

Prior to the revision in 2000 it was required under Penal Code Section 13519.4 for a course to be developed on the racial and cultural differences among the residents of the state of California. It further stated that the training was to start no later than August 1, 1993 and include adequate instruction on racial and cultural diversity in order to foster mutual respect and cooperation between law enforcement and members of all racial and cultural groups. Cultural diversity included gender and sexual orientation issues.

Chapter 684, Statutes of 2000, on which this test claim is based, added new training requirements to Penal Code Section 13519.4. It requires that every law enforcement officer in this state shall participate in expanded training as prescribed and certified by the Commission on Peace Officers Standards and Training to address the pernicious practice of racial profiling. "Racial Profiling" for the purposes of this section, is the practice of detaining a suspect based on a broad set of criteria which casts suspicion on an entire class of people without any individualized suspicion of the particular person being stopped. It also states the Commission will work with a five-person panel, members which shall be selected from the various cultural organizations, to develop the curriculum. That curriculum shall utilize the Tools for Tolerance for Law Enforcement Professionals framework and shall include and examine the patterns, practices, and protocols that make up racial profiling.

As passed, Penal Code, Section 13519.4 reads as follows:

(a) On or before August 1, 1993, the commission shall develop and disseminate guidelines and training for all law enforcement officers in California as described in subdivision (a) of Section 13510 and who adhere to the standards approved by the commission, on the racial and cultural differences among the residents of this state. The course or courses of instruction and the guidelines shall stress understanding and respect for racial and cultural differences, and development of effective, noncombative methods of carrying out law enforcement duties in a racially and culturally diverse environment.

(b) The course of basic training for law enforcement officers shall, no later than August 1, 1993, include adequate instruction on racial and cultural diversity in order to foster mutual respect and cooperation between law enforcement and members of all racial and cultural groups. In developing the training, the commission shall consult with appropriate groups and individuals having an interest and expertise in the field of cultural awareness and diversity.

(c) For the purposes of this section, "culturally diverse" and "cultural diversity" include, but are not limited to, gender and sexual orientation issues. The Legislature finds and declares as follows:

(1) Racial profiling is a practice that presents a great danger to the fundamental principals of a democratic society. It is abhorrent and cannot be tolerated.

(2) Motorists who have been stopped by the police for no reason other than the color of their skin or their apparent nationality or ethnicity are the victims of discriminatory practices.

(3) It is the intent of the Legislature in enacting the changes to Section 13519.4 of the Penal Code made by the act that added this subdivision that more than additional training is required to address the pernicious practice of racial profiling and that enactment of this bill is in no way dispositive of the issue of how the state should deal with racial profiling.

(4) The working men and women in California law enforcement risk their lives every day. The people of California greatly appreciate the hard work and dedication of law enforcement officers in protecting public safety. The good name of these officers should not be tarnished by the actions of those few who commit discriminatory practices.

(d) "Racial profiling," for the purposes of this section, is the practice of detaining a suspect based on a broad set of criteria which casts suspicion on an entire class of people without any individualized suspicion of the particular person being stopped.

(e) A law enforcement officer shall not engage in racial profiling.

(f) Every law enforcement officer in this state shall participate in expanded training as prescribed and certified by the Commission on Peace Officers Standards and Training. Training shall begin being offered no later than January 1, 2002. The curriculum shall be created by the commission in collaboration with a five-person panel, appointed no later than March 1, 2001, as follows: the Governor shall appoint three members and one member each shall be appointed by the Senate Committee on Rules and the Speaker of the Assembly. Each appointee shall be appointed from among prominent members of the following organizations:

(1) State Conference of the NAACP.
(2) Brotherhood Crusade.
(3) Mexican American Legal Defense and Education Fund.
(4) The League of United Latin American Citizens.
(5) American Civil Liberties Union.
(6) Anti-Defamation League.
(7) California NOW.
(8) Asian Pacific Bar of California.
(9) The Urban League.

(g) Members of the panel shall not be compensated, except for reasonable per diem expenses related to their work for panel purposes.

(h) The curriculum shall utilize the Tools for Tolerance for Law Enforcement professionals framework and shall include and examine the patterns, practices, and protocols that make up racial profiling. This training shall prescribe patterns, practices, and protocols that prevent racial profiling. In developing the training, the commission shall consult with appropriate groups and individuals having an interest and expertise in the field of racial profiling. The course of instruction shall include, but not be limited to, adequate consideration of each of the following subjects:

(1) Identification of key indices and perspectives that make up cultural differences among residents in a local community.

(2) Negative impact of biases, prejudices, and stereotyping on effective law enforcement, including examination of how historical perceptions of discriminatory enforcement practices have harmed police-community relations.

(3) The history and the role of the civil rights movement and struggles and their impact on law enforcement.

(4) Specific obligations of officers in preventing, reporting, and responding to discriminatory or biased practices by fellow officers.

(5) Perspectives of diverse, local constituency groups and experts on particular cultural and police-community relations issues in a local area.

(i) Once the initial basic training is completed, each law enforcement officer in California as described in subdivision (a) of Section 13510 who adheres to the standards approved by the commission shall be required to complete a refresher course every five years thereafter, or on a more frequent basis if deemed necessary, in order to keep current with changing racial and cultural trends.

(j) The Legislative Analyst shall conduct a study of the data being voluntarily collected by those jurisdictions that have instituted a program of data collection with regard to racial profiling, including, but not limited to, the California Highway Patrol, the City of San Jose, and the City of San Diego, both to ascertain the incidence of racial profiling and whether data collection serves to address and prevent such practices, as well as to assess the value and efficacy of the training herein prescribed with respect to preventing local profiling. The Legislative Analyst may prescribe the manner in which the data is to be submitted and may request that police agencies collecting such data submit it in the requested manner. The Legislative Analyst shall provide to the Legislature a report and recommendations with regard to racial profiling by July 1, 2002.

With the passage of this mandate, the County of Sacramento has been required to provide each law enforcement officer assigned to the various departments with the required training. This has been accomplished by requiring each of the law enforcement officers to attend an eight hour class which was prepared in conjunction with POST and the panel appointed by POST. Additionally, each new recruit in the Sheriff's Training Academy programs for Sheriff's Deputy or Sheriff's Reserve Deputy Sheriff will receive a condensed two hour block of training.

B. LEGISLATIVE HISTORY PRIOR TO 1975

This penal code section was originally added by Chapter 480, Statutes of 1990 (Exhibit 2), amended by Chapter 1267, Statutes of 1992 (Exhibit 3) and amended again in the test claim statute and as such as no history prior to 1990.

C. SPECIFIC STATUTORY SECTIONS THAT CONTAIN THE MANDATED ACTIVITIES

As related above, the mandated activities are all contained within Penal Code, Section 13519.4. This section directly relates to the reimbursable provisions of this test claim.

D. COST ESTIMATES

1. Development Costs Commencing in Fiscal Year 2000-2001

The curriculum was developed for Sacramento County in conjunction with the Commission on Peace Officers Standards and Training. There will be travel, training, salary and benefit costs for this time in excess of $200.00.

2. Implementation Costs Commencing in Fiscal Year 2001-2002

In the County of Sacramento alone there are over 1,000 sworn peace officers, each of whom will receive the eight hour in-class training. This training will be conducted during regular business hours and may also involve the use of some overtime at time and one-half to pay officers to attend the required training on their days off or time other than regular shift time. The projected salary and benefit cost for all law enforcement officers in Sacramento County to attend the required training is a minimum of $65,269.

Additionally, there will be set-up and prep time for the instructors for an estimated additional cost of $3,000. Accordingly, the minimum costs for the first year's implementation is estimated to be $68,269.00.

2. On-Going Costs

There are approximately 250 new law enforcement officers hired each year by the County of Sacramento. For those new officers who have not received racial profiling training, this training will need to be provided, and their hourly rate plus benefits for eight hours will be the ongoing cost for each new officer. If the training cannot be accommodated during the regular work day, the training will have to be after hours, at time and a half plus benefits. There will also be a refresher training course every five years, or on a more frequent basis if deemed necessary, in order to keep current with changing racial and cultural trends..

E. REIMBURSABLE COSTS MANDATED BY THE STATE

The costs incurred by the County of Sacramento as a result of the statute included in the test claim are all reimbursable costs as such costs are "costs mandated by the State" under Article XIII B (6) of the California Constitution, and Section 17500 *et seq.* Of the Government Code. Section 17514 of the Government Code defines "costs mandated by the state", and specifies the following three requirements:

1. There are "increased costs which a local agency is required to incur after July 1, 1980."

2. The costs are incurred "as a result of any statute enacted on or after January 1, 1975."

3. The costs are the result of "a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution."

All three of the above requirements for finding costs mandated by the State are met as described previously herein.

F. MANDATE MEETS BOTH SUPREME COURT TESTS

The mandate created by these three statutes clearly meets both tests that the Supreme Court in the *County of Los Angeles* v. *State of California* (1987) created for determining what constitutes a reimbursable state mandated local program. Those two tests, which the Commission on State Mandates relies upon to determine if a reimbursable mandate exists, are the "unique to government" and the "carry out a state policy" tests. Their application to this test claim is discussed below.

Mandate Is Unique to Local Government

The statutory scheme set forth above imposes a unique requirement on local government. Only local government investigates, arrests and assists in the prosecution of criminal offenses. Consequently, only local government is responsible for training its peace officers. This mandate only applies to local government.

Mandate Carries Out a State Policy

From the legislation, it is clear that the state wishes all law enforcement officers to be cognizant and aware of the issues surrounding racial profiling. For that reason, the mandate was enacted, and thus carries out the state policy, through the requirement that all such officers be trained in the prevention of racial profiling.

In summary, the statute mandates that the County of Sacramento train its peace officers to prevent racial profiling. This training shall include and examine the patterns, practices, and protocols that make up racial profiling. It shall also prescribe patterns, practices and protocols that prevent racial profiling. To this end, the County of Sacramento has had to train its peace officers in order to comply with this legislation.

STATE FUNDING DISCLAIMERS ARE NOT APPLICABLE

There are seven disclaimers specified in Government Code, Section 17556 which could serve to bar recovery of "costs mandated by the State", as defined in Government Code, Section 17556. None of the seven disclaimers apply to this test claim:

1. The claim is submitted by a local agency or school district which requests legislative authority for that local agency or school district to implement the Program specified in the statutes, and that statute imposes costs upon the local agency or school district requesting the legislative authority.

2. The statute or executive order affirmed for the State that which had been declared existing law or regulation by action of the courts.

3. The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

4. The local agency or school district has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service.

5. The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the State mandate in an amount sufficient to fund the cost of the State mandate.

6. The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a Statewide election.

7. The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

None of the above disclaimers have any application to the County of Sacramento's test claim.

CONCLUSION

The enactment of Chapter 684, Statutes of 2000 imposed a new state mandated program and cost on the County of Sacramento, by requiring it to have all of its peace officers trained in recognizing and preventing racial profiling. The mandated program meets all of the criteria and tests for the Commission on State Mandates to find a reimbursable state mandated program. None of the so-called disclaimers or other statutory or constitutional provisions that would relieve the State from its constitutional obligation to provide reimbursement has any application to this claim.

G. CLAIM REQUIREMENTS

The following elements of this test claim are provided pursuant to Section 1183, Title 2, of the California Code of Regulations:

Exhibit 1:	Chapter 684, Statutes of 2000
Exhibit 2:	Chapter 480, Statutes of 1990
Exhibit 3:	Chapter 1267, Statutes of 1992

CLAIM CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 13th day of August, 2001, at Sacramento, California, by:

Nancy J. Gust
Administrative Services Officer II

DECLARATION OF NANCY GUST

I, Nancy Gust, make the following declaration under oath:

I am the SB90 Coordinator for the County of Sacramento Sheriff's Department. As part of my duties, I am responsible for the complete and timely recovery of costs mandated by the State.

I declare that I have examined the County's State mandated duties and resulting costs, in implementing the subject law, and find that such costs are, in my opinion, "costs mandated by the State", as defined in Government Code, Section 17514:

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

I am personally conversant with the foregoing facts, and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are stated upon information or belief, and as to those matters, I believe them to be true.

Executed this 13th day of August, 2001 at Sacramento, California.

Nancy J. Gust
Administrative Services Officer II

BILL NUMBER: SB 1102 CHAPTERED
BILL TEXT

CHAPTER 684
FILED WITH SECRETARY OF STATE SEPTEMBER 26, 2000
APPROVED BY GOVERNOR SEPTEMBER 24, 2000
PASSED THE SENATE AUGUST 31, 2000
PASSED THE ASSEMBLY AUGUST 31, 2000
AMENDED IN ASSEMBLY AUGUST 30, 2000
AMENDED IN SENATE JANUARY 24, 2000
AMENDED IN SENATE JANUARY 3, 2000

INTRODUCED BY Senator Murray
(Principal coauthor: Senator Polanco)
(Principal coauthors: Assembly Members Cardenas, Cedillo, and Villaraigosa)

FEBRUARY 26, 1999

An act to amend Section 13591.4 of the Penal Code, relating to peace officer training.

LEGISLATIVE COUNSEL'S DIGEST

SB 1102, Murray. Peace officers: racial profiling training.
Existing law generally prescribes peace officer training conducted by the Commission on Peace Officer Standards and Training.
This bill would prohibit law enforcement officers from engaging in racial profiling. It would require every law enforcement officer in the state to participate in racial profiling training, with the curriculum developed by the Commission on Peace Officer Standards and Training, in collaboration with a 5-person panel as specified. By imposing additional training duties on local law enforcement entities, this bill would impose a state-mandated local program.
This bill would require a report by the Legislative Analyst to the Legislature, not later than January 1, 2002, regarding data collection in connection with racial profiling, as specified.
The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.
This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 13519.4 of the Penal Code is amended to read:
13519.4. (a) On or before August 1, 1993, the commission shall develop and disseminate guidelines and training for all law enforcement officers in California as described in subdivision (a) of Section 13510 and who adhere to the standards approved by the

commission, on the racial and cultural differences among the residents of this state. The course or courses of instruction and the guidelines shall stress understanding and respect for racial and cultural differences, and development of effective, noncombative methods of carrying out law enforcement duties in a racially and culturally diverse environment.

(b) The course of basic training for law enforcement officers shall, no later than August 1, 1993, include adequate instruction on racial and cultural diversity in order to foster mutual respect and cooperation between law enforcement and members of all racial and cultural groups. In developing the training, the commission shall consult with appropriate groups and individuals having an interest and expertise in the field of cultural awareness and diversity.

(c) For the purposes of this section, "culturally diverse" and "cultural diversity" include, but are not limited to, gender and sexual orientation issues. The Legislature finds and declares as follows:

(1) Racial profiling is a practice that presents a great danger to the fundamental principals of a democratic society. It is abhorrent and cannot be tolerated.

(2) Motorists who have been stopped by the police for no reason other than the color of their skin or their apparent nationality or ethnicity are the victims of discriminatory practices.

(3) It is the intent of the Legislature in enacting the changes to Section 13519.4 of the Penal Code made by the act that added this subdivision that more than additional training is required to address the pernicious practice of racial profiling and that enactment of this bill is in no way dispositive of the issue of how the state should deal with racial profiling.

(4) The working men and women in California law enforcement risk their lives every day. The people of California greatly appreciate the hard work and dedication of law enforcement officers in protecting public safety. The good name of these officers should not be tarnished by the actions of those few who commit discriminatory practices.

(d) "Racial profiling," for purposes of this section, is the practice of detaining a suspect based on a broad set of criteria which casts suspicion on an entire class of people without any individualized suspicion of the particular person being stopped.

(e) A law enforcement officer shall not engage in racial profiling.

(f) Every law enforcement officer in this state shall participate in expanded training as prescribed and certified by the Commission on Peace Officers Standards and Training. Training shall begin being offered no later than January 1, 2002. The curriculum shall be created by the commission in collaboration with a five-person panel, appointed no later than March 1, 2001, as follows: the Governor shall appoint three members and one member each shall be appointed by the Senate Committee on Rules and the Speaker of the Assembly. Each appointee shall be appointed from among prominent members of the following organizations:

(1) State Conference of the NAACP.
(2) Brotherhood Crusade.
(3) Mexican American Legal Defense and Education Fund.
(4) The League of United Latin American Citizens.
(5) American Civil Liberties Union.
(6) Anti-Defamation League.
(7) California NOW.
(8) Asian Pacific Bar of California.
(9) The Urban League.

(g) Members of the panel shall not be compensated, except for reasonable per diem expenses related to their work for panel purposes.

(h) The curriculum shall utilize the Tools for Tolerance for Law Enforcement Professionals framework and shall include and examine the patterns, practices, and protocols that make up racial profiling. This training shall prescribe patterns, practices, and protocols that prevent racial profiling. In developing the training, the commission shall consult with appropriate groups and individuals having an interest and expertise in the field of racial profiling. The course of instruction shall include, but not be limited to, adequate consideration of each of the following subjects:

(1) Identification of key indices and perspectives that make up cultural differences among residents in a local community.

(2) Negative impact of biases, prejudices, and stereotyping on effective law enforcement, including examination of how historical perceptions of discriminatory enforcement practices have harmed police-community relations.

(3) The history and the role of the civil rights movement and struggles and their impact on law enforcement.

(4) Specific obligations of officers in preventing, reporting, and responding to discriminatory or biased practices by fellow officers.

(5) Perspectives of diverse, local constituency groups and experts on particular cultural and police-community relations issues in a local area.

(i) Once the initial basic training is completed, each law enforcement officer in California as described in subdivision (a) of Section 13510 who adheres to the standards approved by the commission shall be required to complete a refresher course every five years thereafter, or on a more frequent basis if deemed necessary, in order to keep current with changing racial and cultural trends.

(j) The Legislative Analyst shall conduct a study of the data being voluntarily collected by those jurisdictions that have instituted a program of data collection with regard to racial profiling, including, but not limited to, the California Highway Patrol, the City of San Jose, and the City of San Diego, both to ascertain the incidence of racial profiling and whether data collection serves to address and prevent such practices, as well as to assess the value and efficacy of the training herein prescribed with respect to preventing local profiling. The Legislative Analyst may prescribe the manner in which the data is to be submitted and may request that police agencies collecting such data submit it in the requested manner. The Legislative Analyst shall provide to the Legislature a report and recommendations with regard to racial profiling by July 1, 2002.

SEC. 2. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

(d) A fee of fifty dollars ($50) shall be paid by the plaintiff to the Secretary of State for each public agency on which service is made in this manner.

CHAPTER 480

An act to add Section 13519.4 to the Penal Code, relating to peace officers.

[Approved by Governor August 7, 1990. Filed with Secretary of State August 8, 1990.]

The people of the State of California do enact as follows:

SECTION 1. Section 13519.4 is added to the Penal Code, to read:

13519.4. Effective July 1, 1991, the commission shall develop and disseminate guidelines and training for all law enforcement officers in California as described in subdivision (a) of Section 13510 and who adhere to the standards approved by the commission, on the racial and cultural differences among the residents of this state. The course or courses of instruction and the guidelines shall stress understanding and respect for racial and cultural differences, and development of effective, noncombative methods of carrying out law enforcement duties in a racially and culturally diverse environment.

CHAPTER 481

An act to amend Section 10751 of the Vehicle Code, relating to vehicles.

[Approved by Governor August 7, 1990. Filed with Secretary of State August 8, 1990.]

The people of the State of California do enact as follows:

SECTION 1. Section 10751 of the Vehicle Code is amended to read:

10751. (a) No person shall knowingly buy, sell, offer for sale, receive, or have in his possession, any vehicle, or component part thereof, from which the manufacturer's serial or identification number has been removed, defaced, altered, or destroyed, unless the vehicle or component part has attached thereto an identification number assigned or approved by the department in lieu of the manufacturer's number.

(b) Whenever a vehicle or component part described in subdivision (a) comes into the custody of a peace officer, it shall be destroyed, sold, or otherwise disposed of under the conditions as

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changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

SEC. 30. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to increase the redemption of beverage containers and ensure the continuation of recycling operations, thereby protecting public health and safety and the environment, it is necessary that this act take effect immediately.

CHAPTER 1267

An act to amend Sections 13500 and 13519.4 of the Penal Code, relating to law enforcement.

[Approved by Governor September 30, 1992. Filed with Secretary of State September 30, 1992.]

The people of the State of California do enact as follows:

SECTION 1. Section 13500 of the Penal Code is amended to read:

13500. There is in the Department of Justice a Commission on Peace Officer Standards and Training, hereafter referred to in this chapter as the commission. The commission consists of 13 members appointed by the Governor, after consultation with, and with the advice of, the Attorney General and with the advice and consent of the Senate. Racial, gender, and ethnic diversity shall be considered for all appointments to the commission.

The commission shall be composed of the following members:

(1) Two members shall be (i) sheriffs or chiefs of police or peace officers nominated by their respective sheriffs or chiefs of police, (ii) peace officers who are deputy sheriffs or city policemen, or (iii) any combination thereof.

(2) Three members shall be sheriffs or chiefs of police or peace officers nominated by their respective sheriffs or chiefs of police.

(3) Three members shall be a peace officers of the rank of sergeant or below with a minimum of five years' experience as a deputy sheriff, city police officer, marshal, or state-employed peace officer for whom the commission sets standards. These members shall have demonstrated leadership in their local or state peace officer association or union.

(4) One member shall be an elected officer or chief administrative officer of a county in this state.

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(5) One member shall be an elected officer or chief administrative officer of a city in this state.

(6) Two members shall be public members who shall not be peace officers.

(7) One member shall be an educator or trainer in the field of criminal justice.

The Attorney General shall be an ex officio member of the commission.

Of the members first appointed by the Governor, three shall be appointed for a term of one year, three for a term of two years, and three for a term of three years. Their successors shall serve for a term of three years and until appointment and qualification of their successors, each term to commence on the expiration date of the term of the predecessor.

The additional member provided for by the Legislature in its 1973–1974 Regular Session shall be appointed by the Governor on or before January 15, 1975, and shall serve for a term of three years.

The additional member provided for by the Legislature in its 1977–78 Regular Session shall be appointed by the Governor on or after July 1, 1978, and shall serve for a term of three years.

The additional members provided for by the Legislature in its 1991–92 Regular Session shall be appointed by the Governor on or before January 15, 1993, and shall serve for a term of three years.

SEC. 2. Section 13519.4 of the Penal Code is amended to read:

13519.4. (a) On or before August 1, 1993, the commission shall develop and disseminate guidelines and training for all law enforcement officers in California as described in subdivision (a) of Section 13510 and who adhere to the standards approved by the commission, on the racial and cultural differences among the residents of this state. The course or courses of instruction and the guidelines shall stress understanding and respect for racial and cultural differences, and development of effective, noncombative methods of carrying out law enforcement duties in a racially and culturally diverse environment.

(b) The course of basic training for law enforcement officers shall, no later than August 1, 1993, include adequate instruction on racial and cultural diversity in order to foster mutual respect and cooperation between law enforcement and members of all racial and cultural groups. In developing the training, the commission shall consult with appropriate groups and individuals having an interest and expertise in the field of cultural awareness and diversity.

(c) For the purposes of this section, "culturally diverse" and "cultural diversity" include, but are not limited to, gender and sexual orientation issues.

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EXHIBIT B

DEPARTMENT OF
FINANCE

GRAY DAVIS, GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

September 14, 2001

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

RECEIVED
SEP 14 2001
COMMISSION ON
STATE MANDATES

Dear Ms. Higashi:

As requested in your letter of August 15, 2001, the Department of Finance has reviewed the test claim submitted by the County of Sacramento (claimant) asking the Commission to determine whether specified costs incurred under Chapter No. 684, Statutes of 2000 (SB 1102, Murray), are reimbursable state mandated costs (Claim No. CSM 01-TC-01 "Racial Profiling: Law Enforcement Training"). Commencing with Page 5 of the test claim, the claimant has identified the following new duties, which it asserts are reimbursable state mandates:

- The development of curriculum on racial profiling for law enforcement officers.
- Conducting an 8-hour training course for all law enforcement officers currently employed by Sacramento County.
- Conducting an 8-hour training course for new law enforcement officers hired by the county each year.
- Providing a refresher course for officers at least every five years.

As the result of our review, we have concluded that the claim is without merit and should be denied. The reasons for this finding are as follows:

- Chapter 684, Statutes of 2000, does not impose an obligation on any law enforcement agency to provide training in racial profiling to law enforcement officers employed by their agency. The statute imposes the training obligation on the law enforcement officer. No duty is imposed upon any local government entity to pay the expense of training law enforcement officers to be in compliance with the requirements of this statute. In addition, when hiring new law enforcement officers the county has the option of hiring only those persons who have already obtained the training. We note that in the Commission's decision on Law Enforcement Racial and Cultural Diversity Training (CSM-97-TC-06) a similar finding was made. Specifically on page 6 of the decision, the Commission stated that "the requirement to complete the basic training course on racial and cultural diversity is a mandate imposed only on the individual who seeks peace officer status."

- To the extent that a local agency provides or pays for the provision of the training required by Chapter 684, Statutes of 2000, to their employees who are law enforcement officers as a result of any bargaining agreements or agency policy, they are doing so at their option.

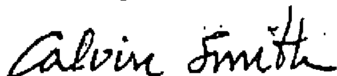
- Chapter 684, Statutes of 2000, specifies that once the initial racial profiling training is completed, each law enforcement officer "who adheres to the standards approved by the commission [i.e. Commission on Peace Officer Standards and Training (POST)]" must complete a refresher course every five years, or more frequently if it is determined necessary. We note that local agency participation in and compliance with POST programs and standards is optional. Local entities agree to participate in POST programs and comply with POST regulations and standards by adopting a local ordinance or resolution pursuant to Penal Code Sections 13522 and 13510. Therefore any costs associated with participation in an optional program are not reimbursable state-mandated local costs. Additionally, any local agency that requires their employees to comply with POST standards and training are doing so at their option.

In addition, we note that this claim appears to be premature since POST has not yet approved a curriculum that meets the requirements of Chapter 684, Statutes of 2000, and statewide training has not yet begun.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your August 15, 2001 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Todd Jerue, Principal Program Budget Analyst at (916) 445-8913 or Jim Lombard, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,



S. Calvin Smith
Program Budget Manager

Attachment

Attachment A

DECLARATION OF SARAH MANGUM
DEPARTMENT OF FINANCE
CLAIM NO. CSM 01-TC-01

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the Chapter No. 684, Statutes of 2000 (SB 1102, Murray) sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

9/14/01
at Sacramento, CA

Sarah Mangum
Sarah Mangum

PROOF OF SERVICE

Test Claim Name: "Racial Profiling: Law Enforcement Training"
Test Claim Number: CSM 01-TC-01

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 8th Floor, Sacramento, CA 95814.

On September 14, 2001, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

Ms. Harmeet Barkschat
Mandate Resource Services
8254 Heath Peak Place
Antelope, CA 95843

Ms. Annette Chinn
Cost Recovery Systems
705-2 East Bidwell Street #294
Folsom, CA 95630

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

B-8
Mr. Glenn Haas, Bureau Chief
State Controller's Office
Division of Accounting & Reporting
3301 C Street, Room 500
Sacramento, CA 95816

Ms. Nancy Gust, SB 90 Coordinator
County of Sacramento
711 G Street
Sacramento, CA 95814

Mr. Lou Blanas, Sheriff
Sacramento County Sheriff's Department
711 G Street
Sacramento, CA 95814

B-8
Mr. Dick Reed, Assistant Executive Director
Commission on Peace Officer Standards and Training
Administrative Services Division
1601 Alhambra Blvd.
Sacramento, 95816-7083

Mr. Steve Keil,
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941

D-8
Mr. Manuel Medeiros
Assistant Attorney General
Office of the Attorney General
1300 I Street
Sacramento, CA 95814

Mr. Andy Nichols, Senior Manager
Centration, Inc.
8316 Red Oak, Suite 101
Rancho Cucamonga, CA 91730

Mr. Keith B. Petersen, President
Sixten & Associates
5252 Balboa Ave., Suite 807
San Diego, CA 92117

Mr. Steve Smith, CEO
Mandated Cost Systems, Inc.
2275 Watt Ave., Suite C
Sacramento, CA 95825

Ms. Pam Stone, Legal Counsel
DMG-MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Mr. Paul Minney
Spector, Middleton, Young & Minney, LLP
7 Park Center Drive
Sacramento, CA 95825

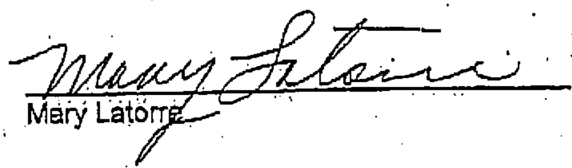
P-03
Assistant Director
Office of Criminal Justice Planning
1130 K Street, Suite 300
Sacramento, CA 95814

Ms. Sandy Reynolds, President
Reynolds Consulting Group, Inc.
P.O. Box 987
Sun City, CA 92586

B-8
Mr. Jim Spano
State Controller's Office
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Mr. David Wellhouse,
Wellhouse & Associates
9175 Kiefer Blvd., Suite 121
Sacramento, CA 95826

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 14, 2001 at Sacramento, California.



Mary Latorre

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EXHIBIT C

COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING

The mission of the California Commission on Peace Officer Standards and Training is to continually enhance the professionalism of California law enforcement in serving its communities.

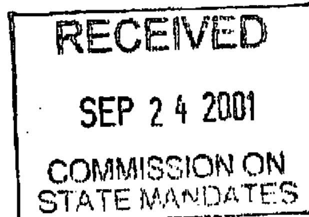
STATE OF

CALIFORNIA

Gray Davis
Governor

Bill Lockyer
Attorney General

September 17, 2001



Ms. Shirley Opie
Assistant Executive Director
Commission on State Mandates
980 North Ninth Street, Suite 300
Sacramento, CA 95814

Re: Racial Profiling: Law Enforcement Training - 01-TC-01
County of Sacramento, (Claimant)

Dear Ms. Opie:

Senate Bill 1102 (Murray) was enacted into law on September 26, 2000. The resulting revision of California Penal Code (CPC) Section 13519.4 requires, among other things, that:

1) The Commission on Peace Officer Standards and Training, in collaboration with an appointed five-person panel, design and certify a prescribed course of instruction on racial profiling; and

2) That every law enforcement officer in this state shall participate in the prescribed training; and

3) That the training commence no later than January 1, 2002; and

4) That specified officers (identified in Section 13510 CPC) complete a refresher course on racial profiling every five years or more frequently if deemed appropriate.

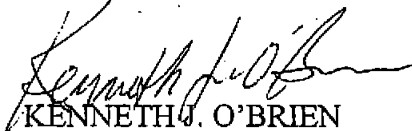
Pursuant to the passage of Senate Bill1102, the Commission is presently in the process of developing a prescribed course that will meet the intent of Senate Bill1102, as well as the needs of all law enforcement agencies that participate in the POST program.

1601 Alhambra Blvd. • Sacramento, CA 95816-7083 • 916.227.3909 • 916.227.3895 fax • www.post.ca.gov

Local agencies participate in the POST program on a voluntary basis. There is no requirement for any department to present this training. Because the prescribed curriculum for this training is still in the design phase, it is not possible to calculate the cost of presenting such training or the fiscal impact on agencies in the POST program. Suffice it to say that POST is desirous of finding a cost-efficient means of presenting the training so that fiscal impact on the field is not onerous.

Please contact us if you have any further questions regarding our progress on this issue.

Sincerely,

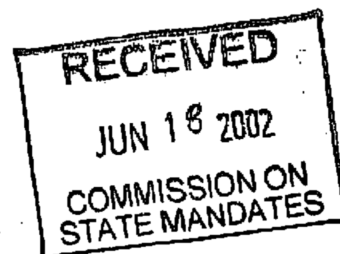


KENNETH J. O'BRIEN
Executive Director

KJO:dr:kh

cc: Sarah Mangum
Captain Tennise Allen

BEFORE THE
COMMISSION ON STATE MANDATES



Rebuttal to Department of Finance
By
County of Sacramento

Racial Profiling: Law Enforcement Training
CSM-01-TC-01
Chapter 684, Statutes of 2000

In its opposition to the test claim filed herein by the County of Sacramento, Sheriff's Department, the Department of Finance raises all sorts of reasons as to why the subject test claim should not be found to be a reimbursable state mandated program. For the reasons stated herein, the arguments and opposition filed against the test claim are not in keeping with the facts and law, and should not be accorded any weight.

I. EVEN IF THE TRAINING REQUIREMENT IS IMPOSED UPON THE OFFICER, THE EMPLOYER MUST PAY FOR TRAINING

The first contention raised by the Department of Finance is that the training mandate is imposed upon the officer and thus, to the extent that the employer pays for same, it is voluntary on the part of the employer. However, as demonstrated herein, the County is required to pay for same.

The Fair Labor Standards Act, 29 U.S.C. § 201 *ff.* (hereinafter "FLSA") governs the minimum wages and maximum hours of peace officers. See 29 U.S.C. § 206 (Exhibit 1); 29 U.S.C. § 207 (Exhibit 2). This law has specific applicability to state and municipal employers. *See* Garcia v. San Antonio Metro. Transit Auth. (1985) 469 U.S. 528, 555-57, 83 L.Ed.2d 1016, 105 S.Ct. 1005 (Exhibit 3); Bratt v. County of Los Angeles (9th Cir. 1990) 912 F.2d 1066, 1068 (Exhibit 4).

The FLSA includes training as working time for purposes of minimum wages and maximum hours, unless all four criteria found in 29 CFR § 785.27 (Exhibit 5) exist. Such regulation states as follows:

> Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:
>
> (a) Attendance is outside of the employee's regular working hours;
>
> (b) Attendance is in fact voluntary;

(c) The course, lecture or meeting is not directly related to the employee's job; and

(d) The employee does not perform any productive work during such attendance.

Whether or not the training is conducted during the working day, it is obvious that all four criteria cannot be met such that the County of Sacramento would not have to pay for such training. First of all, the training is specifically related to the employee's job. Attendance is not voluntary, as it is required of all officers. Absent the passage of the subject test claim legislation, there would be no requirement for training and commensurately, no requirement for the County to pay the costs thereof.

II. EVEN IF PARTICIPATION IN POST IS VOLUNTARY, ALL COUNTIES BELONG AND HAD JOINED PRIOR TO THE TEST CLAIM LEGISLATION AND IS ABOVE THE 24 HOUR MINIMUM

Although membership in POST by a local agency is voluntary, its agency and its officers are required by the state to adhere to the minimum standards imposed by POST for recruitment and continuing professional training once membership is established. Penal Code, Section 13522.

All counties are members of POST, and have been since prior to the inception of the test claim legislation. Furthermore most, if not all cities, are members of POST.

POST has a requirement of a minimum 24 hours of continuing education. Prior to the enactment of the subject test claim legislation, the Commission has already found that a number of new training requirements are reimbursable mandates including, but not limited to sexual harassment training and elder abuse training. POST also has substantial training available, and has certified courses in response to training requirements imposed by the legislature and regulatory agencies. Attached hereto, as Exhibit 6, and incorporated herein by reference, is POST's webpage entitled "Legislative Training Mandates". Also attached as Exhibit 7, is a declaration from Deputy Sheriff Alex Nishimura, regarding the training required by the "Legislative Training Mandates". From a review of Exhibits 6 and 7, it is clear that depending upon an officer's assignment and when that officer completed his basic training, there are a plethora of requirements which must be completed, some on a continuing basis. For example, a First Aid/CPR Refresher course of 12 hours is required every three years. If an officer is assigned to the sexual assault unit, there is an 18-hour supplementary course, which must be taken.

Thus, although membership in POST is voluntary, that membership precedes the date of the requirement of the test claim legislation. There are a substantial number of courses already required in order to exercise peace officer powers, and the test claim legislation is an addition to those preexisting requirements.

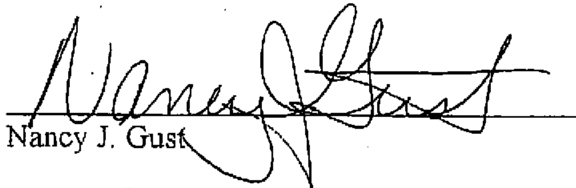
IV. POST HAS ADOPTED A STATEWIDE CURRICULUM

Another basis the Department of Finance contends eliminates the finding of a reimbursable mandate, is that POST has not yet developed the course for Racial Profiling Training. Attached hereto as Exhibit 8, and incorporated herein by reference, is a true and correct copy of the most recent advisement from POST that such curriculum has, in fact, been developed and is available.

V. CERTIFICATION

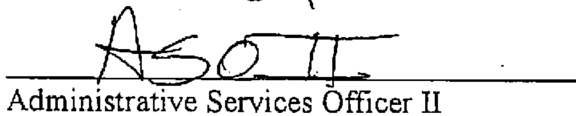
I certify by my signature below that that the statements made herein are true and correct of my own knowledge, or as to all other matters, I believe them to be true and correct based upon my information and belief.

Executed this 13th day of June 2002 at Sacramento, California.



Nancy J. Gust

(916) 874-6032
Phone Number



Administrative Services Officer II

(916) 874-5263
Fax Phone Number

THE CODE OF THE LAWS OF THE UNITED STATES OF AMERICA

TITLE 29 — LABOR

CHAPTER 8. FAIR LABOR STANDARDS

§ 206. Minimum wages

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees. Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than $4.25 an hour during the period ending on September 30, 1996, not less than $4.75 an hour during the year beginning on October 1, 1996, and not less than $5.15 an hour beginning September 1, 1997;

(2)–(5) [Unchanged]

(b) [Unchanged]

(c) [Deleted]

(d)–(f) [Unchanged]

(g) Wage during first 90 days of employment of employees under 20 years of age. (1) In lieu of the rate prescribed by subsection (a)(1), any employer may pay any employee of such employer, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage which is not less than $4.25 an hour.

(2) No employer may take any action to displace employees (including partial displacements such as reduction in hours, wages, or employment benefits) for purposes of hiring individuals at the wage authorized in paragraph (1).

(3) Any employer who violates this subsection shall be considered to have violated section 15(a)(3) [29 USCS § 215(a)(3)].

(4) This subsection shall only apply to an employee who has not attained the age of 20 years.

(As amended Aug. 20, 1996, P. L. 104-188, Title II, §§ 2104(b), (c), 2105(c), 110 Stat. 1928, 1929.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1996. Act Aug. 20, 1996, in subsec. (a), substituted para. (1) for one which read: "(1) except as otherwise provided in this section, not less than $3.35 an hour during the period ending March 31, 1990, not less than $3.80 an hour during the year beginning April 1, 1990, and not less than $4.25 an hour after March 31, 1991;"; deleted subsec. (c), which read:

"(c) Employees in Puerto Rico. (1) The rate or rates provided by subsection (a)(1) shall be applicable in the case of any employee in Puerto Rico who is employed by—

(A) the United States,

(B) an establishment that is a hotel, motel or restaurant,

(C) any other retail or service establishment that employs such employee primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs, [illegible]

(D) any other industry in which the average hourly wage is greater than or equal to $[illegible].65 an hour,

"(2) In the case of any employee in Puerto Rico who is employed in an industry in which the average hourly wage is not less than $4.00 but not more than $4.64, the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter through April 1, 1994, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) shall apply on April 1, 1994.

"(3) In the case of an employee in Puerto Rico who is employed in an industry in which the average hourly wage is less than $4.00, except as provided in paragraph (4), the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter through April 1, 1995, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) shall apply on April 1, 1995.

"(4) In the case of any employee of the Commonwealth of Puerto Rico, or a municipality or other governmental entity of the Commonwealth, in which the average hourly wage is less than $4.00 an hour and who was brought under the coverage of this section pursuant to an amendment made by the Fair Labor Standards Amendments of 1985 (Public Law 99-150), the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter through April 1, 1996, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) shall apply on April 1, 1996.";

and added subsec. (g).

RESEARCH GUIDE

Federal Procedure:

18A Fed Proc L Ed, Immigration, Naturalization, and Nationality § 45:775.

22A Fed Proc L Ed, Labor and Labor Relations §§ 52:1392, 52:1411, 52:1416, 52:1427, 52:1428, 52:1430, 52:1431, 52:1434, 52:1440, 52:1453, 52:1490, 52:1497, 52:1499, 52:1505, 52:1516, 52:1548, 52:1569, 52:1637, 52:1657, 52:1667, 52:1672.

Am Jur:

6 Am Jur 2d, Attachment and Garnishment § 178.

45A Am Jur 2d, Job Discrimination (1993) §§ 20, 44, 78, 79, 82, 146, 229, 262, 300, 725, 728, 736, 765, 803.

45B Am Jur 2d, Job Discrimination (1993) §§ 1113, 1120, 1123, 1163, 1164, 1231, 1380, 1671, 1782, 2023, 2045, 2163.

45C Am Jur 2d, Job Discrimination (1993) §§ 2386, 2509, 2516, 2517, 2560, 2731, 2741, 2774, 2859, 2860, 2864, 2865, 2899, 2908, 2977, 2990, 3007, 3024, 3026.

63C Am Jur 2d, Public Officers and Employees § 282.

64 Am Jur 2d, Public Works and Contracts § 226.

68 Am Jur 2d, Schools § 129.

70C Am Jur 2d, Social Security and Medicare § 393.

Am Jur Trials:

53 Am Jur Trials, Sex Discrimination Based Upon Sexual Stereotyping, p. 310.

62 Am Jur Trials, Workplace Sexual Harassment: Quid Pro Quo, p. 235.

80 Am Jur Trials, Violation of Statutory Work Hour Limits and Shipowner Liability, p. 397.

Am Jur Proof of Facts:

26 Am Jur Proof of Facts 3d, Proof of violation of Equal Pay Act, p. 269.

Forms:

8 Fed Procedural Forms L Ed, Discovery and Depositions (2001) § 23:209.

12 Fed Procedural Forms L Ed, Job Discrimination (1998) §§ 45:175-177, 179, 180, 261.

12A Fed Procedural Forms L Ed, Labor and Labor Relations (1998) §§ 46:330, 334, 337, 354, 379, 380.

10B Am Jur Legal Forms 2d (2001), Labor and Labor Relations §§ 159:293-159:295, 159:324.

16 Am Jur Pl & Pr Forms (2000), Labor and Labor Relations, §§ 177, 180, 181, 183, 185, 191, 195, 200, 202, 203, 204, 205, 215, 298.

Annotations:

What constitutes "establishment" for purposes of § 6(d)(1) of Equal Pay Act (29 USCS § 206(d)(1)), prohibiting wage discrimination within establishment based on sex. 124 ALR Fed 159.

What constitutes reverse or majority gender discrimination against males violative of federal constitution or statutes—private employment cases. 162 ALR Fed 273.

Validity and Construction of "Domestic Service" Provisions of Fair Labor Standards Act (29 U.S.C.A. §§ 201 et seq. [29 USCS §§ 201 et seq.]). 165 ALR Fed 163.

What Constitutes Reverse Sex or Gender Discrimination Against Males Violative of Federal Constitution or Statutes—Nonemployment Cases. 166 ALR Fed 1.

216. Penalties.
(a) Fines and imprisonment.
(b) Damages; right of action; attorney's fees and costs; termination of right of action.
(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions.
(d) Savings provision.
(e) Civil penalties for child labor violations.
216a. [Repealed]
216b. Liability for overtime work performed prior to July 20, 1949
217. Injunction proceedings
218. Relation to other laws
219. Separability of provisions

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

§ 206. Minimum wages

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees. Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than $3.35 an hour during the period ending March 31, 1990, not less than $3.80 an hour during the year beginning April 1, 1990, and not less than $4.25 an hour after March 31, 1991;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator [Secretary], or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of

employees who shall receive not less than the minimum hourly wage rates; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b), not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint pursuant to sections 5 and 8 [29 USCS §§ 205, 208]. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection;

(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(5) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

(b) Additional applicability to employees pursuant to subsequent amendatory provisions. Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this Act by the Fair Labor Standards Amendments of 1966 [29 USCS §§ 203, 206, 207, 213, 214, 216, 218, 255], title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1).

(c) Employees in Puerto Rico. (1) The rate or rates provided by subsection (a)(1) shall be applicable in the case of any employee in Puerto Rico who is employed by—

(A) the United States,

(B) an establishment that is a hotel, motel or restaurant,

(C) any other retail or service establishment that employs such employee primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs, or

(D) any other industry in which the average hourly wage is greater than or equal to $4.65 an hour.

(2) In the case of any employee in Puerto Rico who is employed in an industry in which the average hourly wage is not less than $4.00 but not more than $4.64, the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter through April 1, 1994, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) shall apply on April 1, 1994.

(3) In the case of an employee in Puerto Rico who is employed in an industry in which the average hourly wage is less than $4.00, except as provided in paragraph (4), the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter through April 1, 1995, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) shall apply on April 1, 1995.

(4) In the case of any employee of the Commonwealth of Puerto Rico, or a municipality or other governmental entity of the Commonwealth, in which the average hourly wage is less than $4.00 an hour and who was brought under the coverage of this section pursuant to an amendment made by the Fair Labor Standards Amendments of 1985 (Public Law 99-150), the minimum wage rate applicable to such employee shall be increased on April 1, 1990, and each April 1 thereafter through April 1, 1996, by equal amounts (rounded to the nearest 5 cents) so that the highest minimum wage rate prescribed in subsection (a)(1) shall apply on April 1, 1996.

(d) Prohibition of sex discrimination. (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act [29 USCS §§ 201 et seq., generally; for full classification, consult USCS Tables volumes].

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, or dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(e) **Employees of employers providing contract services to United States.** (1) Notwithstanding the provisions of section 13 of this Act [29 USCS § 213] (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 (41 USC 351–357) or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of section 13 of this Act [29 USCS § 213] (except subsections (a)(1) and (f) thereof) and the provisions of the Service Contract Act of 1965 [41 USCS §§ 351–357], every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b), except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

(f) **Employees in domestic service.** Any employee—

(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under section 6(b) [subsec. (b) this section] unless such employee's compensation for such service would not because of section 209(a)(6) of the Social Security Act [42 USCS § 409(a)(6)] constitute wages for the purposes of title II of such Act [42 USCS §§ 401 et seq.], or

(2) who in any workweek—

(A) is employed in domestic service in one or more households, and

(B) is so employed for more than 8 hours in the aggregate, shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under section 6(b) [subsec. (b) this section].

(June 25, 1938, ch 676, § 6, 52 Stat. 1062; June 26, 1940, ch 432, § 3(e), (f), 54 Stat. 616; Oct. 26, 1949, ch 736, § 6, 63 Stat. 912; Aug. 12, 1955, ch 867, § 3, 69 Stat. 711; Aug. 8, 1956, ch 1035, § 2, 70 Stat. 1118; May 5, 1961, P.L. 87-30, § 5, 75 Stat. 67; June 10, 1963, P. L. 88-38, § 3, 77 Stat. 56; Sept. 23, 1966, P. L. 89-601, Title III, §§ 301–305, 80 Stat. 838–841; April 8, 1974, P. L. 93-259, §§ 2–4, 5(b), 7(b)(1), 88 Stat. 55, 56, 62; Nov. 1, 1977, P. L. 95-151, § 2(a)-(c), (d)(1), (2), 91 Stat. 1245; Nov. 17, 1989, P. L. 101-157,

§§ 2, 4(b), 103 Stat. 938, 940; Dec. 19, 1989, P. L. 101-239, Title X, Subtitle B, § 10208(d)(2)(B)(i), 103 Stat. 2481.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"Fair Labor Standards Amendments of 1966", referred to in subsec. (b), is Act Sept. 23, 1966, P. L. 89-601, 80 Stat. 830. For full classification of such Act, consult USCS Tables volumes.

"Title IX of the Education Amendments of 1972", referred to in subsec (b), is Act June 23, 1972, P. L. 92-318, Title IX, §§ 901–907, 86 Stat. 373–375, which appears generally as 20 USCS §§ 1681 et seq. For full classification of such Title, consult USCS Tables volumes.

"Fair Labor Standards Amendments of 1974" referred to in subsec. (b), is Act April 8, 1974, which appears generally as 29 USCS §§ 202 et seq. For full classification of such Act, consult USCS Tables volumes.

"Fair Labor Standards Amendments of 1985 (Public Law 99-150)" referred to in subsec. (c)(4), is Act Nov. 13, 1985, P. L. 99-150, 99 Stat. 787. For full classification of such Act, consult USCS Tables volumes.

Explanatory notes:

The bracketed word "Secretary", referring to the Secretary of Labor, has been inserted on authority of 1950 Reorg. Plan No. 6, set out as transfer of functions note to 29 USCS § 1.

Amendments:

1940. Act June 26, 1940, in subsec. (a), added para. (5); and added subsec. (c).

1949. Act Oct. 26, 1949 (effective 90 days after enactment, as provided by § 16(a) of such Act, which appears as 29 USCS § 202 note), in subsec. (a), substituted para. (1) for paras. (1) to (4), and renumbered para. (5) as (2); and in subsec. (c), deleted ", (2), and (3)" following "(1)" and "(e)" following "5", inserted "heretofore or hereafter" following "covered by a wage order", and added a proviso which read: "Provided, That the wage order in effect prior to the effective date of this Act for any industry in Puerto Rico or the Virgin Islands shall apply to every employee in such industry covered by subsection (a) of this section until superseded by a wage order hereafter issued pursuant to the recommendations of a special industry committee appointed pursuant to section 5."

1955. Act Aug. 12, 1955 (effective March 1, 1956 as provided by § 3 of that Act), substituted "$1" for "75 cents" in subsec. (a)(1).

1956. Act Aug. 8, 1956, added subsec. (a)(3).

1961. Act May 5, 1961 (effective upon the expiration of 120 days after 5/5/61, as provided by § 14 of that Act, which appears as 29 USCS § 203 note), in subsec. (a), inserted "in any workweek" in the first part of the subsec., substituted a clause (1) which read "not less than $1.15 an hour during the first two years from the effective date of the Fair Labor Standards Amendments of 1961 and not less than $1.25 an hour thereafter, except as otherwise provided in this section.", substituted first sentence of paragraph (3) for one which read "if such employee is employed in American Samoa, not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of

a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are now applicable to the special industry committees provided for Puerto Rico and the Virgin Islands by this Act. Each such committee shall have the same powers and duties and shall apply the same standards with respect to the application of the provisions of this Act to employees employed in American Samoa as pertain to special industry committees established under section 5 with respect to employees employed in Puerto Rico or the Virgin Islands. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection."; and substituted subsec. (b) for one which read:

"(b) Every employer shall pay to each of his employees who in any workweek (i) is employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined in section 3(s)(1), (2), or (4) or by an establishment described in section 3(s)(3) or (5), and who, except for the enactment of the Fair Labor Standards Amendments of 1961, would not be within the purview of this section, or (ii) is brought within the purview of this section by the amendments made to section 13(a) of this Act by the Fair Labor Standards Amendments of 1961, wages at rates—

"(1) not less than $1 an hour during the first three years from the effective date of such amendments; not less than $1.15 an hour during the fourth year from such date; and not less than the rate effective under paragraph (1) of subsection (a) thereafter;

"(2) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement).".

Such Act further substituted subsec. (c) for one which read:

"(c) The rate or rates provided by subsections (a) and (b) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5: Provided, That (1) the following rates shall apply to any such employee to whom the rate or rates prescribed by subsection (a) would otherwise apply:

"(A) The rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1961, increased by 15 per centum, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C). Such rate or rates shall become effective sixty days after the effective date of the Fair Labor Standards Amendments of 1961 or one year from the effective date of the most recent wage

order applicable to such employee theretofore issued by the Secretary pursuant to the recommendations of a special industry committee appointed under section 5, whichever is later.

"(B) Beginning two years after the applicable effective date under paragraph (A), not less than the rate or rates prescribed by paragraph (A), increased by an amount equal to 10 per centum of the rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1961, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C).

"(C) Any employer or group of employers, employing a majority of the employees in an industry, in Puerto Rico or the Virgin Islands may apply to the Secretary in writing for the appointment of a review committee to recommend the minimum rate or rates to be paid such employees in lieu of the rate or rates provided by paragraph (A) or (B). Any such application with respect to any rate or rates provided for under paragraph (A) shall be filed within sixty days following the enactment of the Fair Labor Standards Amendments of 1961 and any such application with respect to any rate or rates provided for under paragraph (B) shall be filed not more than one hundred and twenty days and not less than sixty days prior to the effective date of the applicable rate or rates under paragraph (B). The Secretary shall promptly consider such application and may appoint a review committee if he has reasonable cause to believe, on the basis of financial and other information contained in the application, that compliance with any applicable rate or rates prescribed by paragraph (A) or (B) will substantially curtail employment in such industry. The Secretary's decision upon any such application shall be final. Any wage order issued pursuant to the recommendations of a review committee appointed under this paragraph shall take effect on the applicable effective date provided in paragraph (A) or (B).

"(D) In the event a wage order has not been issued pursuant to the recommendation of a review committee prior to the applicable effective date under paragraph (A) or (B), the applicable percentage increase provided by any such paragraph shall take effect on the effective date prescribed therein, except with respect to the employees of an employer who filed an application under paragraph (C) and who files with the Secretary an undertaking with a surety or sureties satisfactory to the Secretary for payment to his employees of an amount sufficient to compensate such employees for the difference between the wages they actually receive and the wages to which they are entitled under this subsection. The Secretary shall be empowered to enforce such undertaking and any sums recovered by him shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sum not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts.

"(2) In the case of any such employee to whom subsection (b) would otherwise apply, the Secretary shall within sixty days after the enactment of the Fair Labor Standards Amendments of 1961 appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates in accordance with the standards prescribed by section 8, not in excess of the applicable rate provided by subsection (b), to be applicable to such employee in lieu of the rate or rates prescribed by subsection (b). The rate or rates recommended by the special industry committee shall be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1961.

"(3) The provisions of section 5 and section 8, relating to special industry committees, shall be applicable to review committees appointed under this subsection. The appointment of a review committee shall be in addition to and not in lieu of any special industry committee required to be appointed pursuant to the provisions of subsection (a) of section 8, except that no special industry committee shall hold any hearing within one year after a minimum wage rate or rates for such industry shall have been recommended to the Secretary by a review committee to be paid in lieu of the rate or rates provided for under paragraph (A) or (B). The minimum wage rate or rates prescribed by this subsection shall be in effect only for so long as and insofar as such minimum wage rate or rates have not been superseded by a wage order fixing a higher minimum wage rate or rates (but not in excess of the applicable rate prescribed in subsection (a) or subsection (b)) hereafter issued by the Secretary pursuant to the recommendation of a special industry committee.".

1963. Act June 10, 1963, added subsec. (d).

1966. Act Sept. 23, 1966 (effective 2/1/67, as provided by § 602 of such Act), in subsec. (a), the first sentence, inserted ", or is employed in an enterprise engaged in commerce or in the production of goods for commerce,"; substituted, in former clause (1), "$1.40" for "$1.15", "year" for "two years", "1966" for "1961", and "$1.60" for "$1.25"; substituted a semicolon for the period at the end of paragraph (3) added paragraph (4) and a paragraph (5) which read "if such employee is employed in agriculture, not less than $1 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966, not less than $1.15 an hour during the second year from such date, and not less than $1.30 an hour thereafter."; and substituted subsec. (b) for one which read:

"(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this Act by the Fair Labor Standards Amendments of 1966, wages at the following rates:

"(1) not less than $1 an hour during the first year from the effective date of such amendments

"(2) not less than $1.15 an hour during the second year from such date,

"(3) not less than $1.30 an hour during the third year from such date,

"(4) not less than $1.45 an hour during the fourth year from such date, and

"(5) not less than $1.60 an hour thereafter.".

Such Act further substituted subsec. (c), for one which read:

"(c)(1) The rate or rates provided by subsections (a) and (b) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5.

"(2) In the case of any such employee who is covered by such a wage order and to whom the rate or rates prescribed by subsection (a) would otherwise apply, the following rates shall apply:

"(A) The rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1966, increased by 12 per centum, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C). Such rate or rates shall become effective sixty days after the effective date of the Fair Labor Standards Amendments of 1966 or one year from the effective date of the most recent wage order applicable to such employee theretofore issued by the Secretary pursuant to the recommendations of a special industry committee appointed under section 5, whichever is later.

"(B) Beginning one year after the applicable effective date under paragraph (A), not less than the rate or rates prescribed by paragraph (A) increased by an amount equal to 16 per centum of the rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1966, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C).

"(C) Any employer, or group of employers, employing a majority of the employees in an industry in Puerto Rico or the Virgin Islands, may apply to the Secretary in writing for the appointment of a review committee to recommend the minimum rate or rates to be paid such employees in lieu of the rate or rates provided by paragraph (A) or (B). Any such application with respect to any rate or rates provided for under paragraph (A) shall be filed within sixty days following the enactment of the Fair Labor Standards Amendments of 1966 and any such application with respect to any rate or rates provided for under paragraph (B) shall be filed not more than one hundred and twenty days and not less than sixty days prior to the effective date of the applicable rate or rates under paragraph (B). The Secretary shall promptly consider such application and may appoint a review committee if he has reasonable

cause to believe, on the basis of financial and other information contained in the application, that compliance with any applicable rate or rates prescribed by paragraph (A) or (B) will substantially curtail employment in such industry. The Secretary's decision upon any such application shall be final. Any wage order issued pursuant to the recommendations of a review committee appointed under this paragraph shall take effect on the applicable effective date provided in paragraph (A) or (B).

"(D) In the event a wage order has not been issued pursuant to the recommendation of a review committee prior to the applicable effective date under paragraph (A) or (B), the applicable percentage increase provided by any such paragraph shall take effect on the effective date prescribed therein, except with respect to the employees of an employer who filed an application under paragraph (C) and who files with the Secretary an undertaking with a surety or sureties satisfactory to the Secretary for payment to his employees of an amount sufficient to compensate such employees for the difference between the wages they actually receive and the wages to which they are entitled under this subsection. The Secretary shall be empowered to enforce such undertaking and any sums recovered by him shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sum not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts.

"(3) In the case of any such employee to whom subsection (a)(5) or subsection (b) would otherwise apply, the Secretary shall within sixty days after the effective date of the Fair Labor Standards Amendments of 1966 appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates in accordance with the standards prescribed by section 8, but not in excess of the applicable rate provided by subsection (a)(5) or subsection (b), to be applicable to such employee in lieu of the rate or rates prescribed by subsection (a)(5) or subsection (b), as the case may be. The rate or rates recommended by the special industry committee shall be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1966.

"(4) The provisions of section 5 and section 8, relating to special industry committees, shall be applicable to review committees appointed under this subsection. The appointment of a review committee shall be in addition to and not in lieu of any special industry committee required to be appointed pursuant to the provisions of subsection (a) of section 8, except that no special industry committee shall hold any hearing within one year after a minimum wage rate or rates for such industry shall have been recommended to the Secretary by a review committee to be paid in lieu of the rate or rates provided for under paragraph (A) or (B). The minimum wage rate or rates prescribed by this subsection shall be in effect only for so long as and insofar as such minimum wage rate or rates have not been superseded

by a wage order fixing a higher minimum wage rate or rates (but not in excess of the applicable rate prescribed in subsection (a) or subsection (b)) hereafter issued by the Secretary pursuant to the recommendation of a special industry committee.".
Such Act further added subsec. (e).

1974. Act April 8, 1974 (effective 5/1/74, as provided by § 29(a) of that Act), in subsec. (a), substituted paragraph (1) for former paragraph (1), substituted paragraph (5) for former paragraph (5); and in subsec. (b), inserted ", title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974"; substituted paragraphs (1) through (4) for former paragraphs (1) through (5); and added subsec. (f). Such Act further, (effective on enactment as provided by § 5(b) of that Act) in subsec. (c), substituted paragraphs (2)-(6) for former paragraphs (2)-(4).

1977. Act Nov. 1, 1977, in subsec. (a), substituted para. (1) for one that read: "(1) not less than $2 an hour during the period ending December 31, 1974, not less than $2.10 an hour during the year beginning January 1, 1975, and not less than $2.30 an hour after December 31, 1975, except as otherwise provided in this section;" and substituted para. (5) for one that read: "(5) if such employee is employed in agriculture, not less than—

"(A) $1.60 an hour during the period ending December 31, 1974,
"(B) $1.80 an hour during the year beginning January 1, 1975,
"(C) $2 an hour during the year beginning January 1, 1976,
"(D) $2.20 an hour during the year beginning January 1, 1977, and
"(E) $2.30 an hour after December 31, 1977.";

Such Act further, in subsec. (b), substituted "rate:" for "rates:", substituted "Effective after Dec. 31, 1977, not less than the minimum wage rate in effect under subsec. (a)(1)." for paras. (1)–(4), which read:
"In the case of any employee employed in agriculture who is covered by a wage order issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5, to whom the rate or rates prescribed by subsection (a)(5) would otherwise apply, and whose hourly wage is increased above the wage rate prescribed by such wage order by a subsidy (or income supplement) paid, in whole or in part, by the government of Puerto Rico, the increases prescribed by this paragraph shall be applied to the sum of the wage rate in effect under such wage order and the amount by which the employee's hourly wage rate is increased by the subsidy (or income supplement) above the wage rate in effect under such wage order.

"(1) not less than $1.90 an hour during the period ending December 31, 1974,
"(2) not less than $2 an hour during the year beginning January 1, 1975,
"(3) not less than $2.20 an hour during the year beginning January 1, 1976, and
"(4) not less than $2.30 an hour after December 31, 1976.";

Such Act further, in subsec. (c), in para. (1), substituted "subsection (a)(1)" for "subsections (a) and (b)", inserted "(A)", and inserted ", and (B) which prescribes a wage order rate which is less than the wage rate

in effect under subsection (a)(1)", substituted para. (2) for paras. (2)–(4) which read:

"(2) Except as provided in paragraphs (4) and (5), in the case of any employee who is covered by such a wage order on the date of enactment of the Fair Labor Standards Amendments of 1974 and to whom the rate or rates prescribed by subsection (a) or (b) would otherwise apply, the wage rate applicable to such employee shall be increased as follows:

"(A) Effective on the effective date of the Fair Labor Standards Amendments of 1974, the wage order rate applicable to such employee on the day before such date shall—

"(i) if such rate is under $1.40 an hour, be increased by $0.12 an hour, and

"(ii) if such rate is $1.40 or more an hour, be increased by $0.15 an hour.

"(B) Effective on the first day of the second and each subsequent year after such date, the highest wage order rate applicable to such employees on the date before such first day shall—

"(i) if such rate is under $1.40 an hour, be increased by $0.12 an hour, and

"(ii) if such rate is $1.40 or more an hour, be increased by $0.15 an hour.

"(3) In the case of any employee employed in Puerto Rico or the Virgin Islands to whom this section is made applicable by the amendments made to this Act by the Fair Labor Standards Amendments of 1974, the Secretary shall, as soon as practicable after the date of enactment of the Fair Labor Standards Amendments of 1974, appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates, which shall be not less than 60 per centum of the otherwise applicable minimum wage rate in effect under subsection (b) or $1.00 an hour, whichever is greater, to be applicable to such employee in lieu of the rate or rates prescribed by subsection (b). The rate recommended by the special industry committee shall (A) be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation, but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1974, and (B) except in the case of employees of the government of Puerto Rico or any political subdivision thereof, be increased in accordance with paragraph (2)(B).

"(4)(A) Notwithstanding paragraph (2)(A) or (3), the wage rate of any employee in Puerto Rico or the Virgin Islands which is subject to paragraph (2)(A) or (3) of this subsection, shall, on the effective date of the wage increase under paragraph (2)(A) or of the wage rate recommended under paragraph (3), as the case may be, be not less than 60 per centum of the otherwise applicable rate under subsection (a) or (b) or $1.00, whichever is higher.

"(B) Notwithstanding paragraph (2)(B), the wage rate of any employee in Puerto Rico or the Virgin Islands which is subject to paragraph (2)(B), shall, on and after the effective date of the first wage increase under paragraph (2)(B), be not less than 60 per

centum of the otherwise applicable rate under subsection (a) or (b) or $1.00, whichever is higher."

Such Act further, in subsec. (c), redesignated paras. (5) and (6) as paras. (3) and (4) respectively; in para. (3), as redesignated, substituted "subsection (a)(1)" the first time it appears for "subsection (a) or (b)", and the second time it appears, for "such subsection; and in para. (4), as redesignated, deleted "or (3)" following "paragraph (2)".

1989. Act Nov. 17, 1989, in subsec. (a), substituted para. (1) for one which read: "not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;", in para. (3), substituted "pursuant to sections 5 and 8." for "in the same manner and pursuant to the same provisions as are applicable to the special industry committees provided for Puerto Rico and the Virgin Islands by this Act as amended from time to time.", and deleted "Each such committee shall have the same powers and duties and shall apply the same standards with respect to the application of the provisions of this Act to employees employed in American Samoa as pertain to special industry committees established under section 5 with respect to employees employed in Puerto Rico or the Virgin Islands." preceding "The minimum wage rate ..."; and substituted subsec. (c) for one which read:

"(c)(1) The rate or rates provided by subsection (a)(1) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order (A) heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5, and (B) which prescribes a wage order rate which is less than the wage rate in effect under subsection (a)(1).

"(2)(A) Each wage order rate under a wage order described in paragraph (1) which on December 31, 1977, is at least $2 an hour shall, except as provided in paragraph (3), be increased—

"(i) effective January 1, 1978, by $0.25 an hour or by such greater amount as may be recommended by a special industry committee under section 8, and

"(ii) effective January 1, 1979, and January 1 of each succeeding year, by $0.30 an hour or by such greater amount as may be so recommended by such a special industry committee.

"(B) Each wage order rate under a wage order described in paragraph (1) which on December 31, 1977, is less than $2 an hour shall, except as provided in paragraph (3), be increased—

"(i) effective January 1, 1978, by $0.20 an hour or by such greater amount as may be recommended by a special industry committee under section 8, and

"(ii) effective January 1, 1979, and January 1 of each succeeding year,—

"(I) until such wage order rate is not less than $2.30 an hour, by $0.25 an hour or by such greater amount as may be so recommended by a special industry committee, and

"(II) if such wage order rate is not less than $2.30 an hour, by $0.30 an hour or by such greater amount as may be so recommended by a special industry committee.

"(C) In the case of any employee in agriculture who is covered by a wage order issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5, to whom the rate or rates prescribed by subsection (a)(5) of this section would otherwise apply, and whose hourly wage is increased above the wage rate prescribed by such wage order by a subsidy (or income supplement) paid, in whole or in part, by the government of Puerto Rico, the applicable increases prescribed by subparagraph (A) or (B) shall be applied to the sum of the wage rate in effect under such wage order and the amount by which the employee's hourly wage is increased by the subsidy (or income supplement) above the wage rate in effect under such wage order.

"(3) If the wage rate of an employee is to be increased under this subsection to a wage rate which equals or is greater than the wage rate under subsection (a)(1) which, but for paragraph (1) of this subsection, would be applicable to such employee, this subsection shall be inapplicable to such employee and the applicable rate under subsection (a)(1) shall apply to such employee.

"(4) Each minimum wage rate prescribed by or under paragraph (2) shall be in effect unless such minimum wage rate has been superseded by a wage order (issued by the Secretary pursuant to the recommendation of a special industry committee convened under section 8) fixing a higher minimum wage rate.".

Act Dec. 19, 1989, in subsec. (f)(1), substituted "209(a)(6)" for "209(g)".

Short title:

Act Aug. 8, 1956, ch 1035, § 1, 70 Stat. 1118, provides: "This Act [29 USCS §§ 206, 213, 216] may be cited as the 'American Samoa Labor Standards Amendments of 1956'.".

Act June 10, 1963, P. L. 88-38, § 1, 77 Stat. 56, provides: "This Act [subsec. (d) of this section and notes to this section] may be cited as the 'Equal Pay Act of 1963'.".

Transfer of functions:

Transfer of functions of all other officers, employees, and agencies of Department of Labor to Secretary of Labor, by 1950 Reorg. Plan No. 6, see transfer of functions note to 29 USCS § 1.

1978 Reorg. Plan No. 1 of Feb. 23, 1978, § 1, 43 Fed. Reg. 19807, provides:

"Transfer of Equal Pay Enforcement Functions

"All functions related to enforcing or administering Section 6(d) of the Fair Labor Standards Act, as amended, (29 U.S.C. 206(d)) are hereby transferred to the Equal Employment Opportunity Commission. Such functions include, but shall not be limited to, the functions relating to equal pay administration and enforcement now vested in the Secretary of Labor, the Administrator of the Wage and Hour Division of the Department of Labor, and the Civil Service Commission pursuant to Sections 4(d)(1); 4(f); 9; 11(a), (b), and (c); 16(b) and (c) and 17 of the Fair Labor Standards Act, as amended, (29 U.S.C. 204(d)(1); 204(f); 209;

211(a), (b), and (c), 216(b) and (c) and 217) and Section 10(b)(1) of the Portal-to-Portal Act of 1947, as amended, (29 U.S.C. 259).".

Other provisions:

Declaration of purpose. Act June 10, 1963, P. L. 88-38, § 2, 77 Stat. 57, provides:

"(a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

"(1) depresses wages and living standards for employees necessary for their health and efficiency;

"(2) prevents the maximum utilization of the available labor resources;

"(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

"(4) burdens commerce and the free flow of goods in commerce; and

"(5) constitutes an unfair method of competition.

"(b) It is hereby declared to be the policy of this Act [subsec. (d) of this section and notes to this section], through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.".

Effective date of 1963 amendment. Act June 10, 1963, P. L. 88-38, § 4, 77 Stat. 57, provides that the amendments to this section by such Act "shall take effect upon the expiration of one year from the date of its enactment [June 10, 1963]: Provided, That in the case of employees covered by a bona fide collective bargaining agreement in effect at least thirty days prior to the date of enactment of this Act [June 10, 1963], entered into by a labor organization (as defined in section 6(d)(4) of the Fair Labor Standards Act of 1938, as amended [subsec. (d)(4) of this section]), the amendments made by this Act [subsec. (d) of this section] shall take effect upon the termination of such collective bargaining agreement or upon the expiration of two years from the date of enactment of this Act [June 10, 1963], whichever shall first occur.".

Rules and regulations prescribed by Secretary. For provisions in 1966 and 1974 amendments authorizing Secretary to prescribe rules and regulations, see Other provisions notes to 29 USCS §§ 203 and 202, respectively.

Training wage. Act Nov. 17, 1989, 101-157, § 6, 103 Stat. 941, provides:

"(a) In general. (1) Authority. Any employer may, in lieu of the minimum wage prescribed by section 6 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206), pay an eligible employee the wage prescribed by paragraph (2)—

"(A) while such employee is employed for the period authorized by subsection (g)(1)(B)(i), or

"(B) while such employee is engaged in on-the-job training for the period authorized by subsection (g)(1)(B)(ii).

"(2) Wage rate. The wage referred to in paragraph (1) shall be a wage—

"(A) of not less than $3.35 an hour during the year beginning April 1, 1990; and

"(B) beginning April 1, 1991, of not less than $3.35 an hour or 85 percent of the wage prescribed by section 6 of such Act [29 USCS § 206], whichever is greater.

"(b) Wage period. An employer may pay an eligible employee the wage authorized by subsection (a) for a period that—

"(1) begins on or after April 1, 1990;

"(2) does not exceed the maximum period during which an employee may be paid such wage as determined under subsection (g)(1)(B); and

"(3) ends before April 1, 1993.

"(c) Wage conditions. No eligible employee may be paid the wage authorized by subsection (a) by an employer if—

"(1) any other individual has been laid off by such employer from the position to be filled by such eligible employee or from any substantially equivalent position; or

"(2) such employer has terminated the employment of any regular employee or otherwise reduced the number of employees with the intention of filling the vacancy so created by hiring an employee to be paid such wage.

"(d) Limitations. "(1) Employee hours. During any month in which employees are to be employed in an establishment under this section, the proportion of employee hours of employment to the total hours of employment of all employees in such establishment may not exceed a proportion equal to one-fourth of the total hours of employment of all employees in such establishment.

"(2) Displacement. (A) Prohibition. No employer may take any action to displace employees (including partial displacements such as reduction in hours, wages, or employment benefits) for purposes of hiring individuals at the wage authorized in subsection (a).

"(B) Disqualification. If the Secretary determines that an employer has taken an action in violation of subparagraph (A), the Secretary shall issue an order disqualifying such employer from employing any individual at such wage.

"(e) Notice. Each employer shall provide to any eligible employee who is to be paid the wage authorized by subsection (a) a written notice before the employee begins employment stating the requirements of this section and the remedies provided by subsection (f) for violations of this section. The Secretary shall provide to employers the text of the notice to be provided under this subsection.

"(f) Enforcement. Any employer who violates this section shall be considered to have violated section 15(a)(3) of the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a)(3)). Sections 16 and 17 of such Act (29 U.S.C. 216 and 217) shall apply with respect to the violation.

"(g) Definitions. For purposes of this section:

"(1) Eligible employee. (A) In general. The term 'eligible employee' means with respect to an employer an individual who—

"(i) is not a migrant agricultural worker or a seasonal agricultural worker (as defined in paragraphs (8) and (10) of section 3 of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1802(8) and (10)) without regard to subparagraph (B) of such paragraphs and is not a nonimmigrant

described in section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)(a));

"(ii) has not attained the age of 20 years; and

"(iii) is eligible to be paid the wage authorized by subsection (a) as determined under subparagraph (B).

"(B) Duration. (i) An employee shall initially be eligible to be paid the wage authorized by subsection (a) until the employee has been employed a cumulative total of 90 days at such wage.

"(ii) An employee who has been employed by an employer at the wage authorized by subsection (a) for the period authorized by clause (i) may be employed by any other employer for an additional 90 days if the employer meets the requirements of subsection (h).

"(iii) The total period, as authorized by clauses (i) and (ii), that an employee may be paid the wage authorized by subsection (a) may not exceed 180 days.

"(iv) For purposes of this subparagraph, the term 'employer' means with respect to an employee an employer who is required to withhold payroll taxes for such employee. "(C) Proof. (i) In general. An individual is responsible for providing the requisite proof of previous period or periods of employment with other employers. An employer's good faith reliance on the proof presented to the employer by an individual shall constitute a complete defense to a charge that the employer has violated subsection (b)(2) with respect to such individual.

"(ii) Regulations. The Secretary of Labor shall issue regulations defining the requisite proof required of an individual. Such regulations shall establish minimal requirements for requisite proof and may prescribe that an accurate list of the individual's employers and a statement of the dates and duration of employment with each employer constitute requisite proof.

"(2) On-the-job training. The term 'on-the-job training' means training that is offered to an individual while employed in productive work that provides training, technical and other related skills, and personal skills that are essential to the full and adequate performance of such employment.

"(h) Employer requirements. An employer who wants to employ employees at the wage authorized by subsection (a) for the period authorized by subsection (g)(1)(B)(ii) shall—

"(1) notify the Secretary annually of the positions at which such employees are to be employed at such wage,

"(2) provide on-the-job training to such employees which meets general criteria of the Secretary issued by regulation after consultation with the Committee on Labor and Human Resources of the Senate and the Committee on Education and Labor of the House of Representatives and other interested persons,

"(3) keep on file a copy of the training program which the employer will provide such employees,

"(4) provide a copy of the training program to the employees,

"(5) post in a conspicuous place in places of employment a notice of

the types of jobs for which the employer is providing on-the-job training, and

"(6) send to the Secretary on an annual basis a copy of such notice.

"The Secretary shall make available to the public upon request notices provided to the Secretary by employers in accordance with paragraph (6).

"(i) Report. The Secretary of Labor shall report to Congress not later than March 1, 1993, on the effectiveness of the wage authorized by subsection (a). The report shall include—

"(1) an analysis of the impact of such wage on employment opportunities for inexperienced workers;

"(2) any reduction in employment opportunities for experienced workers resulting from the employment of employees under such wage;

"(3) the nature and duration of the training provided under such wage; and

"(4) the degree to which employers used the authority to pay such wage.".

CODE OF FEDERAL REGULATIONS

Wage order procedure for American Samoa, 29 CFR Part 511.

Application of the Fair Labor Standards Act to domestic service, 29 CFR Part 552.

Industries in American Samoa, 29 CFR Part 697.

CROSS REFERENCES

Hours worked defined, 29 USCS § 203.

Overtime pay, 29 USCS § 207.

Employees performing services within foreign country or certain territory under jurisdiction of United States as not subject to provisions of this section, 29 USCS § 213.

Action by employee to recover unpaid minimum wages and liquidated damages, 29 USCS § 216.

Minimum wages of employees of Government contractors prescribed by Davis–Bacon Act, 40 USCS § 276a.

Minimum wages for employees covered by Walsh–Healy Act, 41 USCS § 35.

This section is referred to in 2 USCS § 60k; 5 USCS §§ 2302, 5343, 5349, 7702; 7 USCS §§ 2015, 2026; 15 USCS § 1673; 20 USCS §§ 1077, 1078, 1087dd; 21 USCS § 849; 22 USCS §§ 2506, 3905, 3967–3969; 29 USCS §§ 203, 205, 207, 208, 213–216, 218, 1552; 38 USCS §§ 1720, 3485; 41 USCS § 351; 42 USCS §§ 300e–9, 431, 1437t, 2000e-2, 2753, 3056, 8009, 8011, 9848.

RESEARCH GUIDE

Federal Procedure L Ed:

1 Fed Proc L Ed, Access to District Courts § 1:625.

2 Fed Proc L Ed, Appeal, Certiorari, and Review § 3:303.

5 Fed Proc L Ed, Bankruptcy § 9:369.

6A Fed Proc L Ed, Class Actions § 12:5.

12A Fed Proc L Ed, Farms, Ranches, and Agricultural Products, § 34:976.

Col) 26 BNA FEP Cas 959, 26 BNA WH Cas 1023, 24 CCH EPD ¶ 31384.

Since wrong of denying promotions was separate from wrong of paying employees inadequately, district court's construction of back-pay award to compensate employees for both does not provide duplicate recovery under Equal Pay Act; moreover, for same reasons that plaintiffs are entitled under Title VII to front pay as compensation for losses which will be suffered in future for failure to promote, front pay should be awarded as Equal Pay Act recovery. Thompson v Sawyer (1982) 219 App DC 393, 678 F2d 257, 28 BNA FEP Cas 1614, 25 BNA WH Cas 614, 28 CCH EPD ¶ 32668, 94 CCH LC ¶ 34186, 33 FR Serv 2d 1533, later proceeding (1984, DC Dist Col) 586 F Supp 635, 34 BNA FEP Cas 1327, 34 CCH EPD ¶ 34432, later proceeding (1984, DC Dist Col) 599 F Supp 806, 36 BNA FEP Cas 817, 36 CCH EPD ¶ 35021, later proceeding (1986) 254 App DC 348, 797 F2d 1015, 41 BNA FEP Cas 1435, 41 CCH EPD ¶ 36469, cert den (1987) 480 US 905, 94 L Ed 2d 518, 107 S Ct 1347, 43 BNA FEP Cas 80, 42 CCH EPD ¶ 36796, later proceeding (1987) 89 LC 632, 44 BNA FEP Cas 1457, affd (1989, CA4) 866 F2d 709, 48 BNA FEP Cas 1649, 29 BNA WH Cas 181, 49 CCH EPD ¶ 38720, 111 CCH LC ¶ 35198, 89-1 USTC ¶ 9164, 63 AFTR 2d 89-677 and revd on other grounds (1988) 266 App DC 452, 836 F2d 616, 47 BNA FEP Cas 2, 45 CCH EPD ¶ 37628, on remand (1989, DC Dist Col) 710 F Supp 1, 50 CCH EPD ¶ 38999.

In view of element of discretion in awards of liquidated damages under Portal to Portal Act (29 USCS § 260), issue of liquidated damages under Equal Pay Act (29 USCS § 206(b)) must be determined by court. Altman v Stevens Fashion Fabrics (1977, ND Cal) 441 F Supp 1318, 17 BNA FEP Cas 1085, 16 CCH EPD ¶ 8255, 17 CCH EPD ¶ 8640, 83 CCH LC ¶ 33646, 26 FR Serv 2d 152.

Equal Pay Act (29 USCS § 626(d)) does not authorize recovery of compensatory damages in addition to liquidated damages, and monetary value of plaintiff's emotional and physical harm is therefore not relevant to amount of recovery on EPA claim. Altman v Stevens Fashion Fabrics (1977, ND Cal) 441 F Supp 1318, 17 BNA FEP Cas 1085, 16 CCH EPD ¶ 8255, 17 CCH EPD ¶ 8640, 83 CCH LC ¶ 33646, 26 FR Serv 2d 152.

Backpay may be awarded under Equal Pay Act for period after employee left job, where employee prevails on her Title VII claim and establishes that she was not paid comparably to similarly situated male employees, since she would thus be entitled to damages in form of backpay, and she would be allowed to recover wage she should have earned rather than wage she was actually paid. Weiss v Coca-Cola Bottling Co. (1991, ND Ill) 772 F Supp 407, 56 BNA FEP Cas 1612, 30 BNA WH Cas 955, 57 CCH EPD ¶ 41221, 120 CCH LC ¶ 35571.

92. —Punitive damages

Punitive damages are not recoverable under Equal Pay Act, nor may former employee alleging discrimination recover front pay where no improper discharge is alleged and no relief in nature of reinstatement is sought. Forsberg v Pacific Northwest Bell Tel. Co. (1985, DC Or) 623 F Supp 117, 38 CCH EPD ¶ 35507, 2 FR Serv 3d 342, on reconsideration (1985, DC Or) 622 F Supp 1147, 38 CCH EPD ¶ 35508, later proceeding (1985, DC Or) 622 F Supp 1150, 38 CCH EPD ¶ 35684, 103 CCH LC ¶ 34746, affd (1988, CA9 Or) 840 F2d 1409, 45 CCH EPD ¶ 37758, amd on other grounds (1988, CA9 Or) 46 CCH EPD ¶ 37996.

93. Attorneys' fees

Prevailing defendant was not entitled to award of attorneys' fees in Equal Pay Act (29 USCS § 206(d)) suit in view of lack of statutory authorization for such award and fact that plaintiff's contentions were not totally devoid of merit or otherwise reflective of bad faith. Horner v Mary Institute (1980, CA8 Mo) 613 F2d 706, 21 BNA FEP Cas 1069, 24 BNA WH Cas 436, 22 CCH EPD ¶ 30565, 88 CCH LC ¶ 33880.

94. Prejudgment interest

Prejudgment interest is proper and allowable component of backpay award for violation of 29 USCS § 206(d) because injured worker must be restored to economic position in which worker would have been but for discrimination. Davis v Jobs for Progress, Inc. (1976, DC Ariz) 427 F Supp 479, 18 BNA FEP Cas 59, 14 CCH EPD ¶ 7624.

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions. (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek

longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act [29 USCS §§ 201et seq., generally; for full classification, consult USCS Tables volumes] by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966 [Feb. 1, 1967],

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products. No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

and such employee receives compensation for employment in excess of forty hours in any work-week at a rate not less than one and one-half times the minimum wage rate applicable to him under section 6 [29 USCS § 206],

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) [Repealed]

(d) [Repealed]

(e) **"Regular rate" defined.** As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator [Secretary] set forth in appropriate regulations which he shall issue, having due regard among other relevant

factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator [Secretary]) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)[)], where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

(f) Employment necessitating irregular hours of work. No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 [29 USCS § 206(a) or (b)] (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates. No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the

employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during non-overtime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: Provided, That the rate so established shall be authorized by regulation by the Administrator [Secretary] as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h) Extra compensation creditable toward overtime compensation. Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment. No employer shall be deemed to have violated subsection (a) by employing any employee at a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 6 [29 USCS § 206], and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) Employment in hospital or establishment engaged in care of sick, aged, or mentally ill. No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is

accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) Employment by public agency engaged in fire protection or law enforcement activities. No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) [29 USCS § 213 note] in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) Employment in domestic service in one or more households. No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a).

(m) Employment in tobacco industry. For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee—

(1) is employed by such employer—

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) Employment by street, suburban, or interurban electric railway, or local trolley or motorbus carrier. In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

(o) Compensatory time. (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than—

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee,

whichever is higher [.]

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) For purposes of this subsection—

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution. (1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the pub-

lic agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Maximum hour exemption for employees receiving remedial education. Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is—

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

(June 25, 1938, ch 676, § 7, 52 Stat. 1063; Oct. 29, 1941, ch 461, 55 Stat. 756; July 20, 1949, ch 352, § 1, 63 Stat. 446; Oct. 26, 1949, ch 736, §§ 7, 16(f), 63 Stat. 912, 920; May 5, 1961, P. L. 87-30, § 6, 75 Stat. 69; Sept. 23, 1966, P. L. 89-601, Title II, §§ 204(c), (d), 212(b), Title IV, §§ 401–403, 80 Stat. 835–837, 841, 842; April 8, 1974, P. L. 93-259, §§ 6(c)(1)(A), 7(b)(2), 9(a), 12(b), 19(a)–(c), 21(a), 88 Stat. 60, 62, 64, 66, 68; Nov. 13, 1985, P. L. 99-150, §§ 2(a), 3(a), (b), (c)(1), 99 Stat. 787, 789; Nov. 17, 1989, P. L. 101-157, § 7, 103 Stat. 944.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The bracketed word "Secretary", referring to the Secretary of Labor has been inserted on authority of 1950 Reorg. Plan No. 6, set out as transfer of functions note to 29 USCS § 1.

The bracketed closing parenthesis has been inserted in subsec. (e)(7) to indicate the probable intent of Congress.

The bracketed period has been inserted in subsec. (o)(4) to indicate the probable intent of Congress.

Amendments:

1941. Act Oct. 29, 1941, in subsec. (b), paragraph (2), inserted "and eighty" after "two thousand".

1949. Act July 20, 1949, added subsec. (e)

Act Oct. 26, 1949 (effective 90 days after enactment, as provided by § 16(a) of such Act, which appears as 29 USCS § 202 note), in subsec. (a), transposed the words "no employer shall" at the beginning of the subsec. to follow "section" and substituted "for a workweek longer than forty hours" for former paragraphs (1)–(3); and in subsec. (b), clause (1), inserted "and forty" following "one thousand" and substituted "; or" for the comma at the end, and substituted clause (2), for the former clause (2); and in subsec. (c), inserted "buttermilk," following "milk,"; and substituted subsec. (d), for former subsec. (d); and substituted subsec. (e) for one which read "For the purpose of computing overtime compensation payable under this section to an employee—

"(1) who is paid for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, at a premium rate not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days, or

"(2) who, in pursuance of an applicable employment contract or collective bargaining agreement is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek, the extra compensation provided by such premium rate shall be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work."

Such Act further (effective as above) added subsecs. (f) and (g).

1961. Act May 5, 1961 (effective upon expiration of 120 days after enactment, as provided by § 14 of that Act, which appears as 29 USCS § 203 note), in subsec. (a), redesignated former subsec. (a) as (a)(1), inserted after the word "who" the words "in any workweek", substituted "; and" for the period at the end, and added paragraph (2), except as modified by later amendments; in subsec. (b), para. (2), substituted "in excess of the maximum workweek applicable to such employee under subsection (a)" for "in excess of forty hours in the workweek"; in subsec. (d), para. (5), substituted "in excess of the maximum workweek applicable to such employee under subsection (a)" for "forty in a workweek";

substituted, in para. (7), "the maximum workweek applicable to such employee under subsection (a)" for "forty hours"; and in subsec. (e), substituted "the maximum workweek applicable to such employee under subsec. (a)" for "forty hours", "subsection (a) or (b) of section 6 (whichever may be applicable)" for "section 6(a)", and "such maximum" for "forty in any"; and in subsec. (f), substituted "the maximum workweek applicable to such employee under such subsection" for "forty hours" in two places; and added subsec. (h).

1966. Act Sept. 23, 1966 (effective 2/1/67, as provided by § 602 of such Act), in subsec. (a), inserted ", or is employed in an enterprise engaged in commerce or in the production of goods for commerce," and substituted a period for "; and" at the end of paragraph (1), substituted "is engaged in commerce or in the production of goods for commerce, or" for "(i)", "in such workweek" for "except for the enactment of the Fair Labor Standards Amendments of 1961, would not be within the purview of this subsection, or (ii)", "1966" for "1961" in two places, "first" for "third", and "second" for "fourth" in two places, deleted "as defined in section 3(s)(1) or (4), or by an establishment described in section 3(s)(3)," before "and who" and "section 13 of" before "this Act", and inserted "or" at the end of clause (B) of paragraph (2); in subsec. (b), substituted clause (3) for former clause (3); and substituted subsec. (c), for former subsec. (c), and redesignated subsec. (d) as subsec. (e), inserted subsec. (d); redesignated subsecs. (e)–(h) as (f)–(i), substituted "(e)" for "(d)" in newly-redesignated subsecs. (g) and (h); added the last sentence of subsec. (i); and added subsec. (j).

1974. Act April 8, 1974 (effective 5/1/74, as provided by § 29(a) of such Act), in subsec. (c), substituted "seven workweeks" for "ten workweeks", "ten workweeks" for "fourteen workweeks" and "forty-eight hours" for "fifty hours"; and in subsec. (d), substituted "seven workweeks" for "ten workweeks" and "ten workweeks" for "fourteen workweeks"; and in subsec. (j), inserted "or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises" following "a hospital"; and added subsecs. (l)-(n).

Such Act further (effective 1/1/75, as provided by § 19(c) of such Act), in subsecs. (c) and (d), substituted "five workweeks" for "seven workweeks" and "seven workweeks" for "ten workweeks"; and added subsec. (k).

Such Act further (effective 1/1/76, as provided by § 19(d) of such Act), in subsecs. (c) and (d), substituted "three workweeks" for "five workweeks" and "five workweeks" for "seven workweeks".

Such Act further (effective 1/1/76, as provided by § 6(c)(1)(B) of such Act) in subsec. (k), substituted "232 hours" for "240 hours" each place it occurs.

Such Act further (effective 12/31/76, as provided by § 19(e) of such Act) repealed subsecs. (c) and (d).

Such Act further (effective 1/1/77, as provided by § 6(c)(1)(C) of such Act) in subsec. (k) substituted "216 hours" for "232 hours".

Such Act further (effective 1/1/78 as provided by § (6)(1)(D) of such Act), in subsec. (k), substituted in para. (1) "exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secre-

tary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975" for "exceed 216 hours", and in para. (2) "as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days" for "as 216 hours bears to 28 days".

1985. Act Nov. 13, 1985 (effective 4/15/86, as provided by § 6 of such act, which appears as 29 USCS § 203 note), added subsecs. (o) and (p).

1989. Act Nov. 17, 1989 added subsec. (q).

Transfer of functions:

Transfer of functions of all other officers, employees, and agencies of Department of Labor to Secretary of Labor by 1950 Reorg. Plan No. 6, see transfer of functions note to 29 USCS § 1.

Other provisions:

Study of excessive overtime. Act Sept. 23, 1966, P. L. 89-601, Title VI, § 603, 80 Stat. 844, provides: "The Secretary of Labor is hereby instructed to commence immediately a complete study of present practices dealing with overtime payments for work in excess of forty hours per week and the extent to which such overtime work impedes the creation of new job opportunities in American industry. The Secretary is further instructed to report to the Congress by July 1, 1967, the findings of such survey with appropriate recommendations."

Forty-eight hour wartime workweek. Executive Order No. 9301, which established a minimum wartime workweek of forty-eight hours, was revoked by Exec. Or. No. 9607, of Aug. 30, 1945, 10 Fed. Reg. 11191.

Rules and regulations prescribed by Secretary. For provisions in 1966 and 1974 amendments authorizing Secretary to prescribe rules and regulations, see other provisions notes to 29 USCS §§ 203 and 202, respectively.

Existing collective bargaining agreements. Act Nov. 13, 1985, P. L. 99-150, § 2(b), 99 Stat. 788, effective April 15, 1986, as provided by § 6 of such act, which appears as 29 USCS § 203 note, provides: "A collective bargaining agreement which is in effect on April 15, 1986, and which permits compensatory time off in lieu of overtime compensation shall remain in effect until its expiration date unless otherwise modified, except that compensatory time shall be provided after April 14, 1986, in accordance with section 7(o) of the Fair Labor Standards Act of 1938 [subsection (o) of this section] (as added by subsection (a)).".

Payment of overtime compensation. Act Nov. 13, 1985, P. L. 99-150, § 2(c)(2), 99 Stat. 789, effective April 15, 1986, as provided by § 6 of such act, which appears as 29 USCS § 203 note, provides: "A State, political subdivision of a State, or interstate governmental agency may defer until August 1, 1986, the payment of monetary overtime compensation under section 7 of the Fair Labor Standards Act of 1938 [this section] for hours worked after April 14, 1986.".

CODE OF FEDERAL REGULATIONS

Industries of a seasonal nature and industries with marked seasonal peaks of operation, 29 CFR Part 526.

Area of production, 29 CFR Part 536.

Requirements of a "Bona fide thrift or savings plan", 29 CFR Part 547.
Authorization of established basic rates for computing overtime pay, 29 CFR Part 548.
Requirements of a "Bona fide profit-sharing plan or trust", 29 CFR Part 549.
Defining and delimiting the term "Talent fees", 29 CFR Part 550.

CROSS REFERENCES

Hours worked defined, 29 USCS § 203.
Administrator, 29 USCS § 204.
American Samoa employees not subject to provisions of this section, 29 USCS § 213.
Employees performing services within foreign country or certain territory under jurisdiction of United States as not subject to provisions of this section, 29 USCS § 213.
Action by employee to recover unpaid overtime compensation and liquidated damages, 29 USCS § 216.
Liability for overtime work performed prior to July 20, 1949, 29 USCS § 216b.
Preliminary and post-liminary activities not compensable, 29 USCS § 254.
Hours of labor on public works, 40 USCS § 327 et seq.
Forty-hour workweek for employees covered by Walsh-Healy Act, 41 USCS § 35.
Walsh-Healy Act inapplicable to employees entering into agreements with employees under paragraphs 1 or 2 subsection (b) of this section, 41 USCS § 35.
Rate of overtime for employees covered by Walsh-Healy Act, 41 USCS § 40.
This section is referred to in 5 USCS §§ 5542–5544, 6123, 6128; 29 USCS §§ 203, 211, 213–216b, 218; 41 USCS §§ 35, 355.

RESEARCH GUIDE

Federal Procedure L Ed:

2 Fed Proc L Ed, Appeal, Certiorari, and Review §§ 3:774, 775.
6A Fed Proc L Ed, Class Actions § 12:5.
15A Fed Proc L Ed, Government Contracts § 39:889.
22 Fed Proc, L Ed, Labor and Labor Relations, §§ 52:308, 325, 333, 340, 341, 343, 344, 348, 356, 367, 399, 408, 432, 434, 440-442, 530, 535, 540, 598, 614, 621, 631, 662, 709, 750.

Am Jur:

6 Am Jur 2d, Assignments § 54.
48A Am Jur 2d, Labor and Labor Relations §§ 1936, 2215, 2216, 2233, 2235, 2239–2245, 2247–2250, 2266, 2273, 2274, 2276– 2278, 2285, 2290, 2295, 2303, 2318–2320, 2325, 2331, 2333, 2337, 2388, 2369, 2413, 2417, 2419, 2432, 2435, 2439, 2441, 2456, 2476, 2479, 2483, 2484, 2486–2488, 2498.
64 Am Jur 2d, Public Works and Contracts §§ 224, 231.

Forms:

12A Fed Procedural Forms L Ed, Labor and Labor Relations §§ 46:461-464, 472, 480, 491, 492, 495, 497, 503-516.
10A Am Jur Legal Forms 2d, Labor and Labor Relations §§ 159: 601 et seq., 741 et seq.

tory liability of defendants (restaurant and its owner) for back wages by taking into account tips actually earned by employees during violation period, because defendants had not informed tipped employees that their wages were being decreased, and such notice is required in order to come within requirements of 29 USCS § 203(m); notice requirement of § 203(m) cannot be waived by district court, even when there is evidence of actual tips received. Reich v Chez Robert, Inc. (1994, CA3 NJ) 28 F3d 401, 2 BNA WH Cas 2d 257, 128 CCH LC ¶ 33109.

Fact that employer was aware of existence of Equal Pay Act (29 USCS § 206) and its potential applicability is not enough to show willfulness for purposes of award of liquidated damages; negligent conduct which does not show reckless disregard for matter of whether employer's conduct was prohibited is not sufficient to establish willfulness. EEOC v Cherry-Burrell Corp. (1994, CA8 Iowa) 35 F3d 356, 128 CCH LC ¶ 33138.

Supreme Court's "McKennon" decision, which held that after-acquired evidence of wrongful conduct during employment that would have resulted in termination of Age Discrimination in Employment Act (29 USCS §§ 621 et seq.) plaintiff does not operate in every instance to bar all relief for earlier violation of Act, applies to cases brought under Equal Pay Act; further, Supreme Court's reasoning underlying "McKennon" decision applies with equal force when after-acquired evidence concerns employee's misrepresentations in job application or resume. Wallace v Dunn Constr. Co. (1995, CA11 Ala) 62 F3d 374; 68 BNA FEP Cas 990, 9 FLW Fed C 458.

Lost benefits are recoverable in Equal Pay Act case only if plaintiff has offered evidence of out-of-pocket expenses for same benefits. McMillan v Massachusetts SPCA (1998, CA1 Mass) 140 F3d 288.

Decision of jury on willfulness under 29 USCS § 255(a), which determines appropriate statute of limitations, is distinct from district court judge's decision to award liquidated damages pursuant to 29 USCS § 260 in absence of showing of good faith. Broadus v O.K. Indus. (2000, CA8 Ark) 226 F3d 937, 83 BNA FEP Cas 1537.

Award of prejudgment interest is inappropriate when liquidated damages have been awarded. Gandy v Sullivan County (1993, ED Tenn) 819 F Supp 726, 61 BNA FEP Cas 1289.

Continuing violation doctrine does not permit victim of Equal Pay Act violation to recover damages for period of unequal pay occurring prior to commencement of limitations period. Campana v City of Greenfield (2000, ED Wis) 102 F Supp 2d 1063, 141 CCH LC ¶ 34093.

Liquidated damages under Equal Pay Act are excluded from gross income for taxation purposes. Bennett v Commissioner (1994) 64 BNA FEP Cas 1331, 2 BNA WH Cas 2d 124, TC Memo 1994-190, 67 CCH TCM 2817, 94 TNT 83-11.

Award of liquidated damages for violation of 29 USCS § 206 is based on assumption that damages which may result from retention of employee's pay are too obscure and difficult to calculate with certainty. Miller v Paradise of Port Richey, Inc. (1999, MD Fla) 75 F Supp 2d 1342.

Prevailing plaintiff under 29 USCS § 206 is entitled to mandatory award of liquidated damages unless district court explicitly finds that defendant acted in good faith in violating FLSA. Miller v Paradise of Port Richey, Inc. (1999, MD Fla) 75 F Supp 2d 1342.

93. Attorneys' fees

Fee and cost awards under Equal Pay Act may be analogized to similar claims in civil rights cases; thus, prevailing plaintiff who received only nominal damages ($350.00) was entitled to $2,500 for fees and costs, rather than $29,000 that had been requested. Lawrence v Western Pipe Service (1993, ND Ala) 146 FRD 195, 124 CCH LC ¶ 35785.

In Equal Pay Act action, district court is afforded broad discretion in assessing reasonable attorney's fee award based on circumstances of case. Perdue v City Univ. (1998, ED NY) 13 F Supp 2d 326, 136 CCH LC ¶ 33757.

94. Prejudgment interest

Interest on backpay award in Equal Pay Act case is to be computed from date on which cause of action accrued, and not from date plaintiff filed her complaint. McMillan v Massachusetts SPCA (1998, CA1 Mass) 140 F3d 288.

In action under Equal Pay Act, award of prejudgment interest is inappropriate when liquidated damages have been awarded. Gandy v Sullivan County (1993, ED Tenn) 819 F Supp 726, 61 BNA FEP Cas 1289.

95. Appeals

In determining whether evidence is sufficient to support Equal Pay Act verdict, court of appeals review is limited to ascertaining whether that verdict is supported by substantial evidence when record is viewed in light most favorable to prevailing party; substantial evidence is such relevant evidence as reasonable mind might accept as adequate to support conclusion. Kenworthy v Conoco, Inc. (1992, CA10 Colo) 979 F2d 1462, 60 CCH EPD ¶ 41903, 123 CCH LC ¶ 35740.

When reviewing trial court's measure of damages in Equal Pay Act case, court of appeals will resolve all uncertainties against discriminating employer. Lowe v Southmark Corp. (1993, CA5 Tex) 998 F2d 335, 62 BNA FEP Cas 1087, 126 CCH LC ¶ 33004.

§ 207. Maximum hours

(a)–(d) [Unchanged]

(e) "Regular rate" defined. As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1)–(5) [Unchanged]

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular

workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)[]], where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(f), (g) [Unchanged]

(h) Sums excluded from regular rate; extra compensation creditable toward overtime compensation. (1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 [29 USCS § 206] or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

(i)–(n) [Unchanged]

(o) Compensatory time. (1)–(5) [Unchanged]

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) if—

(A) such employee is paid at a per-page rate which is not less than—

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection—

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p), (q) [Unchanged]

(As amended Sept. 6, 1995, P. L. 104-26, § 2, 109 Stat. 264; May 18, 2000, P. L. 106-202, § 2(a), (b), 114 Stat. 308.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1995. Act Sept. 6, 1995 (applicable as provided by § 3 of such Act, which appears as a note to this section), in subsec. (o), redesignated para. (6) as para. (7), and added a new para. (6).

2000. Act May 18, 2000 (effective 90 days after enactment, as provided by § 2(c) of such Act, which appears as a note to this section), in subsec. (e), in para. (6), deleted "or" following the concluding semicolon; in para. (7), substituted "; or" for a concluding period; and added para. (8); and, in subsec. (h), substituted "(2) Extra" for "Extra", and inserted para. (1).

Other provisions:

Application of Sept. 6, 1995 amendments. Act Sept. 6, 1995, P. L. 104-26, § 3, 109 Stat. 265, provides: "The amendments made by section 2 [amending subsec. (o) of this section] shall apply after the date of the enactment of this Act and with respect to actions brought in a court after the date of the enactment of this Act.".

Effective date of May 18, 2000 amendments. Act May 18, 2000, P. L. 106-202, § 2(c), 114 Stat. 309, provides: "The amendments made by this section [amending subsecs. (e) and (h) of this section] shall take effect on the date that is 90 days after the date of enactment of this Act.".

Stock option rights, etc.; failure to include in employee's regular rate; liability of employer. Act May 18, 2000, P. L. 106-202, § 2(d), 114 Stat. 309, provides:

"No employer shall be liable under the Fair Labor Standards Act of 1938 [29 USCS §§ 201 et seq.] for any failure to include in an employee's regular rate (as defined for purposes of such Act) any income or value derived from employer-provided grants or rights obtained pursuant to any stock option, stock appreciation right, or employee stock purchase program if—

"(1) the grants or rights were obtained before the effective date described in subsection (c) [note to this section];

"(2) the grants or rights were obtained within the 12-month period beginning on the effective date described in subsection (c) [note to this section], so long as such program was in existence on the date of enactment of this Act and will require shareholder approval to modify such program to comply with section 7(e)(8) of the Fair Labor Standards Act of 1938 [subsec. (e)(8) of this section] (as added by the amendments made by subsection (a)); or

"(3) such program is provided under a collective bargaining agreement that is in effect on the effective date described in subsection (c) [note to this section].".

May 18, 2000 amendments; regulations. Act May 18, 2000, P. L. 106-202, § 2(e), 114 Stat. 309, provides: "The Secretary of Labor may promulgate such regulations as may be necessary to carry out the amendments made by this Act [amending subsecs. (e) and (h) of this section].".

RESEARCH GUIDE

Federal Procedure:

15A Fed Proc L Ed, Government Contracts § 39:961.

22A Fed Proc L Ed, Labor and Labor Relations §§ 52:1392, 52:1411, 52:1416, 52:1427, 52:1428, 52:1430, 52:1431, 52:1434, 52:1440, 52:1444, 52:1453, 52:1490, 52:1497, 52:1499, 52:1505–52:1507, 52:1548, 52:1553, 52:1558, 52:1573, 52:1583–1592, 52:1594, 52:1657, 52:1667, 52:1732.

Am Jur:

45B Am Jur 2d, Job Discrimination (1993) § 1895.1.

64 Am Jur 2d, Public Works and Contracts § 239.

Am Jur Trials:

80 Am Jur Trials, Violation of Statutory Work Hour Limits and Shipowner Liability, p. 397.

Forms:

12A Fed Procedural Forms L Ed, Labor and Labor Relations (1998) §§ 46:330, 334, 336, 343, 349, 350, 353, 354.

10B Am Jur Legal Forms 2d (2001), Labor and Labor Relations §§ 159:66–159:68, 159:293–159:295, 159:324.

16 Am Jur Pl & Pr Forms (2000), Labor and Labor Relations, §§ 177, 179, 180, 181, 183, 185, 191, 192, 195, 200.

Annotations:

Emergency medical technicians, ambulance personnel, paramedics, and rescue service workers as fire protection or law enforcement personnel for purposes of § 7(k) of Fair Labor Standards Act (29 USCS § 207(k)) providing limited exception from overtime protection for employees engaged in fire protection or law enforcement activities. 116 ALR Fed 143.

Validity and Construction of "Domestic Service" Provisions of Fair Labor Standards Act (29 U.S.C.A. §§ 201 et seq. [29 USCS §§ 201 et seq.]). 165 ALR Fed 163.

INTERPRETIVE NOTES AND DECISIONS

17.1.—Emergency medical technicians and paramedics

17.2.—Police K-9 unit officers

I. IN GENERAL

2. Constitutionality

Grant of federal court jurisdiction contained in 29 USCS § 216(b) over federal suits for overtime pay under FLSA brought by state employees against state employers is unconstitutional; such suits are barred by Eleventh Amendment. Mills v Maine (1997, CA1 Me) 118 F3d 37, 3 BNA WH Cas 2d 802.

State employee cannot sue state under FLSA for unpaid overtime compensation since state has immu-

GARCIA *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 82-1913. Argued March 19, 1984—Reargued October 1, 1984—Decided February 19, 1985*

Appellee San Antonio Metropolitan Transit Authority (SAMTA) is a public mass-transit authority that is the major provider of transportation in the San Antonio, Tex., metropolitan area. It has received substantial federal financial assistance under the Urban Mass Transportation Act of 1964. In 1979, the Wage and Hour Administration of the Department of Labor issued an opinion that SAMTA's operations are not immune from the minimum-wage and overtime requirements of the Fair Labor Standards Act (FLSA) under *National League of Cities* v. *Usery*, 426 U. S. 833, in which it was held that the Commerce Clause does not empower Congress to enforce such requirements against the States "in areas of traditional governmental functions." *Id.*, at 852. SAMTA then filed an action in Federal District Court, seeking declaratory relief. Entering judgment for SAMTA, the District Court held that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under *National League of Cities*, is exempt from the obligations imposed by the FLSA.

Held: In affording SAMTA employees the protection of the wage and hour provisions of the FLSA, Congress contravened no affirmative limit on its power under the Commerce Clause. Pp. 537-557.

(a) The attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental functions" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled. Pp. 537-547.

(b) There is nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. The States' continued role in the federal system is primarily guaranteed not by any exter-

*Together with No. 82-1951, *Donovan, Secretary of Labor* v. *San Antonio Metropolitan Transit Authority et al.*, also on appeal from the same court.

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nally imposed limits on the commerce power, but by the structure of the Federal Government itself. In these cases, the political process effectively protected that role. Pp. 547–555.

557 F. Supp. 445, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 557. REHNQUIST, J., filed a dissenting opinion, *post*, p. 579. O'CONNOR, J., filed a dissenting opinion, in which POWELL and REHNQUIST, JJ., joined, *post*, p. 580.

Solicitor General Lee reargued the cause and filed briefs on reargument for appellant in No. 82–1951. *Assistant Attorney General Olson* argued the cause for appellants in both cases on the original argument. With him on the briefs on the original argument were Mr. Lee, *Assistant Attorney General McGrath, Deputy Solicitor General Geller, Joshua I. Schwartz, Michael F. Hertz,* and *Douglas Letter*. *Laurence Gold* reargued the cause for appellant in No. 82–1913. With him on the briefs were *Earle Putnam, Linda R. Hirshman, Robert Chanin,* and *George Kaufmann*.

William T. Coleman, Jr., reargued the cause for appellees in both cases. With him on the briefs for appellee American Public Transit Association were *Donald T. Bliss* and *Zoë E. Baird*. *George P. Parker, Jr.*, filed briefs for appellee San Antonio Metropolitan Transit Authority.†

†Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by the Attorneys General of their respective States as follows: *Francis X. Bellotti* of Massachusetts, *John K. Van de Kamp* of California, *Joseph I. Lieberman* of Connecticut, *Michael A. Lilly* of Hawaii, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Robert T. Stephen* of Kansas, *David L. Armstrong* of Kentucky, *William J. Guste, Jr.*, of Louisiana, *Stephen H. Sachs* of Maryland, *Hubert H. Humphrey III* of Minnesota, *John Ashcroft* of Missouri, *Michael P. Greely* of Montana, *Paul L. Douglas* of Nebraska, *Gregory H. Smith* of New Hampshire, *Irwin I. Kimmelman* of New Jersey, *LeRoy Zimmerman* of Pennsylvania, *T. Travis Medlock* of South Carolina, *David Wilkinson* of Utah, *John J. Easton, Jr.*, of Vermont, *Gerald L. Baliles* of Virginia, *Chauncey H. Browning* of West Virginia, *Bronson C. La Follette* of Wisconsin, and *A. G. McClintock* of Wyoming; for the Colorado Public Employees'

JUSTICE BLACKMUN delivered the opinion of the Court.

We revisit in these cases an issue raised in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976). In that litigation, this Court, by a sharply divided vote, ruled that the Commerce Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA) against the States "in areas of traditional governmental functions." *Id.*, at 852. Although *National League of Cities* supplied some examples of "traditional governmental functions," it did not offer a general explanation of how a "traditional" function is to be distinguished from a "nontraditional" one. Since then, federal and state courts have struggled with the task, thus imposed, of identifying a traditional function for purposes of state immunity under the Commerce Clause.

In the present cases, a Federal District Court concluded that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under *National League of Cities*, is exempt from the obligations imposed by the FLSA. Faced with the identical question, three Federal Courts of Appeals and one state appellate court have reached the opposite conclusion.[1]

Retirement Association by *Endicott Peabody* and *Jeffrey N. Martin*; for the Legal Foundation of America by *David Crump*; for the National Institute of Municipal Law Officers by *John W. Witt, Roger F. Cutler, Benjamin L. Brown, J. Lamar Shelley, William H. Taube, William I. Thornton, Jr., Henry W. Underhill, Jr., Charles S. Rhyne, Roy D. Bates, George Agnost, Robert J. Alfton, James K. Baker*, and *Clifford D. Pierce, Jr.*; for the National League of Cities et al. by *Lawrence R. Velvel* and *Elaine Kaplan*; and for the National Public Employer Labor Relations Association et al. by *R. Theodore Clark, Jr.*

[1] See *Dove* v. *Chattanooga Area Regional Transportation Authority*, 701 F. 2d 50 (CA6 1983), cert. pending *sub nom. City of Macon* v. *Joiner*, No. 82–1974; *Alewine* v. *City Council of Augusta, Ga.*, 699 F. 2d 1060 (CA11 1983), cert. pending, No. 83–257; *Kramer* v. *New Castle Area Transit Authority*, 677 F. 2d 308 (CA3 1982), cert. denied, 459 U. S. 1146 (1983); *Francis* v. *City of Tallahassee*, 424 So. 2d 61 (Fla. App. 1982).

Our examination of this "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled.

I

The history of public transportation in San Antonio, Tex., is characteristic of the history of local mass transit in the United States generally. Passenger transportation for hire within San Antonio originally was provided on a private basis by a local transportation company. In 1913, the Texas Legislature authorized the State's municipalities to regulate vehicles providing carriage for hire. 1913 Tex. Gen. Laws, ch. 147, § 4, ¶ 12, now codified, as amended, as Tex. Rev. Civ. Stat. Ann., Art. 1175, §§ 20 and 21 (Vernon 1963). Two years later, San Antonio enacted an ordinance setting forth franchising, insurance, and safety requirements for passenger vehicles operated for hire. The city continued to rely on such publicly regulated private mass transit until 1959, when it purchased the privately owned San Antonio Transit Company and replaced it with a public authority known as the San Antonio Transit System (SATS). SATS operated until 1978, when the city transferred its facilities and equipment to appellee San Antonio Metropolitan Transit Authority (SAMTA), a public mass-transit authority organized on a countywide basis. See generally Tex. Rev. Civ. Stat. Ann., Art. 1118x (Vernon Supp. 1984). SAMTA currently is the major provider of transportation in the San Antonio metropolitan area; between 1978 and 1980 alone, its vehicles traveled over 26 million route miles and carried over 63 million passengers.

As did other localities, San Antonio reached the point where it came to look to the Federal Government for financial assistance in maintaining its public mass transit. SATS managed to meet its operating expenses and bond obligations for the first decade of its existence without federal or local financial aid. By 1970, however, its financial position had deteriorated to the point where federal subsidies were vital for its continued operation. SATS' general manager that year testified before Congress that "if we do not receive substantial help from the Federal Government, San Antonio may . . . join the growing ranks of cities that have inferior [public] transportation or may end up with no [public] transportation at all." [2]

The principal federal program to which SATS and other mass-transit systems looked for relief was the Urban Mass Transportation Act of 1964 (UMTA), Pub. L. 88–365, 78 Stat. 302, as amended, 49 U. S. C. App. § 1601 *et seq.*, which provides substantial federal assistance to urban mass-transit programs. See generally *Jackson Transit Authority* v. *Transit Union*, 457 U. S. 15 (1982). UMTA now authorizes the Department of Transportation to fund 75 percent of the capital outlays and up to 50 percent of the operating expenses of qualifying mass-transit programs. §§ 4(a), 5(d) and (e), 49 U. S. C. App. §§ 1603(a), 1604(d) and (e). SATS received its first UMTA subsidy, a $4.1 million capital grant, in December 1970. From then until February 1980, SATS and SAMTA received over $51 million in UMTA grants—more than $31 million in capital grants, over $20 million in operating assistance, and a minor amount in technical assistance. During SAMTA's first two fiscal years, it received $12.5 million in UMTA operating grants, $26.8 million from sales taxes, and only $10.1 million from fares. Federal subsidies

[2] Urban Mass Transportation: Hearings on H. R. 6663 et al. before the Subcommittee on Housing of the House Committee on Banking and Currency, 91st Cong., 2d Sess., 419 (1970) (statement of F. Norman Hill).

and local sales taxes currently account for about 75 percent of SAMTA's operating expenses.

The present controversy concerns the extent to which SAMTA may be subjected to the minimum-wage and overtime requirements of the FLSA. When the FLSA was enacted in 1938, its wage and overtime provisions did not apply to local mass-transit employees or, indeed, to employees of state and local governments. §§ 3(d), 13(a)(9), 52 Stat. 1060, 1067. In 1961, Congress extended minimum-wage coverage to employees of any private mass-transit carrier whose annual gross revenue was not less than $1 million. Fair Labor Standards Amendments of 1961, §§ 2(c), 9, 75 Stat. 65, 71. Five years later, Congress extended FLSA coverage to state and local-government employees for the first time by withdrawing the minimum-wage and overtime exemptions from public hospitals, schools, and mass-transit carriers whose rates and services were subject to state regulation. Fair Labor Standards Amendments of 1966, §§ 102(a) and (b), 80 Stat. 831. At the same time, Congress eliminated the overtime exemption for all mass-transit employees other than drivers, operators, and conductors. § 206(c), 80 Stat. 836. The application of the FLSA to public schools and hospitals was ruled to be within Congress' power under the Commerce Clause. *Maryland* v. *Wirtz*, 392 U. S. 183 (1968).

The FLSA obligations of public mass-transit systems like SATS were expanded in 1974 when Congress provided for the progressive repeal of the surviving overtime exemption for mass-transit employees. Fair Labor Standards Amendments of 1974, § 21(b), 88 Stat. 68. Congress simultaneously brought the States and their subdivisions further within the ambit of the FLSA by extending FLSA coverage to virtually all state and local-government employees. §§ 6(a)(1) and (6), 88 Stat. 58, 60, 29 U. S. C. §§ 203(d) and (x). SATS complied with the FLSA's overtime requirements until 1976, when this Court, in *National League of Cities*, overruled *Maryland* v. *Wirtz*, and held that the FLSA could not be

applied constitutionally to the "traditional governmental functions" of state and local governments. Four months after *National League of Cities* was handed down, SATS informed its employees that the decision relieved SATS of its overtime obligations under the FLSA.[3]

Matters rested there until September 17, 1979, when the Wage and Hour Administration of the Department of Labor issued an opinion that SAMTA's operations "are not constitutionally immune from the application of the Fair Labor Standards Act" under *National League of Cities*. Opinion WH-499, 6 LRR 91:1138. On November 21 of that year, SAMTA filed this action against the Secretary of Labor in the United States District Court for the Western District of Texas. It sought a declaratory judgment that, contrary to the Wage and Hour Administration's determination, *National League of Cities* precluded the application of the FLSA's overtime requirements to SAMTA's operations. The Secretary counterclaimed under 29 U. S. C. §217 for enforcement of the overtime and recordkeeping requirements of the FLSA. On the same day that SAMTA filed its action, appellant Garcia and several other SAMTA employees brought suit against SAMTA in the same District Court for overtime pay under the FLSA. *Garcia* v. *SAMTA*, Civil Action No. SA 79 CA 458. The District Court has stayed that action pending the outcome of these cases, but it allowed Garcia to intervene in the present litigation as a defendant in support of the Secretary. One month after SAMTA brought suit, the Department of Labor formally amended its FLSA interpretive regulations to provide that publicly owned local mass-transit systems are not entitled to immunity under

[3] Neither SATS nor SAMTA appears to have attempted to avoid the FLSA's minimum-wage provisions. We are informed that basic wage levels in the mass-transit industry traditionally have been well in excess of the minimum wages prescribed by the FLSA. See Brief for National League of Cities et al. as *Amici Curiae* 7–8.

National League of Cities. 44 Fed. Reg. 75630 (1979), codified as 29 CFR § 775.3(b)(3) (1984).

On November 17, 1981, the District Court granted SAMTA's motion for summary judgment and denied the Secretary's and Garcia's cross-motion for partial summary judgment. Without further explanation, the District Court ruled that "local public mass transit systems (including [SAMTA]) constitute integral operations in areas of traditional governmental functions" under *National League of Cities.* App. D to Juris. Statement in No. 82–1913, p. 24a. The Secretary and Garcia both appealed directly to this Court pursuant to 28 U. S. C. § 1252. During the pendency of those appeals, *Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678 (1982), was decided. In that case, the Court ruled that commuter rail service provided by the state-owned Long Island Rail Road did not constitute a "traditional governmental function" and hence did not enjoy constitutional immunity, under *National League of Cities*, from the requirements of the Railway Labor Act. Thereafter, it vacated the District Court's judgment in the present cases and remanded them for further consideration in the light of *Long Island.* 457 U. S. 1102 (1982).

On remand, the District Court adhered to its original view and again entered judgment for SAMTA. 557 F. Supp. 445 (1983). The court looked first to what it regarded as the "historical reality" of state involvement in mass transit. It recognized that States not always had owned and operated mass-transit systems, but concluded that they had engaged in a longstanding pattern of public regulation, and that this regulatory tradition gave rise to an "inference of sovereignty." *Id.*, at 447–448. The court next looked to the record of federal involvement in the field and concluded that constitutional immunity would not result in an erosion of federal authority with respect to state-owned mass-transit systems, because many federal statutes themselves contain exemptions for States and thus make the withdrawal of fed-

eral regulatory power over public mass-transit systems a supervening federal policy. *Id.*, at 448–450. Although the Federal Government's authority over employee wages under the FLSA obviously would be eroded, Congress had not asserted any interest in the wages of public mass-transit employees until 1966 and hence had not established a long-standing federal interest in the field, in contrast to the century-old federal regulatory presence in the railroad industry found significant for the decision in *Long Island.* Finally, the court compared mass transit to the list of functions identified as constitutionally immune in *National League of Cities* and concluded that it did not differ from those functions in any material respect. The court stated: "If transit is to be distinguished from the exempt *[National League of Cities]* functions it will have to be by identifying a traditional state function in the same way pornography is sometimes identified: someone knows it when they see it, but they can't describe it." 557 F. Supp., at 453.[4]

The Secretary and Garcia again took direct appeals from the District Court's judgment. We noted probable jurisdiction. 464 U. S. 812 (1983). After initial argument, the cases were restored to our calendar for reargument, and the parties were requested to brief and argue the following additional question:

> "Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), should be reconsidered?" 468 U. S. 1213 (1984).

Reargument followed in due course.

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[4] The District Court also analyzed the status of mass transit under the four-part test devised by the Sixth Circuit in *Amersbach* v. *City of Cleveland*, 598 F. 2d 1033 (1979). In that case, the Court of Appeals looked to (1) whether the function benefits the community as a whole and is made available at little or no expense; (2) whether it is undertaken for public service or pecuniary gain; (3) whether government is its principal provider; and (4) whether government is particularly suited to perform it because of a community-wide need. *Id.*, at 1037.

II

Appellees have not argued that SAMTA is immune from regulation under the FLSA on the ground that it is a local transit system engaged in intrastate commercial activity. In a practical sense, SAMTA's operations might well be characterized as "local." Nonetheless, it long has been settled that Congress' authority under the Commerce Clause extends to intrastate economic activities that affect interstate commerce. See, *e. g.*, *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, 452 U. S. 264, 276–277 (1981); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 258 (1964); *Wickard* v. *Filburn*, 317 U. S. 111, 125 (1942); *United States* v. *Darby*, 312 U. S. 100 (1941). Were SAMTA a privately owned and operated enterprise, it could not credibly argue that Congress exceeded the bounds of its Commerce Clause powers in prescribing minimum wages and overtime rates for SAMTA's employees. Any constitutional exemption from the requirements of the FLSA therefore must rest on SAMTA's status as a governmental entity rather than on the "local" nature of its operations.

The prerequisites for governmental immunity under *National League of Cities* were summarized by this Court in *Hodel*, *supra*. Under that summary, four conditions must be satisfied before a state activity may be deemed immune from a particular federal regulation under the Commerce Clause. First, it is said that the federal statute at issue must regulate "the 'States as States.'" Second, the statute must "address matters that are indisputably 'attribute[s] of state sovereignty.'" Third, state compliance with the federal obligation must "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" Finally, the relation of state and federal interests must not be such that "the nature of the federal interest . . . justifies state submission." 452 U. S., at 287–288, and n. 29, quoting *National League of Cities*, 426 U. S., at 845, 852, 854.

The controversy in the present cases has focused on the third *Hodel* requirement—that the challenged federal statute trench on "traditional governmental functions." The District Court voiced a common concern: "Despite the abundance of adjectives, identifying which particular state functions are immune remains difficult." 557 F. Supp., at 447. Just how troublesome the task has been is revealed by the results reached in other federal cases. Thus, courts have held that regulating ambulance services, *Gold Cross Ambulance* v. *City of Kansas City*, 538 F. Supp. 956, 967–969 (WD Mo. 1982), aff'd on other grounds, 705 F. 2d 1005 (CA8 1983), cert. pending, No. 83–138; licensing automobile drivers, *United States* v. *Best*, 573 F. 2d 1095, 1102–1103 (CA9 1978); operating a municipal airport, *Amersbach* v. *City of Cleveland*, 598 F. 2d 1033, 1037–1038 (CA6 1979); performing solid waste disposal, *Hybud Equipment Corp.* v. *City of Akron*, 654 F. 2d 1187, 1196 (CA6 1981); and operating a highway authority, *Molina-Estrada* v. *Puerto Rico Highway Authority*, 680 F. 2d 841, 845–846 (CA1 1982), are functions protected under *National League of Cities*. At the same time, courts have held that issuance of industrial development bonds, *Woods* v. *Homes and Structures of Pittsburg, Kansas, Inc.*, 489 F. Supp. 1270, 1296–1297 (Kan. 1980); regulation of intrastate natural gas sales, *Oklahoma ex rel. Derryberry* v. *FERC*, 494 F. Supp. 636, 657 (WD Okla. 1980), aff'd, 661 F. 2d 832 (CA10 1981), cert. denied *sub nom. Texas* v. *FERC*, 457 U. S. 1105 (1982); regulation of traffic on public roads, *Friends of the Earth* v. *Carey*, 552 F. 2d 25, 38 (CA2), cert. denied, 434 U. S. 902 (1977); regulation of air transportation, *Hughes Air Corp.* v. *Public Utilities Comm'n of Cal.*, 644 F. 2d 1334, 1340–1341 (CA9 1981); operation of a telephone system, *Puerto Rico Tel. Co.* v. *FCC*, 553 F. 2d 694, 700–701 (CA1 1977); leasing and sale of natural gas, *Public Service Co. of N. C.* v. *FERC*, 587 F. 2d 716, 721 (CA5), cert. denied *sub nom. Louisiana* v. *FERC*, 444 U. S. 879 (1979); operation of a mental health facility, *Williams* v. *Eastside Mental*

Health Center, Inc., 669 F. 2d 671, 680–681 (CA11), cert. denied, 459 U. S. 976 (1982); and provision of in-house domestic services for the aged and handicapped, *Bonnette* v. *California Health and Welfare Agency*, 704 F. 2d 1465, 1472 (CA9 1983), are *not* entitled to immunity. We find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side. The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best.

Thus far this Court itself has made little headway in defining the scope of the governmental functions deemed protected under *National League of Cities*. In that case the Court set forth examples of protected and unprotected functions, see 426 U. S., at 851, 854, n. 18, but provided no explanation of how those examples were identified. The only other case in which the Court has had occasion to address the problem is *Long Island*.[5] We there observed: "The determination of whether a federal law impairs a state's authority with respect to 'areas of traditional [state] functions' may at times be a difficult one." 455 U. S., at 684, quoting *National League of Cities*, 426 U. S., at 852. The accuracy of that statement is demonstrated by this Court's own difficulties in *Long Island* in developing a workable standard for "traditional governmental functions." We relied in large part there on "the *historical reality* that the operation of railroads is not among the functions *traditionally* performed by state and local governments," but we

[5] See also, however, *Jefferson County Pharmaceutical Assn.* v. *Abbott Laboratories*, 460 U. S. 150, 154, n. 6 (1983); *FERC* v. *Mississippi*, 456 U. S. 742, 781, and n. 7 (1982) (opinion concurring in judgment in part and dissenting in part); *Fry* v. *United States*, 421 U. S. 542, 558, and n. 2 (1975) (dissenting opinion).

simultaneously disavowed "a static historical view of state functions generally immune from federal regulation." 455 U. S., at 686 (first emphasis added; second emphasis in original). We held that the inquiry into a particular function's "traditional" nature was merely a means of determining whether the federal statute at issue unduly handicaps "basic state prerogatives," *id.*, at 686–687, but we did not offer an explanation of what makes one state function a "basic prerogative" and another function not basic. Finally, having disclaimed a rigid reliance on the historical pedigree of state involvement in a particular area, we nonetheless found it appropriate to emphasize the extended historical record of *federal* involvement in the field of rail transportation. *Id.*, at 687–689.

Many constitutional standards involve "undoubte[d] . . . gray areas," *Fry* v. *United States*, 421 U. S. 542, 558 (1975) (dissenting opinion), and, despite the difficulties that this Court and other courts have encountered so far, it normally might be fair to venture the assumption that case-by-case development would lead to a workable standard for determining whether a particular governmental function should be immune from federal regulation under the Commerce Clause. A further cautionary note is sounded, however, by the Court's experience in the related field of state immunity from federal taxation. In *South Carolina* v. *United States*, 199 U. S. 437 (1905), the Court held for the first time that the state tax immunity recognized in *Collector* v. *Day*, 11 Wall. 113 (1871), extended only to the "ordinary" and "strictly governmental" instrumentalities of state governments and not to instrumentalities "used by the State in the carrying on of an ordinary private business." 199 U. S., at 451, 461. While the Court applied the distinction outlined in *South Carolina* for the following 40 years, at no time during that period did the Court develop a consistent formulation of the kinds of governmental functions that were entitled to immunity. The Court identified the protected functions at various times as "essential," "usual," "traditional," or "strictly gov-

ernmental."[6] While "these differences in phraseology . . . must not be too literally contradistinguished," *Brush* v. *Commissioner*, 300 U. S. 352, 362 (1937), they reflect an inability to specify precisely what aspects of a governmental function made it necessary to the "unimpaired existence" of the States. *Collector* v. *Day*, 11 Wall., at 127. Indeed, the Court ultimately chose "not, by an attempt to formulate any general test, [to] risk embarrassing the decision of cases [concerning] activities of a different kind which may arise in the future." *Brush* v. *Commissioner*, 300 U. S., at 365. If these tax-immunity cases had any common thread, it was in the attempt to distinguish between "governmental" and "proprietary" functions.[7] To say that the distinction be-

[6] See *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172 (1911) ("essential"); *Helvering* v. *Therrell*, 303 U. S. 218, 225 (1938) (same); *Helvering* v. *Powers*, 293 U. S. 214, 225 (1934) ("usual"); *United States* v. *California*, 297 U. S. 175, 185 (1936) ("activities in which the states have traditionally engaged"); *South Carolina* v. *United States*, 199 U. S. 437, 461 (1905) ("strictly governmental").

[7] In *South Carolina*, the Court relied on the concept of "strictly governmental" functions to uphold the application of a federal liquor license tax to a state-owned liquor-distribution monopoly. In *Flint*, the Court stated: "The true distinction is between . . . those operations of the States essential to the execution of its *[sic]* governmental functions, and which the State can only do itself, and those activities which are of a private character"; under this standard, "[i]t is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like." 220 U. S., at 172. In *Ohio* v. *Helvering*, 292 U. S. 360 (1934), another case involving a state liquor-distribution monopoly, the Court stated that "the business of buying and selling commodities . . . is not the performance of a governmental function" and that "[w]hen a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned." *Id.*, at 369. In *Powers*, the Court upheld the application of the federal income tax to the income of trustees of a state-operated commuter railroad; the Court reiterated that "the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend," regardless of the

tween "governmental" and "proprietary" proved to be stable, however, would be something of an overstatement. In 1911, for example, the Court declared that the provision of a municipal water supply "is no part of the essential governmental functions of a State." *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172. Twenty-six years later, without any intervening change in the applicable legal standards, the Court simply rejected its earlier position and decided that the provision of a municipal water supply *was* immune from federal taxation as an essential governmental function, even though municipal waterworks long had been operated for profit by private industry. *Brush* v. *Commissioner*, 300 U. S., at 370–373. At the same time that the Court was holding a municipal water supply to be immune from federal taxes, it had held that a state-run commuter rail system was *not* immune. *Helvering* v. *Powers*, 293 U. S. 214 (1934). Justice Black, in *Helvering* v. *Gerhardt*, 304 U. S. 405, 427 (1938), was moved to observe: "An implied constitutional distinction which taxes income of an officer of a state-operated transportation system and exempts income of the manager of a municipal water works system manifests the uncertainty created by the 'essential' and 'non-essential' test" (concurring opinion). It was this uncertainty and instability that led the Court shortly thereafter, in *New York* v. *United States*, 326 U. S. 572 (1946), unanimously to conclude that the distinction between "governmental" and "proprietary" functions was "untenable" and must be abandoned. See *id.*, at 583 (opinion of Frankfurter, J., joined by Rutledge, J.); *id.*, at 586 (Stone, C. J., concurring, joined by Reed, Murphy, and Burton, JJ.); *id.*, at 590–596 (Douglas, J., dissenting, joined by Black, J.). See also *Massachusetts* v. *United States*, 435 U. S. 444, 457, and n. 14 (1978) (plurality opinion); *Case* v. *Bowles*, 327 U. S. 92, 101 (1946).

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fact that the proprietary enterprises "are undertaken for what the State conceives to be the public benefit." 293 U. S., at 225. Accord, *Allen* v. *Regents*, 304 U. S. 439, 451–453 (1938).

Even during the heyday of the governmental/proprietary distinction in intergovernmental tax-immunity doctrine the Court never explained the constitutional basis for that distinction. In *South Carolina*, it expressed its concern that unlimited state immunity from federal taxation would allow the States to undermine the Federal Government's tax base by expanding into previously private sectors of the economy. See 199 U. S., at 454–455.[8] Although the need to reconcile state and federal interests obviously demanded that state immunity have some limiting principle, the Court did not try to justify the particular result it reached; it simply concluded that a "line [must] be drawn," *id.*, at 456, and proceeded to draw that line. The Court's elaborations in later cases, such as the assertion in *Ohio* v. *Helvering*, 292 U. S. 360, 369 (1934), that "[w]hen a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*," sound more of *ipse dixit* than reasoned explanation. This inability to give principled content to the distinction between "governmental" and "proprietary," no less significantly than its unworkability, led the Court to abandon the distinction in *New York* v. *United States*.

The distinction the Court discarded as unworkable in the field of tax immunity has proved no more fruitful in the field of regulatory immunity under the Commerce Clause. Neither do any of the alternative standards that might be employed to distinguish between protected and unprotected governmental functions appear manageable. We rejected the possibility of making immunity turn on a purely historical standard of "tradition" in *Long Island*, and properly so. The most obvious defect of a historical approach to state immunity is that it prevents a court from accommodating changes in the historical functions of States, changes that have re-

[8] That concern was especially weighty in *South Carolina* because liquor taxes, the object of the dispute in that case, then accounted for over one-fourth of the Federal Government's revenues. See *New York* v. *United States*, 326 U. S. 572, 598, n. 4 (1946) (dissenting opinion).

sulted in a number of once-private functions like education being assumed by the States and their subdivisions.[9] At the same time, the only apparent virtue of a rigorous historical standard, namely, its promise of a reasonably objective measure for state immunity, is illusory. Reliance on history as an organizing principle results in line-drawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated.[10]

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[9] Indeed, the "traditional" nature of a particular governmental function can be a matter of historical nearsightedness; today's self-evidently "traditional" function is often yesterday's suspect innovation. Thus, *National League of Cities* offered the provision of public parks and recreation as an example of a traditional governmental function. 426 U. S., at 851. A scant 80 years earlier, however, in *Shoemaker* v. *United States*, 147 U. S. 282 (1893), the Court pointed out that city commons originally had been provided not for recreation but for grazing domestic animals "in common," and that "[i]n the memory of men now living, a proposition to take private property [by eminent domain] for a public park . . . would have been regarded as a novel exercise of legislative power." *Id.*, at 297.

[10] For much the same reasons, the existence *vel non* of a tradition of *federal* involvement in a particular area does not provide an adequate standard for state immunity. Most of the Federal Government's current regulatory activity originated less than 50 years ago with the New Deal, and a good portion of it has developed within the past two decades. The recent vintage of this regulatory activity does not diminish the strength of the federal interest in applying regulatory standards to state activities, nor does it affect the strength of the States' interest in being free from federal supervision. Although the Court's intergovernmental tax-immunity decisions ostensibly have subjected particular state activities to federal taxation because those activities "ha[ve] been traditionally within [federal taxing] power from the beginning," *New York* v. *United States*, 326 U. S., at 588 (Stone, C. J., concurring, joined by Reed, Murphy, and Burton, JJ.), the Court has not in fact required federal taxes to have long historical records in order to be effective. The income tax at issue in *Powers*, *supra*, took effect less than a decade before the tax years for which it was challenged, while the federal tax whose application was

A nonhistorical standard for selecting immune governmental functions is likely to be just as unworkable as is a historical standard. The goal of identifying "uniquely" governmental functions, for example, has been rejected by the Court in the field of government tort liability in part because the notion of a "uniquely" governmental function is unmanageable. See *Indian Towing Co.* v. *United States*, 350 U. S. 61, 64–68 (1955); see also *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 433 (1978) (dissenting opinion). Another possibility would be to confine immunity to "necessary" governmental services, that is, services that would be provided inadequately or not at all unless the government provided them. Cf. *Flint* v. *Stone Tracy Co.*, 220 U. S., at 172. The set of services that fits into this category, however, may well be negligible. The fact that an unregulated market produces less of some service than a State deems desirable does not mean that the State itself must provide the service; in most if not all cases, the State can "contract out" by hiring private firms to provide the service or simply by providing subsidies to existing suppliers. It also is open to question how well equipped courts are to make this kind of determination about the workings of economic markets.

We believe, however, that there is a more fundamental problem at work here, a problem that explains why the Court was never able to provide a basis for the governmental/proprietary distinction in the intergovernmental tax-immunity cases and why an attempt to draw similar distinctions with respect to federal regulatory authority under *National League of Cities* is unlikely to succeed regardless of how the distinctions are phrased. The problem is that neither the governmental/proprietary distinction nor any

upheld in *New York* v. *United States* took effect in 1932 and was rescinded less than two years later. See *Helvering* v. *Powers*, 293 U. S., at 222; Rakestraw, The Reciprocal Rule of Governmental Tax Immunity—A Legal Myth, 11 Fed. Bar J. 3, 34, n. 116 (1950).

other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be. Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. "The science of government . . . is the science of experiment," *Anderson* v. *Dunn*, 6 Wheat. 204, 226 (1821), and the States cannot serve as laboratories for social and economic experiment, see *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting), if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands. In the words of Justice Black:

> "There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires." *Helvering* v. *Gerhardt*, 304 U. S., at 427 (concurring opinion).

We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a

particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles. If there are to be limits on the Federal Government's power to interfere with state functions—as undoubtedly there are—we must look elsewhere to find them. We accordingly return to the underlying issue that confronted this Court in *National League of Cities*—the manner in which the Constitution insulates States from the reach of Congress' power under the Commerce Clause.

III

The central theme of *National League of Cities* was that the States occupy a special position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. Of course, the Commerce Clause by its specific language does not provide any special limitation on Congress' actions with respect to the States. See *EEOC* v. *Wyoming*, 460 U. S. 226, 248 (1983) (concurring opinion). It is equally true, however, that the text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for "[b]ehind the words of the constitutional provisions are postulates which limit and control." *Monaco* v. *Mississippi*, 292 U. S. 313, 322 (1934). *National League of Cities* reflected the general conviction that the Constitution precludes "the National Government [from] devour[ing] the essentials of state sovereignty." *Maryland* v. *Wirtz*, 392 U. S., at 205 (dissenting opinion). In order to be faithful to the underlying federal premises of the Constitution, courts must look for the "postulates which limit and control."

What has proved problematic is not the perception that the Constitution's federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations. One approach to defining the limits on Con-

gress' authority to regulate the States under the Commerce Clause is to identify certain underlying elements of political sovereignty that are deemed essential to the States' "separate and independent existence." *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869). This approach obviously underlay the Court's use of the "traditional governmental function" concept in *National League of Cities*. It also has led to the separate requirement that the challenged federal statute "address matters that are indisputably 'attribute[s] of state sovereignty.'" *Hodel*, 452 U. S., at 288, quoting *National League of Cities*, 426 U. S., at 845. In *National League of Cities* itself, for example, the Court concluded that decisions by a State concerning the wages and hours of its employees are an "undoubted attribute of state sovereignty." 426 U. S., at 845. The opinion did not explain what aspects of such decisions made them such an "undoubted attribute," and the Court since then has remarked on the uncertain scope of the concept. See *EEOC* v. *Wyoming*, 460 U. S., at 238, n. 11. The point of the inquiry, however, has remained to single out particular features of a State's internal governance that are deemed to be intrinsic parts of state sovereignty.

We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty. In part, this is because of the elusiveness of objective criteria for "fundamental" elements of state sovereignty, a problem we have witnessed in the search for "traditional governmental functions." There is, however, a more fundamental reason: the sovereignty of the States is limited by the Constitution itself. A variety of sovereign powers, for example, are withdrawn from the States by Article I, § 10. Section 8 of the same Article works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation. See

Hodel, 452 U. S., at 290–292. By providing for final review of questions of federal law in this Court, Article III curtails the sovereign power of the States' judiciaries to make authoritative determinations of law. See *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816). Finally, the developed application, through the Fourteenth Amendment, of the greater part of the Bill of Rights to the States limits the sovereign authority that States otherwise would possess to legislate with respect to their citizens and to conduct their own affairs.

The States unquestionably do "retai[n] a significant measure of sovereign authority." *EEOC* v. *Wyoming*, 460 U. S., at 269 (POWELL, J., dissenting). They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government. In the words of James Madison to the Members of the First Congress: "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States." 2 Annals of Cong. 1897 (1791). Justice Field made the same point in the course of his defense of state autonomy in his dissenting opinion in *Baltimore & Ohio R. Co.* v. *Baugh*, 149 U. S. 368, 401 (1893), a defense quoted with approval in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78–79 (1938):

> "[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. [Federal] [s]upervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of

the authority of the State and, to that extent, a denial of its independence.'"

As a result, to say that the Constitution assumes the continued role of the States is to say little about the nature of that role. Only recently, this Court recognized that the purpose of the constitutional immunity recognized in *National League of Cities* is not to preserve "a sacred province of state autonomy." *EEOC* v. *Wyoming*, 460 U. S., at 236. With rare exceptions, like the guarantee, in Article IV, § 3, of state territorial integrity, the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace. James Wilson reminded the Pennsylvania ratifying convention in 1787: "It is true, indeed, sir, although it presupposes the existence of state governments, yet this Constitution does not suppose them to be the sole power to be respected." 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 439 (J. Elliot 2d ed. 1876) (Elliot). The power of the Federal Government is a "power to be respected" as well, and the fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies. In short, we have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.

When we look for the States' "residuary and inviolable sovereignty," The Federalist No. 39, p. 285 (B. Wright ed. 1961) (J. Madison), in the shape of the constitutional scheme rather than in predetermined notions of sovereign power, a different measure of state sovereignty emerges. Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Fed-

eral Government was designed in large part to protect the States from overreaching by Congress.[11] The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. U. S. Const., Art. I, §2, and Art. II, §1. They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. Art. I, §3. The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent. Art. V.

The extent to which the structure of the Federal Government itself was relied on to insulate the interests of the States is evident in the views of the Framers. James Madison explained that the Federal Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist No. 46, p. 332 (B. Wright ed. 1961). Similarly, James Wilson observed that "it was a favorite object in the Convention" to provide for the security of the States against federal encroachment and that the structure of the Federal Government itself served that end. 2 Elliot, at 438–439. Madison placed particular reliance on the equal representation of the States in the Senate, which he saw as "at once a constitutional recognition of the portion of sovereignty remaining in the individual

[11] See, *e. g.*, J. Choper, Judicial Review and the National Political Process 175–184 (1980); Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954); La Pierre, The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation, 60 Wash. U. L. Q. 779 (1982).

States, and an instrument for preserving that residuary sovereignty." The Federalist No. 62, p. 408 (B. Wright ed. 1961). He further noted that "the residuary sovereignty of the States [is] implied *and secured* by that principle of representation in one branch of the [federal] legislature" (emphasis added). The Federalist No. 43, p. 315 (B. Wright ed. 1961). See also *McCulloch* v. *Maryland*, 4 Wheat. 316, 435 (1819). In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

The effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation. On the one hand, the States have been able to direct a substantial proportion of federal revenues into their own treasuries in the form of general and program-specific grants in aid. The federal role in assisting state and local governments is a longstanding one; Congress provided federal land grants to finance state governments from the beginning of the Republic, and direct cash grants were awarded as early as 1887 under the Hatch Act.[12] In the past quarter century alone, federal grants to States and localities have grown from $7 billion to $96 billion.[13] As a result, federal

[12] See, *e. g.*, A. Howitt, Managing Federalism: Studies in Intergovernmental Relations 3–18 (1984); Break, Fiscal Federalism in the United States: The First 200 Years, Evolution and Outlook, in Advisory Commission on Intergovernmental Relations, The Future of Federalism in the 1980s, pp. 39–54 (July 1981).

[13] A. Howitt, *supra*, at 8; Bureau of the Census, U. S. Dept. of Commerce, Bureau of the Census, Federal Expenditures by State for Fiscal Year 1983, p. 2 (1984) (Census, Federal Expenditures); Division of Gov-

grants now account for about one-fifth of state and local government expenditures.[14] The States have obtained federal funding for such services as police and fire protection, education, public health and hospitals, parks and recreation, and sanitation.[15] Moreover, at the same time that the States have exercised their influence to obtain federal support, they have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause. For example, the Federal Power Act, the National Labor Relations Act, the Labor-Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, and the Sherman Act all contain express or implied exemptions for States and their subdivisions.[16] The fact that some federal statutes such as the FLSA extend general obligations to the States cannot obscure the extent to which the political position of

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[illegible] ernment Accounts and Reports, Fiscal Service—Bureau of Government Financial Operations, Dept. of the Treasury, Federal Aid to States: Fiscal Year 1982, p. 1 (1983 rev. ed.).

[14] Advisory Commission on Intergovernmental Relations, Significant Features of Fiscal Federalism 120, 122 (1984).

[15] See, *e. g.*, the Federal Fire Prevention and Control Act of 1974, 88 Stat. 1535, as amended, 15 U. S. C. § 2201 *et seq.*; the Urban Park and Recreation Recovery Act of 1978, 92 Stat. 3538, 16 U. S. C. § 2501 *et seq.*; the Elementary and Secondary Education Act of 1965, 79 Stat. 27, as amended, 20 U. S. C. § 2701 *et seq.*; the Water Pollution Control Act, 62 Stat. 1155, as amended, 33 U. S. C. § 1251 *et seq.*; the Public Health Service Act, 58 Stat. 682, as amended, 42 U. S. C. § 201 *et seq.*; the Safe Drinking Water Act, 88 Stat. 1660, as amended, 42 U. S. C. § 300f *et seq.*; the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, as amended, 42 U. S. C. § 3701 *et seq.*; the Housing and Community Development Act of 1974, 88 Stat. 633, as amended, 42 U. S. C. § 5301 *et seq.*; and the Juvenile Justice and Delinquency Prevention Act of 1974, 88 Stat. 1109, as amended, 42 U. S. C. § 5601 *et seq.* See also Census, Federal Expenditures 2–15.

[16] See 16 U. S. C. § 824(f); 29 U. S. C. § 152(2); 29 U. S. C. § 402(e); 29 U. S. C. § 652(5); 29 U. S. C. §§ 1003(b)(1), 1002(32); and *Parker* v. *Brown*, 317 U. S. 341 (1943).

the States in the federal system has served to minimize the burdens that the States bear under the Commerce Clause.[17]

We realize that changes in the structure of the Federal Government have taken place since 1789, not the least of which has been the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913, and that these changes may work to alter the influence of the States in the federal political process.[18] Nonetheless, against this background, we are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy." *EEOC* v. *Wyoming*, 460 U. S., at 236.

Insofar as the present cases are concerned, then, we need go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.

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[17] Even as regards the FLSA, Congress incorporated special provisions concerning overtime pay for law enforcement and firefighting personnel when it amended the FLSA in 1974 in order to take account of the special concerns of States and localities with respect to these positions. See 29 U. S. C. § 207(k). Congress also declined to impose any obligations on state and local governments with respect to policymaking personnel who are not subject to civil service laws. See 29 U. S. C. §§ 203(e)(2)(C)(i) and (ii).

[18] See, *e. g.*, Choper, *supra*, at 177–178; Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847, 860–868 (1979).

In these cases, the status of public mass transit simply underscores the extent to which the structural protections of the Constitution insulate the States from federally imposed burdens. When Congress first subjected state mass-transit systems to FLSA obligations in 1966, and when it expanded those obligations in 1974, it simultaneously provided extensive funding for state and local mass transit through UMTA. In the two decades since its enactment, UMTA has provided over $22 billion in mass-transit aid to States and localities.[19] In 1983 alone, UMTA funding amounted to $3.7 billion.[20] As noted above, SAMTA and its immediate predecessor have received a substantial amount of UMTA funding, including over $12 million during SAMTA's first two fiscal years alone. In short, Congress has not simply placed a financial burden on the shoulders of States and localities that operate mass-transit systems, but has provided substantial countervailing financial assistance as well, assistance that may leave individual mass-transit systems better off than they would have been had Congress never intervened at all in the area. Congress' treatment of public mass transit reinforces our conviction that the national political process systematically protects States from the risk of having their functions in that area handicapped by Commerce Clause regulation.[21]

IV

This analysis makes clear that Congress' action in affording SAMTA employees the protections of the wage and hour

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[19] See Department of Transportation and Related Agencies Appropriations for 1983: Hearings before a Subcommittee of the House Committee on Appropriations, 97th Cong., 2d Sess., pt. 4, p. 808 (1982) (fiscal years 1965–1982); Census, Federal Expenditures 15 (fiscal year 1983).

[20] *Ibid.*

[21] Our references to UMTA are not meant to imply that regulation under the Commerce Clause must be accompanied by countervailing financial benefits under the Spending Clause. The application of the FLSA to SAMTA would be constitutional even had Congress not provided federal funding under UMTA.

provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause. The judgment of the District Court therefore must be reversed.

Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended.

These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause. See *Coyle* v. *Oklahoma*, 221 U. S. 559 (1911). We note and accept Justice Frankfurter's observation in *New York* v. *United States*, 326 U. S. 572, 583 (1946):

> "The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court."

Though the separate concurrence providing the fifth vote in *National League of Cities* was "not untroubled by certain possible implications" of the decision, 426 U. S., at 856, the Court in that case attempted to articulate affirmative limits on the Commerce Clause power in terms of core governmental functions and fundamental attributes of state sovereignty. But the model of democratic decisionmaking the

Court there identified underestimated, in our view, the solicitude of the national political process for the continued vitality of the States. Attempts by other courts since then to draw guidance from this model have proved it both impracticable and doctrinally barren. In sum, in *National League of Cities* the Court tried to repair what did not need repair.

We do not lightly overrule recent precedent.[22] We have not hesitated, however, when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause. See *United States* v. *Darby*, 312 U. S. 100, 116–117 (1941). Due respect for the reach of congressional power within the federal system mandates that we do so now.

National League of Cities v. *Usery*, 426 U. S. 833 (1976), is overruled. The judgment of the District Court is reversed, and these cases are remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The Court today, in its 5–4 decision, overrules *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), a case in which we held that Congress lacked authority to impose the requirements of the Fair Labor Standards Act on state and local governments. Because I believe this decision substantially alters the federal system embodied in the Constitution, I dissent.

I

There are, of course, numerous examples over the history of this Court in which prior decisions have been reconsidered and overruled. There have been few cases, however, in which the principle of *stare decisis* and the rationale of recent

[22] But see *United States* v. *Scott*, 437 U. S. 82, 86–87 (1978).

decisions were ignored as abruptly as we now witness.[1] The reasoning of the Court in *National League of Cities*, and the principle applied there, have been reiterated consistently over the past eight years. Since its decision in 1976, *National League of Cities* has been cited and quoted in opinions joined by every Member of the present Court. *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, 452 U. S. 264, 287–293 (1981); *Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678, 684–686 (1982); *FERC* v. *Mississippi*, 456 U. S. 742, 764–767 (1982). Less than three years ago, in *Long Island R. Co.*, *supra*, a unanimous Court reaffirmed the principles of *National League of Cities* but found them inapplicable to the regulation of a railroad heavily engaged in interstate commerce. The Court stated:

> "The key prong of the *National League of Cities* test applicable to this case is the third one [repeated and reformulated in *Hodel*], which examines whether 'the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."'" 455 U. S., at 684.

The Court in that case recognized that the test "may at times be a difficult one," *ibid.*, but it was considered in that unanimous decision as settled constitutional doctrine.

As recently as June 1, 1982, the five Justices who constitute the majority in these cases also were the majority in *FERC* v. *Mississippi*. In that case, the Court said:

> "In *National League of Cities* v. *Usery*, *supra*, for example, the Court made clear that the State's regulation of its relationship with its employees is an 'undoubted attribute of state sovereignty.' 426 U. S., at 845. Yet,

[1] *National League of Cities*, following some changes in the composition of the Court, had overruled *Maryland* v. *Wirtz*, 392 U. S. 183 (1968). Unlike *National League of Cities*, the rationale of *Wirtz* had not been repeatedly accepted by our subsequent decisions.

by holding "unimpaired" *California* v. *Taylor*, 353 U. S. 553 (1957), which upheld a federal labor regulation as applied to state railroad employees, 426 U. S., at 854, n. 18. *National League of Cities* acknowledged that not 'all aspects of a State's sovereign authority are immune from federal control.'" 456 U. S., at 764, n. 28.

The Court went on to say that even where the requirements of the *National League of Cities* standard are met, "'[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission.'" *Ibid.*, quoting *Hodel*, *supra*, at 288, n. 29. The joint federal/state system of regulation in *FERC* was such a "situation," but there was no hint in the Court's opinion that *National League of Cities*—or its basic standard—was subject to the infirmities discovered today.

Although the doctrine is not rigidly applied to constitutional questions, "any departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). See also *Oregon* v. *Kennedy*, 456 U. S. 667, 691–692, n. 34 (1982) (STEVENS, J., concurring in judgment). In the present cases, the five Justices who compose the majority today participated in *National League of Cities* and the cases reaffirming it.[2] The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitate overruling of multiple precedents that we witness in these cases.[3]

Whatever effect the Court's decision may have in weakening the application of *stare decisis*, it is likely to be less

[2] JUSTICE O'CONNOR, the only new Member of the Court since our decision in *National League of Cities*, has joined the Court in reaffirming its principles. See *Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678 (1982), and *FERC* v. *Mississippi*, 456 U. S. 742, 775 (1982) (O'CONNOR, J., dissenting in part).

[3] As one commentator noted, *stare decisis* represents "a natural evolution from the very nature of our institutions." Lile, Some Views on the Rule of *Stare Decisis*, 4 Va. L. Rev. 95, 97 (1916).

important than what the Court has done to the Constitution itself. A unique feature of the United States is the *federal* system of government guaranteed by the Constitution and implicit in the very name of our country. Despite some genuflecting in the Court's opinion to the concept of federalism, today's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause. The Court holds that the Fair Labor Standards Act (FLSA) "contravened no affirmative limit on Congress' power under the Commerce Clause" to determine the wage rates and hours of employment of all state and local employees. *Ante*, at 556. In rejecting the traditional view of our federal system, the Court states:

> "Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the *structure* of the Federal Government itself." *Ante*, at 550 (emphasis added).

To leave no doubt about its intention, the Court renounces its decision in *National League of Cities* because it "inevitably invites an unelected federal judiciary to make decisions about which state policies its favors and which ones it dislikes." *Ante*, at 546. In other words, the extent to which the States may exercise their authority, when Congress purports to act under the Commerce Clause, henceforth is to be determined from time to time by political decisions made by members of the Federal Government, decisions the Court says will not be subject to judicial review. I note that it does not seem to have occurred to the Court that *it*—an unelected majority of five Justices—today rejects almost 200 years of the understanding of the constitutional status of federalism. In doing so, there is only a single passing reference to the Tenth Amendment. Nor is so much as a dictum of any court cited in support of the view that the role of the States in the federal system may depend upon

the grace of elected federal officials, rather than on the Constitution as interpreted by this Court.

In my opinion that follows, Part II addresses the Court's criticisms of *National League of Cities*. Part III reviews briefly the understanding of federalism that ensured the ratification of the Constitution and the extent to which this Court, until today, has recognized that the States retain a significant measure of sovereignty in our federal system. Part IV considers the applicability of the FLSA to the indisputably local service provided by an urban transit system.

II

The Court finds that the test of state immunity approved in *National League of Cities* and its progeny is unworkable and unsound in principle. In finding the test to be unworkable, the Court begins by mischaracterizing *National League of Cities* and subsequent cases. In concluding that efforts to define state immunity are unsound in principle, the Court radically departs from long-settled constitutional values and ignores the role of judicial review in our system of government.

A

Much of the Court's opinion is devoted to arguing that it is difficult to define *a priori* "traditional governmental functions." *National League of Cities* neither engaged in, nor required, such a task.[4] The Court discusses and condemns

[4] In *National League of Cities*, we referred to the sphere of state sovereignty as including "traditional governmental functions," a realm which is, of course, difficult to define with precision. But the luxury of precise definitions is one rarely enjoyed in interpreting and applying the general provisions of our Constitution. Not surprisingly, therefore, the Court's attempt to demonstrate the impossibility of definition is unhelpful. A number of the cases it cites simply do not involve the problem of defining governmental functions. *E. g., Williams* v. *Eastside Mental Health Center, Inc.*, 669 F. 2d 671 (CA11), cert. denied, 459 U. S. 976 (1982); *Friends of the Earth* v. *Carey*, 552 F. 2d 25 (CA2), cert. denied, 434 U. S. 902 (1977). A number of others are not properly analyzed under the principles

as standards "traditional governmental functions," "purely historical" functions, "'uniquely' governmental functions," and "'necessary' governmental services." *Ante*, at 539, 543, 545. But nowhere does it mention that *National League of Cities* adopted a familiar type of balancing test for determining whether Commerce Clause enactments transgress constitutional limitations imposed by the federal nature of our system of government. This omission is noteworthy, since the author of today's opinion joined *National League of Cities* and concurred separately to point out that the Court's opinion in that case "adopt[s] a balancing approach [that] does not outlaw federal power in areas . . . where the federal interest is demonstrably greater and where state . . . compliance with imposed federal standards would be essential." 426 U. S., at 856 (BLACKMUN, J., concurring).

In reading *National League of Cities* to embrace a balancing approach, JUSTICE BLACKMUN quite correctly cited the part of the opinion that reaffirmed *Fry* v. *United States*, 421 U. S. 542 (1975). The Court's analysis reaffirming *Fry* explicitly weighed the seriousness of the problem addressed by the federal legislation at issue in that case, against the effects of compliance on state sovereignty. 426 U. S., at 852–853. Our subsequent decisions also adopted this approach of weighing the respective interests of the States and Federal

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of *National League of Cities*, notwithstanding some of the language of the lower courts. *E. g.*, *United States* v. *Best*, 573 F. 2d 1095 (CA9 1978), and *Hybud Equipment Corp.* v. *City of Akron*, 654 F. 2d 1187 (CA6 1981). Moreover, rather than carefully analyzing the case law, the Court simply lists various functions thought to be protected or unprotected by courts interpreting *National League of Cities*. *Ante*, at 538–539. In the cited cases, however, the courts considered the issue of state immunity on the specific facts at issue; they did not make blanket pronouncements that particular things inherently qualified as traditional governmental functions or did not. Having thus considered the cases out of context, it was not difficult for the Court to conclude that there is no "organizing principle" among them. See *ante*, at 539.

Government.[5] In *EEOC* v. *Wyoming*, 460 U. S. 226 (1983), for example, the Court stated that "[t]he principle of immunity articulated in *National League of Cities* is a functional doctrine . . . whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system . . . not be lost through undue federal interference in certain core state functions." *Id.*, at 236. See also *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, 452 U. S. 264 (1981). In overruling *National League of Cities*, the Court incorrectly characterizes the mode of analysis established therein and developed in subsequent cases.[6]

[5] In undertaking such balancing, we have considered, on the one hand, the strength of the federal interest in the challenged legislation and the impact of exempting the States from its reach. Central to our inquiry into the federal interest is how closely the challenged action implicates the central concerns of the Commerce Clause, viz., the promotion of a national economy and free trade among the States. See *EEOC* v. *Wyoming*, 460 U. S. 226, 244 (1983) (STEVENS, J., concurring). See also, for example, *Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678, 688 (1982) ("Congress long ago concluded that federal regulation of railroad labor services is necessary to prevent disruptions in vital rail service essential to the national economy"); *FERC* v. *Mississippi*, 456 U. S. 742, 757 (1982) ("[I]t is difficult to conceive of a more basic element of interstate commerce than electric energy . . . "). Similarly, we have considered whether exempting States from federal regulation would undermine the goals of the federal program. See *Fry* v. *United States*, 421 U. S. 542 (1975). See also *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, 452 U. S. 264, 282 (1981) (national surface mining standards necessary to insure competition among States does not undermine States' efforts to maintain adequate intrastate standards). On the other hand, we have also assessed the injury done to the States if forced to comply with federal Commerce Clause enactments. See *National League of Cities*, 426 U. S., at 846–851.

[6] In addition, reliance on the Court's difficulties in the tax immunity field is misplaced. Although the Court has abandoned the "governmental/proprietary" distinction in this field, see *New York* v. *United States*, 326 U. S. 572 (1946), it has not taken the drastic approach of relying solely on the structure of the Federal Government to protect the States'

Moreover, the statute at issue in this case, the FLSA, is the identical statute that was at issue in *National League of Cities*. Although JUSTICE BLACKMUN's concurrence noted that he was "not untroubled by certain possible implications of the Court's opinion" in *National League of Cities*, it also stated that "the result with respect to the statute under challenge here [the FLSA] is *necessarily correct.*" 426 U. S., at 856 (emphasis added). His opinion for the Court today does not discuss the statute, nor identify any changed circumstances that warrant the conclusion today that *National League of Cities* is *necessarily wrong.*

B

Today's opinion does not explain how the States' role in the electoral process guarantees that particular exercises of the Commerce Clause power will not infringe on residual state sovereignty.[7] Members of Congress are elected from the various States, but once in office they are Members of the

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immunity from taxation. See *Massachusetts* v. *United States*, 435 U. S. 444 (1978). Thus, faced with an equally difficult problem of defining constitutional boundaries of federal action directly affecting the States, we did not adopt the view many would think naive, that the Federal Government *itself* will protect whatever rights the States may have.

[7] Late in its opinion, the Court suggests that after all there may be some "affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Ante*, at 556. The Court asserts that "[i]n the factual setting of these cases the internal safeguards of the political process have performed as intended." *Ibid.* The Court does not explain the basis for this judgment. Nor does it identify the circumstances in which the "political process" may fail and "affirmative limits" are to be imposed. Presumably, such limits are to be determined by the Judicial Branch even though it is "unelected." Today's opinion, however, has rejected the balancing standard and suggests no other standard that would enable a court to determine when there has been a malfunction of the "political process." The Court's failure to specify the "affirmative limits" on federal power, or when and how these limits are to be determined, may well be explained by the transparent fact that any such attempt would be subject to precisely the same objections on which it relies to overrule *National League of Cities*.

Federal Government.[8] Although the States participate in the Electoral College, this is hardly a reason to view the President as a representative of the States' interest against federal encroachment. We noted recently "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . ." *INS* v. *Chadha*, 462 U. S. 919, 951 (1983). The Court offers no reason to think that this pressure will not operate when Congress seeks to invoke its powers under the Commerce Clause, notwithstanding the electoral role of the States.[9]

[8] One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet, the position adopted today is indistinguishable in principle. The Tenth Amendment also is an essential part of the Bill of Rights. See *infra*, at 568–570.

[9] At one time in our history, the view that the structure of the Federal Government sufficed to protect the States might have had a somewhat more practical, although not a more logical, basis. Professor Wechsler, whose seminal article in 1954 proposed the view adopted by the Court today, predicated his argument on assumptions that simply do not accord with current reality. Professor Wechsler wrote: "National action has always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case." Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 544 (1954). Not only is the premise of this view clearly at odds with the proliferation of national legislation over the past 30 years, but "a variety of structural and political changes occurring in this century have combined to make Congress particularly *insensitive* to state and local values." Advisory Commission on Intergovernmental Relations (ACIR), Regulatory Federalism: Policy, Process, Impact and Reform 50 (1984). The adoption of the Seventeenth Amendment (providing for direct election of Senators), the weakening of political parties on the local level, and the rise of national media, among other things, have made Congress increasingly less representative of state and local interests, and more likely to be responsive to the demands of various national constituencies. *Id.*, at 50–51. As one observer explained: "As Senators and members of the House develop independent constituencies among groups such as farmers, businessmen, laborers, environmentalists, and the poor, each of which generally supports certain national initiatives, their tendency to identify with state interests and the positions of state officials is reduced." Kaden,

The Court apparently thinks that the States' success at obtaining federal funds for various projects and exemptions from the obligations of some federal statutes is indicative of the "effectiveness of the federal political process in preserving the States' interests. . . ." *Ante*, at 552.[10] But such political success is not relevant to the question whether the political *processes* are the proper means of enforcing constitutional limitations.[11] The fact that Congress generally

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Federalism in the Courts: Agenda for the 1980s, in ACIR, The Future of Federalism in the 1980s, p. 97 (July 1981).

See also Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847, 849 (1979) (changes in political practices and the breadth of national initiatives mean that the political branches "may no longer be as well suited as they once were to the task of safeguarding the role of the states in the federal system and protecting the fundamental values of federalism"), and ACIR, Regulatory Federalism, *supra*, at 1–24 (detailing the "dramatic shift" in kind of federal regulation applicable to the States over the past two decades). Thus, even if one were to ignore the numerous problems with the Court's position in terms of constitutional theory, there would remain serious questions as to its factual premises.

[10] The Court believes that the significant financial assistance afforded the States and localities by the Federal Government is relevant to the constitutionality of extending Commerce Clause enactments to the States. See *ante*, at 552–553, 555. This Court has never held, however, that the mere disbursement of funds by the Federal Government establishes a right to control activities that benefit from such funds. See *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17–18 (1981). Regardless of the willingness of the Federal Government to provide federal aid, the constitutional question remains the same: whether the federal statute violates the sovereign powers reserved to the States by the Tenth Amendment.

[11] Apparently in an effort to reassure the States, the Court identifies several major statutes that thus far have not been made applicable to state governments: the Federal Power Act, 16 U. S. C. § 824(f); the Labor-Management Relations Act, 29 U. S. C. § 152(2); the Labor-Management Reporting and Disclosure Act, 29 U. S. C. § 402(e); the Occupational Safety and Health Act, 29 U. S. C. § 652(5); the Employee Retirement Income Security Act, 29 U. S. C. §§ 1002(32), 1003(b)(1); and the Sherman Act, 15 U. S. C. § 1 *et seq.*; see *Parker* v. *Brown*, 317 U. S. 341 (1943). *Ante*, at 553. The Court does not suggest that this restraint will continue after its decision here. Indeed, it is unlikely that special interest groups will fail

does not transgress constitutional limits on its power to reach state activities does not make judicial review any less necessary to rectify the cases in which it does do so.[12] The States' role in our system of government is a matter of constitutional law, not of legislative grace. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." U. S. Const., Amdt. 10.

More troubling than the logical infirmities in the Court's reasoning is the result of its holding, *i. e.*, that federal political officials, invoking the Commerce Clause, are the sole judges of the limits of their own power. This result is inconsistent with the fundamental principles of our constitutional system. See, *e. g.*, The Federalist No. 78 (Hamilton). At least since *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), it has been the settled province of the federal judiciary "to say what the law is" with respect to the constitutionality of Acts of Congress. In rejecting the role of the judiciary in protecting the States from federal overreaching, the Court's opinion offers no explanation for ignoring the teaching of the most famous case in our history.[13]

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to accept the Court's open invitation to urge Congress to extend these and other statutes to apply to the States and their local subdivisions.

[12] This Court has never before abdicated responsibility for assessing the constitutionality of challenged action on the ground that affected parties theoretically are able to look out for their own interests through the electoral process. As the Court noted in *National League of Cities*, a much stronger argument as to inherent structural protections could have been made in either *Buckley* v. *Valeo*, 424 U. S. 1 (1976), or *Myers* v. *United States*, 272 U. S. 52 (1926), than can be made here. In these cases, the President signed legislation that limited his authority with respect to certain appointments and thus arguably "it was . . . no concern of this Court that the law violated the Constitution." 426 U. S., at 841–842, n. 12. The Court nevertheless held the laws unconstitutional because they infringed on Presidential authority, the President's consent notwithstanding. The Court does not address this point; nor does it cite any authority for its contrary view.

[13] The Court states that the decision in *National League of Cities* "invites an unelected federal judiciary to make decisions about which state

III

A

In our federal system, the States have a major role that cannot be pre-empted by the National Government. As contemporaneous writings and the debates at the ratifying conventions make clear, the States' ratification of the Constitution was predicated on this understanding of federalism. Indeed, the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized.

Much of the initial opposition to the Constitution was rooted in the fear that the National Government would be too powerful and eventually would eliminate the States as viable political entities. This concern was voiced repeatedly until proponents of the Constitution made assurances that a Bill of Rights, including a provision explicitly reserving powers in the States, would be among the first business of the new Congress. Samuel Adams argued, for example, that if the several States were to be joined in "one entire Nation, under one Legislature, the Powers of which shall extend to every Subject of Legislation, and its Laws be supreme & controul the whole, the Idea of Sovereignty in these States must be lost." Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1787), reprinted in Anti-Federalists versus Federal-

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policies it favors and which ones its dislikes." Curiously, the Court then suggests that under the application of the "traditional" governmental function analysis, "the States cannot serve as laboratories for social and economic experiment." *Ante*, at 546, citing Justice Brandeis' famous observation in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). Apparently the Court believes that when "an unelected federal judiciary" makes decisions as to whether a particular function is one for the Federal or State Governments, the States no longer may engage in "social and economic experiment." *Ante*, at 546. The Court does not explain how leaving the States virtually at the mercy of the Federal Government, without recourse to judicial review, will enhance their opportunities to experiment and serve as "laboratories."

ists 159 (J. Lewis ed. 1967). Likewise, George Mason feared that "the general government being paramount to, and in every respect more powerful than the state governments, the latter must give way to the former." Address in the Ratifying Convention of Virginia (June 4–12, 1788), reprinted in Anti-Federalists versus Federalists, *supra*, at 208–209.

Antifederalists raised these concerns in almost every state ratifying convention.[14] See generally 1–4 Debates in the Several State Conventions on the Adoption of the Federal Constitution (J. Elliot 2d. ed. 1876). As a result, eight States voted for the Constitution only after proposing amendments to be adopted after ratification.[15] All eight of these included among their recommendations some version of what later became the Tenth Amendment. *Ibid.* So strong was the concern that the proposed Constitution was seriously defective without a specific bill of rights, including a provision reserving powers to the States, that in order to secure the votes for ratification, the Federalists eventually conceded that such provisions were necessary. See 1 B. Schwartz, The Bill of Rights: A Documentary History 505 and *passim* (1971). It was thus generally agreed that consideration of a bill of rights would be among the first business of the new Congress. See generally 1 Annals of Cong. 432–437 (1789) (remarks of James Madison). Accordingly, the 10 Amendments that we know as the Bill of Rights were proposed and adopted early in the first session of the First Congress. 2 Schwartz, The Bill of Rights, *supra*, at 983–1167.

[14] Opponents of the Constitution were particularly dubious of the Federalists' claim that the States retained powers not delegated to the United States in the absence of an express provision so providing. For example, James Winthrop wrote that "[i]t is a mere fallacy . . . that what rights are not given are reserved." Letters of Agrippa, reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 510, 511 (1971).

[15] Indeed, the Virginia Legislature came very close to withholding ratification of the Constitution until the adoption of a Bill of Rights that included, among other things, the substance of the Tenth Amendment. See 2 Schwartz, The Bill of Rights, *supra*, at 762–766 and *passim*.

This history, which the Court simply ignores, documents the integral role of the Tenth Amendment in our constitutional theory. It exposes as well, I believe, the fundamental character of the Court's error today. Far from being "unsound in principle," *ante*, at 546, judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution.

B

The Framers had definite ideas about the nature of the Constitution's division of authority between the Federal and State Governments. In The Federalist No. 39, for example, Madison explained this division by drawing a series of contrasts between the attributes of a "national" government and those of the government to be established by the Constitution. While a national form of government would possess an "indefinite supremacy over all persons and things," the form of government contemplated by the Constitution instead consisted of "local or municipal authorities [which] form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them, within its own sphere." *Id.*, at 256 (J. Cooke ed. 1961). Under the Constitution, the sphere of the proposed government extended to jurisdiction of "certain enumerated objects only, . . . leav[ing] to the several States a residuary and inviolable sovereignty over all other objects." *Ibid.*

Madison elaborated on the content of these separate spheres of sovereignty in The Federalist No. 45:

> "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce . . . . The powers

reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." *Id.*, at 313 (J. Cooke ed. 1961).

Madison considered that the operations of the Federal Government would be "most extensive and important in times of war and danger; those of the State Governments in times of peace and security." *Ibid.* As a result of this division of powers, the state governments generally would be more important than the Federal Government. *Ibid.*

The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective "counterpoise" to the power of the Federal Government. The States would serve this essential role because they would attract and retain the loyalty of their citizens. The roots of such loyalty, the Founders thought, were found in the objects peculiar to state government. For example, Hamilton argued that the States "regulat[e] all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake. . . ." The Federalist No. 17, p. 107 (J. Cooke ed. 1961). Thus, he maintained that the people would perceive the States as "the immediate and visible guardian of life and property," a fact which "contributes more than any other circumstance to impressing upon the minds of the people affection, esteem and reverence towards the government." *Ibid.* Madison took the same position, explaining that "the people will be more familiarly and minutely conversant" with the business of state governments, and "with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments. . . ." The Federalist No. 46, p. 316 (J. Cooke ed. 1961). Like Hamilton, Madison saw the States' involvement in the everyday concerns of the people as the source of

their citizens' loyalty. *Ibid.* See also Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 S. Ct. Rev. 81.

Thus, the harm to the States that results from federal overreaching under the Commerce Clause is not simply a matter of dollars and cents. *National League of Cities*, 426 U. S., at 846–851. Nor is it a matter of the wisdom or folly of certain policy choices. Cf. *ante*, at 546. Rather, by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.

C

The emasculation of the powers of the States that can result from the Court's decision is predicated on the Commerce Clause as a power "delegated to the United States" by the Constitution. The relevant language states: "Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. Section 8 identifies a score of powers, listing the authority to lay taxes, borrow money on the credit of the United States, pay its debts, and provide for the common defense and the general welfare *before* its brief reference to "Commerce." It is clear from the debates leading up to the adoption of the Constitution that the commerce to be regulated was that which the States themselves lacked the practical capability to regulate. See, *e. g.*, 1 M. Farrand, The Records of the Federal Convention of 1787 (rev. ed. 1937); The Federalist Nos. 7, 11, 22, 42, 45. See also *EEOC* v. *Wyoming*, 460 U. S. 226, 265 (1983) (POWELL, J., dissenting). Indeed, the language of the Clause itself focuses on activities that only a National Government could regulate: commerce with foreign nations and Indian tribes and "*among*" the several States.

To be sure, this Court has construed the Commerce Clause to accommodate unanticipated changes over the past two centuries. As these changes have occurred, the Court has had to decide whether the Federal Government has exceeded its authority by regulating activities beyond the capability of a single State to regulate or beyond legitimate federal interests that outweighed the authority and interests of the States. In so doing, however, the Court properly has been mindful of the essential role of the States in our federal system.

The opinion for the Court in *National League of Cities* was faithful to history in its understanding of federalism. The Court observed that "our federal system of government imposes definite limits upon the authority of Congress to regulate the activities of States as States by means of the commerce power." 426 U. S., at 842. The Tenth Amendment was invoked to prevent Congress from exercising its "power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.'" *Id.*, at 842–843 (quoting *Fry* v. *United States*, 421 U. S., at 547, n. 7).

This Court has recognized repeatedly that state sovereignty is a fundamental component of our system of government. More than a century ago, in *Lane County* v. *Oregon*, 7 Wall. 71 (1869), the Court stated that the Constitution recognized "the necessary existence of the States, and, within their proper spheres, the independent authority of the States." It concluded, as Madison did, that this authority extended to "nearly the whole charge of interior regulation . . . to [the States] and to the people all powers not expressly delegated to the national government are reserved." *Id.*, at 76. Recently, in *Community Communications Co.* v. *Boulder*, 455 U. S. 40, 53 (1982), the Court recognized that the state action exemption from the antitrust laws was based on state sovereignty. Similarly, in *Transportation Union* v. *Long Island R. Co.*, 455 U. S., at 683, although finding the Railway Labor Act applicable to a state-owned railroad, the

unanimous Court was careful to say that the States possess constitutionally preserved sovereign powers.

Again, in *FERC* v. *Mississippi*, 456 U. S. 742, 752 (1982), in determining the constitutionality of the Public Utility Regulatory Policies Act, the Court explicitly considered whether the Act impinged on state sovereignty in violation of the Tenth Amendment. These represent only a few of the many cases in which the Court has recognized not only the role, but also the importance, of state sovereignty. See also, *e. g.*, *Fry* v. *United States*, *supra; Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514 (1926); *Coyle* v. *Oklahoma*, 221 U. S. 559 (1911). As Justice Frankfurter noted, the States are not merely a factor in the "shifting economic arrangements" of our country, *Kovacs* v. *Cooper*, 336 U. S. 77, 95 (1949) (concurring), but also constitute a "coordinate element in the system established by the Framers for governing our Federal Union." *National League of Cities*, *supra*, at 849.

D

In contrast, the Court today propounds a view of federalism that pays only lipservice to the role of the States. Although it says that the States "unquestionably do 'retai[n] a significant measure of sovereign authority,'" *ante*, at 549 (quoting *EEOC* v. *Wyoming*, *supra*, at 269 (POWELL, J., dissenting)), it fails to recognize the broad, yet specific areas of sovereignty that the Framers intended the States to retain. Indeed, the Court barely acknowledges that the Tenth Amendment exists.[16] That Amendment states explicitly that "[t]he powers not delegated to the United States . . . are reserved to the States." The Court recasts this language to say that the States retain their sovereign powers "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal

[16] The Court's opinion mentions the Tenth Amendment only once, when it restates the question put to the parties for reargument in these cases. See *ante*, at 536.

Government." *Ante*, at 549. This rephrasing is not a distinction without a difference; rather, it reflects the Court's unprecedented view that Congress is free under the Commerce Clause to assume a State's traditional sovereign power, and to do so without judicial review of its action. Indeed, the Court's view of federalism appears to relegate the States to precisely the trivial role that opponents of the Constitution feared they would occupy.[17]

In *National League of Cities*, we spoke of fire prevention, police protection, sanitation, and public health as "typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U. S., at 851. Not only are these activities remote from any normal concept of interstate commerce, they are also activities that epitomize the concerns of local, democratic self-government. See n. 5, *supra*. In emphasizing the need to protect traditional governmental functions, we identified the kinds of activities engaged in by state and local governments that affect the everyday lives of citizens. These are services that people are in a position to understand and evaluate, and in a democracy, have the right to oversee.[18] We recognized that "it is

[17] As the *amici* argue, "the ability of the states to fulfill their role in the constitutional scheme is dependent solely upon their effectiveness as instruments of self-government." Brief for State of California et al. as *Amici Curiae* 50. See also Brief for National League of Cities et al. as *Amici Curiae* (a brief on behalf of every major organization representing the concerns of state and local governments).

[18] The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them. *E. g.*, The Federalist No. 17, p. 107 (J. Cooke ed. 1961); The Federalist No. 46, p. 316 (J. Cooke ed. 1961). This is as true today as it was when the Constitution was adopted. "Participation is likely to be more frequent, and exercised at more different stages of a governmental activity at the local level, or in regional organizations, than at the state and federal levels. [Additionally,] the proportion of people actually involved from the total population tends to be greater, the lower the level of govern-

functions such as these which governments are created to provide . . ." and that the States and local governments are better able than the National Government to perform them. 426 U. S., at 851.

The Court maintains that the standard approved in *National League of Cities* "disserves principles of democratic self-governance." *Ante*, at 547. In reaching this conclusion, the Court looks myopically only to persons elected to positions in the Federal Government. It disregards entirely the far more effective role of democratic self-government at the state and local levels. One must compare realistically the operation of the state and local governments with that of the Federal Government. Federal legislation is drafted primarily by the staffs of the congressional committees. In view of the hundreds of bills introduced at each session of Congress and the complexity of many of them, it is virtually impossible for even the most conscientious legislators to be truly familiar with many of the statutes enacted. Federal departments and agencies customarily are authorized to write regulations. Often these are more important than the text of the statutes. As is true of the original legislation, these are drafted largely by staff personnel. The administration and enforcement of federal laws and regulations necessarily are largely in the hands of staff and civil service employees. These employees may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible. In any case, they hardly are as accessible and responsive

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ment, and this, of course, better approximates the citizen participation ideal." ACIR, Citizen Participation in the American Federal System 95 (1980).

Moreover, we have witnessed in recent years the rise of numerous special interest groups that engage in sophisticated lobbying, and make substantial campaign contributions to some Members of Congress. These groups are thought to have significant influence in the shaping and enactment of certain types of legislation. Contrary to the Court's view, a "political process" that functions in this way is unlikely to safeguard the sovereign rights of States and localities. See n. 9, *supra*.

as those who occupy analogous positions in state and local governments.

In drawing this contrast, I imply no criticism of these federal employees or the officials who are ultimately in charge. The great majority are conscientious and faithful to their duties. My point is simply that members of the immense federal bureaucracy are not elected, know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are state legislatures, city councils, boards of supervisors, and state and local commissions, boards, and agencies. It is at these state and local levels—not in Washington as the Court so mistakenly thinks—that "democratic self-government" is best exemplified.

IV

The question presented in these cases is whether the extension of the FLSA to the wages and hours of employees of a city-owned transit system unconstitutionally impinges on fundamental state sovereignty. The Court's sweeping holding does far more than simply answer this question in the negative. In overruling *National League of Cities*, today's opinion apparently authorizes federal control, under the auspices of the Commerce Clause, over the terms and conditions of employment of all state and local employees. Thus, for purposes of federal regulation, the Court rejects the distinction between public and private employers that had been drawn carefully in *National League of Cities*. The Court's action reflects a serious misunderstanding, if not an outright rejection, of the history of our country and the intention of the Framers of the Constitution.[19]

[19] The opinion of the Court in *National League of Cities* makes clear that the very essence of a federal system of government is to impose "definite limits upon the authority of Congress to regulate the activities of the States as States by means of the commerce power." 426 U. S., at 842. See also the Court's opinion in *Fry* v. *United States*, 421 U. S. 542, 547, n. 7 (1975).

I return now to the balancing test approved in *National League of Cities* and accepted in *Hodel*, *Long Island R. Co.*, and *FERC* v. *Mississippi*. See n. 5, *supra*. The Court does not find in these cases that the "federal interest is demonstrably greater." 426 U. S., at 856 (BLACKMUN, J., concurring). No such finding could have been made, for the state interest is compelling. The financial impact on States and localities of displacing their control over wages, hours, overtime regulations, pensions, and labor relations with their employees could have serious, as well as unanticipated, effects on state and local planning, budgeting, and the levying of taxes.[20] As we said in *National League of Cities*, federal control of the terms and conditions of employment of state employees also inevitably "displaces state policies regarding the manner in which [States] will structure delivery of those governmental services that citizens require." *Id.*, at 847.

The Court emphasizes that municipal operation of an intracity mass transit system is relatively new in the life of our country. It nevertheless is a classic example of the type of service traditionally provided by local government. It is *local* by definition. It is indistinguishable in principle from the traditional services of providing and maintaining streets, public lighting, traffic control, water, and sewerage systems.[21] Services of this kind are precisely those with which citizens are more "familiarly and minutely conversant." The Federalist No. 46, p. 316 (J. Cooke ed. 1961). State and local officials of course must be intimately familiar with these services and sensitive to their quality as well as cost. Such

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[20] As Justice Douglas observed in his dissent in *Maryland* v. *Wirtz*, 392 U. S., at 203, extension of the FLSA to the States could "disrupt the fiscal policy of the States and threaten their autonomy in the regulation of health and education."

[21] In *Long Island R. Co.* the unanimous Court recognized that "[t]his Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation." 455 U. S., at 686.

officials also know that their constituents and the press respond to the adequacy, fair distribution, and cost of these services. It is this kind of state and local control and accountability that the Framers understood would insure the vitality and preservation of the federal system that the Constitution explicitly requires. See *National League of Cities*, 426 U. S., at 847–852.

V

Although the Court's opinion purports to recognize that the States retain some sovereign power, it does not identify even a single aspect of state authority that would remain when the Commerce Clause is invoked to justify federal regulation. In *Maryland* v. *Wirtz*, 392 U. S. 183 (1968), overruled by *National League of Cities* and today reaffirmed, the Court sustained an extension of the FLSA to certain hospitals, institutions, and schools. Although the Court's opinion in *Wirtz* was comparatively narrow, Justice Douglas, in dissent, wrote presciently that the Court's reading of the Commerce Clause would enable "the National Government [to] devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment." 392 U. S., at 205. Today's decision makes Justice Douglas' fear once again a realistic one.

As I view the Court's decision today as rejecting the basic precepts of our federal system and limiting the constitutional role of judicial review, I dissent.

JUSTICE REHNQUIST, dissenting.

I join both JUSTICE POWELL's and JUSTICE O'CONNOR's thoughtful dissents. JUSTICE POWELL's reference to the "balancing test" approved in *National League of Cities* is not identical with the language in that case, which recognized that Congress could not act under its commerce power to infringe on certain fundamental aspects of state sovereignty that are essential to "the States' separate and independent existence." Nor is either test, or JUSTICE

O'CONNOR's suggested approach, precisely congruent with JUSTICE BLACKMUN's views in 1976, when he spoke of a balancing approach which did not outlaw federal power in areas "where the federal interest is demonstrably greater." But under any one of these approaches the judgment in these cases should be affirmed, and I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.

JUSTICE O'CONNOR, with whom JUSTICE POWELL and JUSTICE REHNQUIST join, dissenting.

The Court today surveys the battle scene of federalism and sounds a retreat. Like JUSTICE POWELL, I would prefer to hold the field and, at the very least, render a little aid to the wounded. I join JUSTICE POWELL's opinion. I also write separately to note my fundamental disagreement with the majority's views of federalism and the duty of this Court.

The Court overrules *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), on the grounds that it is not "faithful to the role of federalism in a democratic society." *Ante*, at 546. "The essence of our federal system," the Court concludes, "is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal. . . ." *Ibid.* *National League of Cities* is held to be inconsistent with this narrow view of federalism because it attempts to protect only those fundamental aspects of state sovereignty that are essential to the States' separate and independent existence, rather than protecting all state activities "equally."

In my view, federalism cannot be reduced to the weak "essence" distilled by the majority today. There is more to federalism than the nature of the constraints that can be imposed on the States in "the realm of authority left open to them by the Constitution." The central issue of federalism,

of course, is whether any realm *is* left open to the States by the Constitution—whether any area remains in which a State may act free of federal interference. "The issue . . . is whether the federal system has any *legal* substance, any core of constitutional right that courts will enforce." C. Black, Perspectives in Constitutional Law 30 (1963). The true "essence" of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme. *Younger* v. *Harris*, 401 U. S. 37, 44 (1971). If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States.

Due to the emergence of an integrated and industrialized national economy, this Court has been required to examine and review a breathtaking expansion of the powers of Congress. In doing so the Court correctly perceived that the Framers of our Constitution intended Congress to have sufficient power to address national problems. But the Framers were not single-minded. The Constitution is animated by an array of intentions. *EEOC* v. *Wyoming*, 460 U. S. 226, 265–266 (1983) (POWELL, J., dissenting). Just as surely as the Framers envisioned a National Government capable of solving national problems, they also envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States. *FERC* v. *Mississippi*, 456 U. S. 742, 790 (1982) (O'CONNOR, J., dissenting). In the 18th century these intentions did not conflict because technology had not yet converted every local problem into a national one. A conflict has now emerged, and the Court today retreats rather than reconcile the Constitution's dual concerns for federalism and an effective commerce power.

We would do well to recall the constitutional basis for federalism and the development of the commerce power which has come to displace it. The text of the Constitution does not define the precise scope of state authority other than to specify, in the Tenth Amendment, that the powers not delegated to the United States by the Constitution are reserved to the States. In the view of the Framers, however, this did not leave state authority weak or defenseless; the powers delegated to the United States, after all, were "few and defined." The Federalist No. 45, p. 313 (J. Cooke ed. 1961). The Framers' comments indicate that the sphere of state activity was to be a significant one, as JUSTICE POWELL's opinion clearly demonstrates, *ante* at 570–572. The States were to retain authority over those local concerns of greatest relevance and importance to the people. The Federalist No. 17, pp. 106–108 (J. Cooke ed. 1961). This division of authority, according to Madison, would produce efficient government and protect the rights of the people:

> "In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself." The Federalist No. 51, pp. 350–351 (J. Cooke ed. 1961).

See Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 S. Ct. Rev. 81, 88.

Of course, one of the "few and defined" powers delegated to the National Congress was the power "To regulate Com-

merce with foreign Nations, and among the several States, and with the Indian Tribes." U. S. Const., Art. I, § 8, cl. 3. The Framers perceived the interstate commerce power to be important but limited, and expected that it would be used primarily if not exclusively to remove interstate tariffs and to regulate maritime affairs and large-scale mercantile enterprise. See Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432 (1941). This perception of a narrow commerce power is important not because it suggests that the commerce power should be as narrowly construed today. Rather, it explains why the Framers could believe the Constitution assured significant state authority even as it bestowed a range of powers, including the commerce power, on the Congress. In an era when interstate commerce represented a tiny fraction of economic activity and most goods and services were produced and consumed close to home, the interstate commerce power left a broad range of activities beyond the reach of Congress.

In the decades since ratification of the Constitution, interstate economic activity has steadily expanded. Industrialization, coupled with advances in transportation and communications, has created a national economy in which virtually every activity occurring within the borders of a State plays a part. The expansion and integration of the national economy brought with it a coordinate expansion in the scope of national problems. This Court has been increasingly generous in its interpretation of the commerce power of Congress, primarily to assure that the National Government would be able to deal with national economic problems. Most significantly, the Court in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), and *United States* v. *Darby*, 312 U. S. 100 (1941), rejected its previous interpretations of the commerce power which had stymied New Deal legislation. *Jones & Laughlin* and *Darby* embraced the notion that Congress can regulate intrastate activities that affect

interstate commerce as surely as it can regulate interstate commerce directly. Subsequent decisions indicate that Congress, in order to regulate an activity, needs only a rational basis for a finding that the activity affects interstate commerce. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 258 (1964). Even if a particular individual's activity has no perceptible interstate effect, it can be reached by Congress through regulation of that class of activity in general as long as that *class*, considered as a whole, affects interstate commerce. *Fry* v. *United States*, 421 U. S. 542 (1975); *Perez* v. *United States*, 402 U. S. 146 (1971).

Incidental to this expansion of the commerce power, Congress has been given an ability it lacked prior to the emergence of an integrated national economy. Because virtually every *state* activity, like virtually every activity of a private individual, arguably "affects" interstate commerce, Congress can now supplant the States from the significant sphere of activities envisioned for them by the Framers. It is in this context that recent changes in the workings of Congress, such as the direct election of Senators and the expanded influence of national interest groups, see *ante*, at 544, n. 9 (POWELL, J., dissenting), become relevant. These changes may well have lessened the weight Congress gives to the legitimate interests of States as States. As a result, there is now a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic.

It would be erroneous, however, to conclude that the Supreme Court was blind to the threat to federalism when it expanded the commerce power. The Court based the expansion on the authority of Congress, through the Necessary and Proper Clause, "to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *United States* v. *Darby*, *supra*, at 124. It is through this reasoning that an intrastate activity "affecting" interstate commerce can be reached through the

commerce power. Thus, in *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119 (1942), the Court stated:

> "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 . . . ."

United States v. *Wrightwood Dairy Co.* was heavily relied upon by *Wickard* v. *Filburn*, 317 U. S. 111, 124 (1942), and the reasoning of these cases underlies every recent decision concerning the reach of Congress to activities affecting interstate commerce. See, *e. g., Fry* v. *United States*, *supra*, at 547; *Perez* v. *United States*, *supra*, at 151–152; *Heart of Atlanta Motel, Inc.* v. *United States*, *supra*, at 258–259.

It is worth recalling the cited passage in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819), that lies at the source of the recent expansion of the commerce power. "Let the end be legitimate, let it be within the scope of the constitution," Chief Justice Marshall said, "and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter *and spirit* of the constitution, are constitutional" (emphasis added). The *spirit* of the Tenth Amendment, of course, is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme. *Fry* v. *United States*, *supra*, at 547, n. 7.

It is not enough that the "end be legitimate"; the means to that end chosen by Congress must not contravene the spirit of the Constitution. Thus many of this Court's decisions acknowledge that the means by which national power is exercised must take into account concerns for state autonomy. See, *e. g., Fry* v. *United States*, *supra*, at 547, n. 7; *New*

York v. *United States*, 326 U. S. 572, 586–587 (1946) (Stone, C. J., concurring); *NLRB* v. *Jones & Laughlin Steel Corp.*, *supra*, at 37 ("Undoubtedly, the scope of this [commerce] power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government"); *Santa Cruz Fruit Packing Co.* v. *NLRB*, 303 U. S. 453, 466–467 (1938). See also Sandalow, Constitutional Interpretation, 79 Mich. L. Rev. 1033, 1055 (1981) ("The question, always, is whether the exercise of power is consistent with the entire Constitution, a question that can be answered only by taking into account, so far as they are relevant, all of the values to which the Constitution—as interpreted over time—gives expression"). For example, Congress might rationally conclude that the location a State chooses for its capital may affect interstate commerce, but the Court has suggested that Congress would nevertheless be barred from dictating that location because such an exercise of a delegated power would undermine the state sovereignty inherent in the Tenth Amendment. *Coyle* v. *Oklahoma*, 221 U. S. 559, 565 (1911). Similarly, Congress in the exercise of its taxing and spending powers can protect federal savings and loan associations, but if it chooses to do so by the means of converting quasi-public state savings and loan associations into federal associations, the Court has held that it contravenes the reserved powers of the States because the conversion is not a reasonably necessary exercise of power to reach the desired end. *Hopkins Federal Savings & Loan Assn.* v. *Cleary*, 296 U. S. 315 (1935). The operative language of these cases varies, but the underlying principle is consistent: state autonomy is a relevant factor in assessing the means by which Congress exercises its powers.

This principle requires the Court to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power. *National League of Cities* v. *Usery* represented an attempt to define such limits. The Court today rejects *National League of Cities* and washes its hands of all efforts to protect the States. In the process, the Court opines that unwarranted federal encroachments on state authority are and will remain "'horrible possibilities that never happen in the real world.'" *Ante*, at 556, quoting *New York* v. *United States*, *supra*, at 583 (opinion of Frankfurter, J.). There is ample reason to believe to the contrary.

The last two decades have seen an unprecedented growth of federal regulatory activity, as the majority itself acknowledges. *Ante*, at 544–545, n. 10. In 1954, one could still speak of a "burden of persuasion on those favoring national intervention" in asserting that "National action has . . . always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case." Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 544–545 (1954). Today, as federal legislation and coercive grant programs have expanded to embrace innumerable activities that were once viewed as local, the burden of persuasion has surely shifted, and the extraordinary has become ordinary. See Engdahl, Sense and Nonsense About State Immunity, 2 Constitutional Commentary 93 (1985). For example, recently the Federal Government has, with this Court's blessing, undertaken to tell the States the age at which they can retire their law enforcement officers, and the regulatory standards, procedures, and even the agenda which their utilities commissions must consider and follow. See *EEOC* v. *Wyoming*, 460 U. S. 226 (1983); *FERC* v. *Mississippi*, 456 U. S. 742 (1982). The political process

has not protected against these encroachments on state activities, even though they directly impinge on a State's ability to make and enforce its laws. With the abandonment of *National League of Cities*, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint.

The problems of federalism in an integrated national economy are capable of more responsible resolution than holding that the States as States retain no status apart from that which Congress chooses to let them retain. The proper resolution, I suggest, lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States. It is insufficient, in assessing the validity of congressional regulation of a State pursuant to the commerce power, to ask only whether the same regulation would be valid if enforced against a private party. That reasoning, embodied in the majority opinion, is inconsistent with the spirit of our Constitution. It remains relevant that a *State* is being regulated, as *National League of Cities* and every recent case have recognized. See *EEOC* v. *Wyoming*, *supra*; *Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678, 684 (1982); *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, 452 U. S. 264, 287–288 (1981); *National League of Cities*, 426 U. S., at 841–846. As far as the Constitution is concerned, a State should not be equated with any private litigant. Cf. *Nevada* v. *Hall*, 440 U. S. 410, 428 (1979) (BLACKMUN, J., dissenting) (criticizing the ability of a state court to treat a sister State no differently than a private litigant). Instead, the autonomy of a State is an essential component of federalism. If state autonomy is ignored in assessing the means by which Congress regulates matters affecting commerce, then federalism becomes irrelevant simply because the set of activities remaining beyond the reach of such a commerce power "may well be negligible." *Ante*, at 545.

It has been difficult for this Court to craft bright lines defining the scope of the state autonomy protected by *National*

League of Cities. Such difficulty is to be expected whenever constitutional concerns as important as federalism and the effectiveness of the commerce power come into conflict. Regardless of the difficulty, it is and will remain the duty of this Court to reconcile these concerns in the final instance. That the Court shuns the task today by appealing to the "essence of federalism" can provide scant comfort to those who believe our federal system requires something more than a unitary, centralized government. I would not shirk the duty acknowledged by *National League of Cities* and its progeny, and I share JUSTICE REHNQUIST's belief that this Court will in time again assume its constitutional responsibility.

I respectfully dissent.

the proceeds of an insurance policy, and the claimants are of diverse citizenship, the district courts may exercise original jurisdiction and entertain an interpleader action filed by the custodian of the policy proceeds. 28 U.S.C. § 1335. Had Metropolitan known of the existence of Neaves' claim prior to its payment of the proceeds to Gambrell, it could have filed an interpleader action in California in order to adjudicate the merits of the competing claims. Metropolitan has made a showing here for jurisdictional purposes that Gambrell's conduct prevented it from learning of Neaves' competing claim until after it was too late to file such an action. This makes it even more difficult for Gambrell to contend that the California court's exercise of jurisdiction over her is unreasonable in this case.

The district court's order dismissing the claims of Neaves and Metropolitan against Gambrell is REVERSED and the matter is REMANDED.

Daniel E. BRATT; Frank Cooke; Ray Marin; Ishmael S. Moran, Jr.; Billy W. Pugh; Russell Turner; James Blaydes; Tyrone Allain, Plaintiffs-Appellants-Cross-Appellees,

v.

COUNTY OF LOS ANGELES, Defendant-Appellee-Cross-Appellant.

Nos. 89-55373, 89-55463.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 6, 1990.

Decided Aug. 27, 1990.

County employees brought action against county under Fair Labor Standards Act. The United States District Court for the Central District of California, Harry L. Hupp, J., awarded employees overtime wages, interest and attorneys' fees but refused to award them liquidated damages, and both parties appealed. The Court of Appeals, Boochever, Circuit Judge, held that: (1) applying Act to county probation and child protection activities did not exceed federal powers under the commerce clause or violate Tenth Amendment; (2) employees who worked as deputy probation officers and children treatment counselors were not administrative employees exempt from coverage under Act; but (3) employees were not entitled to award of liquidated damages.

Affirmed.

1. **Commerce** ⇐62.49

Labor Relations ⇐1092

States ⇐18.71

Applying Fair Labor Standards Act to county probation and child protection activities did not exceed federal powers under the commerce clause or violate Tenth Amendment. Fair Labor Standards Act of 1938, §§ 1 et seq., 16(b), as amended, 29 U.S.C.A. §§ 201 et seq., 216(b); U.S.C.A. Const. Art. 1, § 8, cl. 3; Amend. 10.

2. **Labor Relations** ⇐1198

County employees who worked as deputy probation officers and children treatment counselors were not administrative employees exempt from coverage under Fair Labor Standards Act. Fair Labor Standards Act of 1938, § 13(a)(1), as amended, 29 U.S.C.A. § 213(a)(1).

3. **Federal Courts** ⇐776, 865

Questions of whether employer acted in good faith in failing to comply with Fair Labor Standards Act and had reasonable basis for its interpretation of Act and applicable regulations are reviewed de novo to extent they involve application of legal principles to established facts, and for clear error to extent they involve inquiry that is essentially factual. Fair Labor Standards Act of 1938, §§ 1 et seq., 7, 16(b), as amended, 29 U.S.C.A. §§ 201 et seq., 207, 216(b).

4. Federal Courts ⇐813

Once employer has demonstrated its good faith and reasonable belief for failing to comply with Fair Labor Standards Act, district court's refusal to award liquidated damages is reviewed for abuse of discretion. Fair Labor Standards Act of 1938, §§ 1 et seq., 7, 16(b), as amended, 29 U.S.C.A. §§ 201 et seq., 207, 216(b).

5. Labor Relations ⇐1521

Evidence was sufficient to establish that county acted in good faith in failing to pay overtime benefits to county employees who worked as deputy probation officers and children treatment counselors, in determining whether employees were entitled to liquidated damages under Fair Labor Standards Act; evidence indicated that person assigned to make coverage decisions arguably was adequately qualified, and his decisions whether to make more extensive studies of individual jobs and corresponding data involved practical considerations of how best to complete required evaluations in timely fashion. Fair Labor Standards Act of 1938, §§ 7, 16(b), as amended, 29 U.S.C.A. §§ 207, 216(b).

6. Labor Relations ⇐1521

County had reasonable grounds for denying overtime benefits to employees who worked as deputy probation officers and children treatment counselors, making award of liquidated damages discretionary under Fair Labor Standards Act; regulations promulgated under Act did not specifically address government employees, and duties performed by employees could be construed as analogous to those of exempt employees. Fair Labor Standards Act of 1938, §§ 7, 16(b), as amended, 29 U.S.C.A. §§ 207, 216(b).

Alexander B. Cvitan, Reich, Adell & Crost, Los Angeles, Cal., for plaintiffs-appellants-cross-appellees.

Albert D. Kelly, Principal Deputy County Counsel, Los Angeles, Cal., for defendant-appellee-cross-appellant.

Appeal from the United States District Court for the Central District of California.

Before HUG, BOOCHEVER and BEEZER, Circuit Judges.

BOOCHEVER, Circuit Judge:

Daniel E. Bratt, Frank Cooke, Ray Marin, Ishmael S. Moran, Jr., Billy W. Pugh, Russell Turner, James Blaydes, and Tyrone Allain (Employees) appeal the district court's decision refusing to award them liquidated damages on their claim under the Fair Labor Standards Act (FLSA or the Act), specifically 29 U.S.C. § 216(b) (1982). The County of Los Angeles (County) cross-appeals the district court's award of overtime wages, interest, and attorneys' fees in favor of the Employees on this claim. The County argues that application of the FLSA to County probation and child protection activities violates the tenth amendment and, in the alternative, that the Employees were exempt from the FLSA. We affirm.

FACTS AND PROCEDURAL HISTORY

The facts are not in dispute. Six of the Employees, Bratt, Marin, Cooke, Moran, Pugh, and Turner, are employed by the County's Probation Department as Deputy Probation Officers II (DPO II). These Employees conduct factual investigations for, and make recommendations to, County courts, either to aid in sentencing an adult offender or to determine whether and how to detain a minor who has been arrested. Some of them also supervise a crew of minors who have been ordered as part of a court sentence to participate in the Juvenile Alternative Work Service program or other correctional activity.

The remaining Employees, Allain and Blaydes, are employed by the County's Department of Children's Services as Children Treatment Counselors II and III (CTC II and III) respectively. Allain and Blaydes supervise abused and neglected children at the County's MacLaren Children's Center until they can be suitably placed elsewhere. Blaydes also acts as a "team leader" for the CTC staff on his shift in his unit.

Since April 1986, all eight Employees have accumulated overtime hours for which they were not paid 1½ times their regular

rate of pay. The Employees filed suit under the FLSA for recovery of overtime pay, liquidated damages, and attorneys' fees. After a bench trial on November 15-17, 1988, the district court found in favor of the Employees and awarded them damages in the amount of 1½ times their regular rate of pay for each hour worked in excess of forty per week, pre- and post-judgment interest, and attorneys' fees. The court, however, refused to award liquidated damages. Both the Employees and the County appeal the district court's decision.

DISCUSSION

I. Tenth Amendment

[1] The County argues that applying the FLSA to County probation and child protection activities exceeds federal powers under the commerce clause and violates the tenth amendment. The district court did not address this issue in its findings of fact and conclusions of law, but by proceeding with trial and judgment on the merits of the Employees' claims, the court implicitly rejected the County's constitutional challenge.

The constitutionality of applying the FLSA to County probation and child protection activities is a question of law which we review de novo. *See United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). The County maintains that its probation and child protection activities are traditional government functions and thus are beyond federal commerce power to regulate under *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), *overruled in Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). The County recognizes that *National League of Cities* was overruled in *Garcia*, but nevertheless argues that *Garcia* should apply only to activities such as city mass transit systems, not to the County's services at issue here.

The County's attempt to resurrect the test in *National League of Cities* is without merit. The Court in *Garcia* specifically "reject[ed], as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'" 469 U.S. at 546-47, 105 S.Ct. at 1015. Thus, any attempt to distinguish the decision in *Garcia* from the present case on the grounds that the County's probation and child protection services are more traditional government functions than mass transit services is unavailing.

II. Exemption from the FLSA

[2] The County also argues that the Employees are exempt from coverage under the Act because they are administrative employees. The district court found that the Employees were not administrative employees and thus were not exempt from FLSA coverage. "The question of how the [Employees] spent their working time ... is a question of fact [reviewed for clear error]. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law" reviewed de novo. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 106 S.Ct. 1527, 1530, 89 L.Ed.2d 739 (1986).

The FLSA provides that its overtime and minimum wage requirements "shall not apply with respect to—(1) any employee employed in a bona fide executive, administrative, or professional capacity ... as such terms are defined and delimited from time to time by regulations of the Secretary." 29 U.S.C. § 213(a)(1) (1982).

> The term "employee employed in a bona fide * * * administrative * * * capacity" ... shall mean any employee:
>
> (a) Whose primary duty consists of ...
>
> (1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, ...
>
> ... *and*
>
> (b) Who customarily and regularly exercises discretion and independent judgment; *and*
>
> (c) ...

(3) Who executes under only general supervision special assignments and tasks; *and*

(d) Who does not devote more than 20 percent ... of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; *and*

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week....

29 C.F.R. § 541.2 (1987) (emphasis added). "The criteria provided by regulations are absolute and the employer must prove that any particular employee meets every requirement before the employee will be deprived of the protection of the Act." *Mitchell v. Williams*, 420 F.2d 67, 69 (8th Cir.1969). Thus, the County must prove that each Employee meets all five requirements in this regulation before that Employee can be held exempt from coverage under the FLSA.

The key requirement for exemption for purposes of this appeal is that the employee's primary work be "directly related to management policies or general business operations of his employer or his employer's customers." 29 C.F.R. § 541.2(a)(1) (1987). The regulations explain that this language

describes those types of activities relating to the administrative operations of a business as distinguished from "production" ... work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers.

(b) The administrative operations of the business include the work performed by so-called white-collar employees engaged in "servicing" a business, as, for, example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control....

(c) As used to describe work of substantial importance to the management or operation of the business, the phrase ... is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole. Employees whose work is "directly related" to management policies or to general business operations include those [whose] work affects policy or whose responsibility it is to execute or carry it out. The phrase also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business....

(d) Under § 541.2, the "management policies or general business operations" may be those of the employer or the employer's customers. For example, many bona fide administrative employees perform important functions as advisers and consultants but are employed by a concern engaged in furnishing such services for a fee. Typical instances are tax experts, labor relations consultants, financial consultants, systems analysts, or resident buyers. Such employees, if they meet the other requirements of § 541.2, qualify for exemption regardless of whether the management policies or general business operations to which their work is directly related are those of their employer's clients or customers or those of their employer.

Id. § 541.205.

The County contends that the trial court misinterpreted these regulations by concluding that the Employees were production, as opposed to administrative, employees. The primary responsibility of the DPO II Employees is to conduct factual investigations of adult offenders or juvenile detainees and advise the court on their proper sentence or disposition within the system. The County claims that the Employees' duties are more akin to those of advisory specialists or consultants such as stock brokers or insurance claim agents and adjusters—positions the regulations consider to meet the test of "directly relat-

ed to management policies or general business operations." See id. § 541.205(c)(5). Thus, the County argues, these employees are essentially "servicing" the "business" of the courts by "advising the management" and should be considered administrative under § 541.205(b).[1]

The language of the regulations forecloses the County's argument. The test is whether the activities are directly related to *management policies* or *general* business operations. The district court correctly captured the essence of this requirement by interpreting it to mean "the running of a business, and not merely ... the day-to-day carrying out of its affairs." Accordingly, to the extent that probation activities can be analogized to a business, the work of the DPO II Employees primarily involves the day-to-day carrying out of the business' affairs, rather than running the business itself or determining its overall course or policies. This interpretation also reflects the position of the Department of Labor. In two recent letter rulings, the Department found that juvenile and adult probation officers do not qualify for exemption as administrative employees. Labor Dept., Wage and Hour Division, Ltr. Ruls. February 16, 1988 & April 12, 1988.[2] "We must ... give due deference to the interpretation of statutes and regulations by the agency charged with their administration." *Western Pioneer, Inc. v. United States,* 709 F.2d 1331, 1335 (9th Cir.1983).

In addition, while the regulations provide that "servicing" a business may be administrative, *id.* § 541.205(b), "advising the management" as used in that subsection is directed at advice on matters that involve policy determinations, *i.e.,* how a business should be run or run more efficiently, not merely providing information in the course of the customer's daily business operation. The services the Employees provide the courts do not relate to court policy or overall operational management but to the courts' day-to-day production process. Thus, the Employees are not engaged in "servicing" a business within the meaning of § 541.205(b).

The use of stock brokers and insurance claims agents and adjusters in § 541.205(c)(5) as examples of employees who are "servicing" a business is not inconsistent with the language of the regulations. To the extent that these employees primarily serve as general financial advisors or as consultants on the proper way to conduct a business, *e.g.,* advising businesses how to increase financial productivity or reduce insured risks, these employees properly would qualify for exemption under this regulation. Here, although probation officers provide recommendations to the courts, these recommendations do not involve advice on the proper way to conduct the business of the court, but merely provide information which the court uses in the course of its daily production activities. Thus, the duties of the Employees here do not qualify them as exempt administrative employees under the applicable regulations, even if conceivably some probation officers *might* be exempt.

The County also argues that we should ignore these regulations because they are drafted with commercial businesses in mind and are not applicable to public service. Although the County correctly notes that the terms used in the regulations are general business terms and that analogies between business and government often are somewhat strained, the general principles and rationales underlying the regulations are instructive in a government context, at least as they apply to the employees involved here. "Though not binding upon this court, these regulations, promulgated by the agency primarily responsible for enforcement of Congress' enactments, are entitled to great deference. The presump-

1. The County's argument focuses solely on the DPO II Employees, and does not address the applicability of the regulations to CTC II and III Employees. The County fails to explain how or why the regulations exempt CTC II and III Employees.

2. Neither ruling involved the parties to this action, and the rulings were issued after the Employees filed this suit against the County. There is no indication, however, that the duties of the deputy probation officers here were different from those considered in the Labor Department's rulings.

tion is that they are valid unless shown to be erroneously in conflict with the Act itself. *Brennan v. City Stores, Inc.*, 479 F.2d 235, 239–40 (5th Cir.1973). We find no conflict between the regulations and the FLSA on the issue before us and therefore defer to those regulations in interpreting the Act as it applies to the Employees.

Finally, the County maintains that applying the FLSA to the Employees here would not serve the purposes of the FLSA, which the County claims was directed against sweatshop labor rather than highly paid civil servants. The Employees, however, meet all the qualifications for coverage under the Act and are not exempted from its protection. The County's argument that this contravenes the purposes of the Act more appropriately would be made to Congress or to the Department of Labor, rather than to the courts.

We agree with the district court that none of the Employees engages in activities primarily related to management policies or general business operations. None of the Employees, therefore, satisfies the first requirement of the regulation's administrative employee exception, and we need not address whether the Employees satisfy the remaining requirements. We thus affirm the district court's decision in favor of the Employees and its award of overtime compensation, interest, and attorneys' fees at trial.

III. Liquidated Damages

Having agreed with the district court that the Employees were not exempt from coverage under the FLSA, we address whether the Employees are entitled to liquidated damages. Overtime pay for hours worked in excess of forty hours per week is required for covered employees under 29 U.S.C. § 207 (1982). "Any employer who violates the provisions of [that] section ... shall be liable to the employee or employees affected in the amount of ... their unpaid overtime compensation ..., and in an additional equal amount as liquidated damages." *Id.* § 216(b).

[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216.

Id. § 260. "An employer has the burden of showing that the violation of the [FLSA] was in good faith *and* that the employer had reasonable grounds for believing that no violation took place. Absent such a showing, liquidated damages are mandatory." *Equal Employment Opportunity Comm'n v. First Citizens Bank*, 758 F.2d 397, 403 (9th Cir.) (emphasis added and citation omitted), *cert. denied*, 474 U.S. 902, 106 S.Ct. 228, 88 L.Ed.2d 228 (1985).

[3, 4] The district court refused to award liquidated damages to the Employees, finding "[t]he facts are convincing to the court that the county's determinations were made in good faith and were based on reasonable grounds." The Employees challenge this decision, claiming that the County lacked both a good faith intent to comply with the FLSA and a reasonable basis for its interpretation of the FLSA and the applicable regulations. "What constitutes good faith on the part of [the County] and whether [it] had reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA] are mixed questions of fact and law." 29 C.F.R. § 790.22(c) (1987). We review such questions de novo to the extent they involve application of legal principles to established facts, and for clear error to the extent they involve an inquiry that is essentially factual. *See McConney*, 728 F.2d at 1202. Once the employer has demonstrated its good faith and reasonable belief, the district court's refusal to award liquidated damages is reviewed for abuse of discretion. *See First Citizens Bank*, 758 F.2d at 402; 29 U.S.C. § 260; 29 C.F.R. § 790.22(c).

A. *Good Faith*

[5] The statutory requirement of good faith and reasonable grounds establishes a

912 F.2d—25

test with both subjective and objective components. *Brock v. Shirk,* 833 F.2d 1326, 1330 (9th Cir.1987) (per curiam), *vacated on other grounds* 488 U.S. 806, 109 S.Ct. 38, 102 L.Ed.2d 18 (1988); *see Marshall v. Brunner,* 668 F.2d 748, 753 (3d Cir.1982); *Laffey v. Northwest Airlines, Inc.,* 567 F.2d 429, 463–66 (D.C.Cir.1976), *cert. denied,* 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978). "To satisfy the subjective 'good faith' component, the [County was] obligated to prove that [it] had 'an honest intention to ascertain what [the FLSA] requires and to act in accordance with it.'" *Shirk,* 833 F.2d at 1330 (quoting *First Citizens Bank,* 758 F.2d at 403); *accord Brunner,* 668 F.2d at 753; *Laffey,* 567 F.2d at 464.

Whether the County had an honest intention to ascertain what the FLSA requires and to act in accordance with it involves an inquiry that is essentially factual and which we thus review for clear error. The district court found "that an objective as possible a study was made of the job classifications for the purpose of determining presumptively exempt and non-exempt status." Moreover, there is no evidence that the County attempted to evade its responsibilities under the Act. "[A] decision made above board and justified in public is more likely to satisfy this test. An employer's willingness to state and defend a ground suggests a colorable foundation, and openness facilitates challenges by the employees. Double damages are designed in part to compensate for concealed violations, which may escape scrutiny." *Walton v. United Consumers Club, Inc.,* 786 F.2d 303, 312 (7th Cir.1986). The district court concluded that "[t]his is not a case, like many of those cited [by the Employees], where the employer is using 'ticky-tack' reasons to attempt to evade the wage and hour laws."

The Employees nevertheless claim that the County's lack of good faith intent to comply with the FLSA is evidenced by 1) its assignment of the coverage decisions to someone with insufficient expertise in this area; 2) its reliance solely on written job specifications as opposed to individual job descriptions; 3) its refusal to review pertinent data obtainable from internal documents as well as the Employees' representative; and 4) its establishment of group exemptions. While the Employees present arguments that the County did not do as good a job as it could have done, they fail to show that the County had anything other than an honest intention to comply with the Act. The person assigned to make the coverage decisions arguably was adequately qualified, and his decisions whether to make more extensive studies of individual jobs and corresponding data involved practical considerations on how best to complete the required evaluations in a timely fashion. The district court's finding that the County's actions were taken in good faith, therefore, was not clearly erroneous.

B. Reasonable Grounds

[6] "The additional requirement that the employer have reasonable grounds for believing that his conduct complies with the Act imposes an objective standard by which to judge the employer's behavior." *Brunner,* 668 F.2d at 753. Here, determining the reasonableness of the County's belief involves applying the proper interpretation of the FLSA and supporting regulations to uncontested facts, a primarily legal determination which we review de novo. Although we conclude that the County's interpretation of the regulations was incorrect, its belief in that interpretation was not unreasonable. The regulations do not specifically address government employees, and the duties performed by the DPO II Employees reasonably could be construed as analogous to those of stock brokers and insurance claims agents and adjusters, cited in the regulations as examples of exempt employees. Under these circumstances, we agree with the district court that the County had reasonable grounds for believing that it had not violated the FLSA.

The district court, therefore, did not err in finding that the County acted in good faith and had reasonable grounds for its decision not to pay the Employees overtime under the FLSA. Thus, liquidated dam-

ages were not mandatory but were within the discretion of the district court to award. The Employees do not claim that the court abused its discretion in refusing to award liquidated damages—only that the court had no such discretion in this case. We conclude that the district court did not abuse its discretion by refusing to award liquidated damages.

IV. Attorneys' Fees

The Employees request their attorneys' fees on appeal. As the prevailing party, the Employees are entitled to reasonable attorneys' fees incurred to defend against the County's cross-appeal. *See Newhouse v. Robert's Ilima Tours, Inc.*, 708 F.2d 436, 441 (9th Cir. 1983); 29 U.S.C. § 216(b) (1982). Because they do not prevail on their own appeal, however, they are not entitled to fees incurred pursuant to that appeal.

CONCLUSION

The County has not raised a sufficiently compelling argument that its probation and child protection services are constitutionally exempt from federal regulation under the FLSA. Nor are the Employees administrative employees precluded from coverage under the Act. The district court also was within its discretion in refusing to award liquidated damages to the Employees. The court's decision, therefore, is affirmed, and the Employees are awarded reasonable attorneys' fees on appeal, representing only their efforts to defend against the County's cross-appeal.

AFFIRMED.

In re SLUGGO'S CHICAGO STYLE, INC., Debtor.

CALIFORNIA STATE BOARD OF EQUALIZATION, Appellant,

v.

Harold S. TAXEL, Trustee, Appellee.

No. 89-55040.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 29, 1989.
Decided Aug. 27, 1990.

Chapter 7 trustee brought action to recover funds from California State Board of Equalization. The United States Bankruptcy Court for the Southern District of California, James W. Meyers, J., granted trustee's motion for summary judgment, and denied Board's cross motion, and appeal was taken. The Bankruptcy Appellate Panel of the Ninth Circuit, Volinn, J., 94 B.R. 625, affirmed, and further appeal was taken. The Court of Appeals, Rosenblatt, District Judge, sitting by designation, held that the statutory scheme pursuant to which the California State Board of Equalization required security, as condition of doing business, for payment of California sales and use taxes, did not create a trust immune from claims of general creditors, and thus, certificate of deposit provided as security by debtor under California law was property of debtor's bankruptcy estate.

Affirmed.

1. Bankruptcy ⚷2547

The statutory scheme pursuant to which the California State Board of Equalization required security, as condition of doing business, for payment of California sales and use taxes, did not create a trust immune from claims of general creditors, and thus, certificate of deposit provided as security by debtor under California law was property of debtor's bankruptcy estate.

clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee. During any week in which such clothes-changing or washing time is not so excluded, it must be counted as hours worked if the changing of clothes or washing is indispensable to the performance of the employee's work or is required by law or by the rules of the employer. The same would be true if the changing of clothes or washing was a preliminary or postliminary activity compensable by contract, custom, or practice as provided by section 4 of the Portal-to-Portal Act, and as discussed in § 785.9 and part 790 of this chapter.

[30 FR 9912, Aug. 10, 1965]

LECTURES, MEETINGS AND TRAINING PROGRAMS

§ 785.27 General.

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:

(a) Attendance is outside of the employee's regular working hours;

(b) Attendance is in fact voluntary;

(c) The course, lecture, or meeting is not directly related to the employee's job; and

(d) The employee does not perform any productive work during such attendance.

§ 785.28 Involuntary attendance.

Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance.

§ 785.29 Training directly related to employee's job.

The training is directly related to the employee's job if it is designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill. For example, a stenographer who is given a course in stenography is engaged in an activity to make her a better stenographer. Time spent in such a course given by the employer or under his auspices is hours worked. However, if the stenographer takes a course in bookkeeping, it may not be directly related to her job. Thus, the time she spends voluntarily in taking such a bookkeeping course, outside of regular working hours, need not be counted as working time. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his regular work.

[30 FR 9912, Aug. 10, 1965]

§ 785.30 Independent training.

Of course, if an employee on his own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job.

§ 785.31 Special situations.

There are some special situations where the time spent in attending lectures, training sessions and courses of instruction is not regarded as hours worked. For example, an employer may establish for the benefit of his employees a program of instruction which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to his job, or paid for by the employer.

§ 785.32 Apprenticeship training.

As an enforcement policy, time spent in an organized program of related, supplemental instruction by employees working under bona fide apprenticeship

LEGISLATIVE TRAINING MANDATES (UPDATED 6/01)

Disclaimer: This handout is intended for use as a quick reference. Its purpose is not regulatory. For complete text refer to appropriate law section.

LAW SECTION	HOURS	COURSE TITLE *requires POST certification	REQUIRED FOR	OTHER PERTINENT INFORMATION
PC 832	64 (less if IVD trained)	Arrest and Firearms*	All peace officers in the POST program. Requires completion prior to exercise of powers.	Training can be satisfied by a stand-alone course or completion of other larger courses which include Arrest and Firearms curriculum, e.g. Regular Basic Course. Peace officers with a 3-year-or-longer break in service must requalify their training (Commission Regulation 1080).
PC 832.1	20	Aviation Security*	All airport: security officers, policeman, and special officers shall complete within 90 days of hire and shall not continue to have peace officer powers after 90 days until satisfactory completion.	
PC 832.3	664	Basic Course (Regular)*	Entry level requirement for all peace officers in the POST program except Level II and Level III reserve officers and peace officers whose primary duties are investigative (Reg 1005). Requires completion prior to exercise of powers.	There is a equivalency and waiver process for the Regular Basic Course. There is a 3-year rule and 6-year rule for requalification specified in Commission Regulation 1008.
Cal OSHA Regulation 5193		Bloodborne Pathogens	All public and private employees who are exposed to blood in the workplace.	Training included in the Regular Basic Course. Annual refresher training required. POST telecourse available.
H&S 1797.187	4	Carcinogenic Materials* (LD41)	POST requires for all peace officers who must complete the Regular Basic Course.	Curriculum included in the Regular Basic Course.
PC 832.2 (reserves) PC 832.3 (g) (school police)	32	Campus Law Enforcement*	School police reserve officers and school police officer s.	School police first employed by a K-12 public school district or CA Community College district before 7-1-99 must complete no later than 7-1-02, and all others must complete within 2 years of hire date.. No completion deadline specified for school police reserve officers.
PC 12403	Modules A- 4 B- 2 C- 4	Chemical Agents* (LD 35)	All peace officers as defined in Chapter 4.5 of Title 3 of Part 2 (commencing with Section 830).	Completion of this training is required for peace officers purchasing, possessing, transporting, or using tear gas or tear gas weapon. Modules A&B, included in Regular Basic Course, satisfies requirements of PC12403 for peace officer using aerosol chemical agents and who are expected to use a gas mask. Module C satisfies the requirements for those who are responsible for deployment of tactical chemical agent munitions.
PC13517	24	Child Abuse Investigation* (LD30)	POST requires for all peace officers who must complete the Regular Basic Course.	Included in the Regular Basic Course. Commission required to certify an optional course for specialists. No deadline specified for completion.
PC 13515.55	4	Computer Crimes*	City police and deputy sheriff supervisors assigned to field or investigative duties.	Must be completed by 1-1-00 or within 18 months of assignment to supervisory duties.
PC 13519.2	4	Developmental Disabilities and Mental Illness* (LD37)	POST requires for all peace officers who must complete the Regular Basic Course.	Peace officers who did not complete in the Regular Basic Course are required to complete supplementary training.

LEGISLATIVE TRAINING MANDATES (UPDATED 6/01)

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LAW SECTION	HOURS	COURSE TITLE *requires POST certification	REQUIRED FOR	OTHER PERTINENT INFORMATION
GC 8607	No hours speci-fied	Disaster Response	All emergency response personnel.	The Office of Emergency Services mandated to develop course in coordination with POST and others. POST Telecourse 95-04 available.
PC 13519	8	Domestic Violence*	POST requires for all peace officers who must complete the Regular Basic Course. The Penal Code in addition requires for officers described in PC 830.31.	Officers completing the Basic Course prior to 1-1-86 must complete supplementary training. Various deadlines in Penal Code depending on individual's peace officer category.
PC 13519(g)	No hours speci-fied	Domestic Violence Update* (LD25)	Each law enforcement officer below the rank of supervisor who is assigned to patrol duties and would normally respond to domestic violence shall complete every two years.	For all other officers local law enforcement agencies are encouraged to include update training but not mandatory. Update training available as a POST-certified course.
PC 13515	2	Elder and Dependent Abuse (Dependent abuse added by stats 2000 not yet added to POST-certified training) *	Every city police officer or deputy sheriff at a supervisory level and below who is assigned field or investigative duties.	Completion required within 18 months of assignment to field or investigative duties.
PC 13518	21	First Aid/CPR (LD34)	POST requires for all peace officers who must complete the Regular Basic Course.	Included in the Regular Basic Course. Curriculum standards set by Emergency Medical Services Authority (EMSA) (Reference California Code of Regulations, Title 22, Division 9, Chapter 1.5 , sections 100005-100028.) For officers primarily doing administrative or clerical duties refer to the code for an exception.
PC 13518(a)	12	First Aid/CPR Refresher	Peace officers subject to the Regular Basic Course requirement.	Penal Code 13518(a) requires periodic refresher training. EMSA requirement is a minimum of 12 hours every three years or appropriate testing in cardiopulmonary resuscitation and other first aid as prescribed by EMSA.
PC13519.5	No hours speci-fied	Gang and Drug Enforcement (LD12, 38)	POST requires for all peace officers who must complete the Regular Basic Course.	Training included as part of the Regular Basic Course. Also available as POST Telecourse training. No deadline specified for completion.
PC 13519.6	4	Hate Crimes* (LD 42)	POST requires for all peace officers who must complete the Regular Basic Course.	No deadline specified for completion.
PC 872(b)	1	Hearsay Testimony* (LD 17)	All peace officers with less than five years of service and who wish to testify to hearsay evidence in preliminary hearings.	Curriculum included in the Basic Course. Also available in video training.
PC 13519.8(a)	2	High Speed Vehicle Pursuit Training I* (LD 19)	Peace officers of a local police department, sheriff's department or California Highway Patrol who are below middle management rank and who completed the Regular Basic Course prior to 7-15-95.	Curriculum included in the Basic Course. Penal Code 13519.8 encourages periodic update training.

LEGISLATIVE TRAINING MANDATES (UPDATED 6/01)

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LAW SECTION	HOURS	COURSE TITLE *requires POST certification	REQUIRED FOR	OTHER PERTINENT INFORMATION
PC 13519.8(c)	1	High Speed Vehicle Pursuit Training II*	Middle managers and above of local police departments, sheriff departments or California Highway Patrol who completed the Regular Basic Course prior to 7-15-95.	This training can be satisfied by completion of either High Speed Vehicle Pursuit Training I or II.
PC 629.94		Interception of Wire, Pager, and Cellular Communications	All peace officers.	Training not yet developed.
VC40802	8	Laser Operator*	Peace officers issuing speed violation citations using laser or any other electronic speed measuring devices and where a traffic and engineering survey is beyond five years.	Prerequisite Radar Operator Course.
B&P 25755	160	Narcotics Enforcement*	All peace officer investigators of the Department of Alcoholic Beverage Control.	The 160 hours of training is satisfied by combination of the 80-hour POST certified Narcotics Investigation Course* plus the 80-hour Narcotics Investigation Field Training Program. *Two or more POST-certified courses (totaling a minimum of 80 hours) which include the Narcotics Investigation curriculum specified by POST may be substituted for the 80-hour course.
PC 13519.1	4 2 in-service	Missing Persons* (LD 27)	Peace officers and dispatchers of a local police department, sheriff's department or California Highway Patrol	Curriculum included in the Regular Basic Course and P.S. Dispatcher's Basic Course. If Regular Basic Course or Public Safety Dispatcher's Basic Course was completed prior to 1-1-89, completion of supplementary in-service training is required.
VC 40802	24	Radar Operator*	Peace officers issuing speed violation citations using radar speed measuring devices and where a traffic and engineering survey is beyond five years.	
PC 13519.4	No hours speci-fied	Racial and Cultural Diversity* (LD42)	All peace officers specified in Penal Code section 13510(a) [Note this includes reserves].	Curriculum included in the Regular Basic Course. ****New training curriculum to be added to the Basic Course by 1-1-02.
PC 13519.4 (i)		Racial and Cultural Diversity Refresher	All peace officers specified in Penal Code section 13510(a) [Note this includes reserves].	****Expanded training to be developed by 1-1-02 and to include new profiling curriculum and other specified topics Required every five years or on a more frequent basis if deemed necessary, in order to keep current with changing racial and cultural trends..

LEGISLATIVE TRAINING MANDATES *(UPDATED 6/01)*

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LAW SECTION	HOURS	COURSE TITLE *requires POST certification	REQUIRED FOR	OTHER PERTINENT INFORMATION
PC 832.6	344 L I 224 L II 162 :LIII	Reserve Level I Module Reserve Level II Module Reserve Level III Module	Level I Reserve officers must complete all three modules (774 hours) or the Regular Basic Course (664 hours). Level II Reserve officers must complete Reserve Modules II and III (386 hours). Reserve Level III officers must complete Reserve Module III (162 hours).	Training must be completed before being assigned duties which include the exercise of peace officer powers.
PC 13516(b) PC13516(c)	6 18	Sexual Assault Investigation (LD 30)	POST requires for all peace officers who must complete the Regular Basic. A supplementary course is certified for investigators of sexual assault cases, child sexual exploitation cases and child sexual abuse cases (18 hours).	Officers assigned to investigation duties which include the handling of cases involving the sexual exploitation or sexual abuse of children are required to complete the supplementary course within six months of the date of assignment.
PC 13519.7(b) PC 13519 (c)	2	Sexual Harassment (LD 42)	POST requires for all peace officers who must complete the Regular Basic Course. Peace officers who have not completed in the Regular Basic Course shall complete supplementary training.	Curriculum included in the Regular Basic Course.
PC 12020 (b)(1)	16 16	Shotgun (Long/Short Barrel)*[see comment A] Rifle (Long/Short Barrel)* [see comment B]	Peace officers of local police departments, sheriffs departments, marshals departments, California Highway Patrol or Department of Justice and reserve officers of these departments.	Comment A – This training requirement can be satisfied by completing the Regular Basic Course, Reserve Training Modules I or II, or Reserve Modules A, B, C, and D which contain POST-certified shotgun training. Comment B – Prerequisite for Rifle training is completion of the Regular Basic Course, Reserve Training Modules I or II, and III or Reserve Modules A, B, C, and D. Comment C – Completion of this training exempts these officers from the provisions of PC 12020(a).
PC 13519.3	2	Sudden Infant Death Syndrome (LD 30)	Penal Code specifies all peace officers specified in PC13510 (a) who are assigned to patrol or investigations. POST requires for all peace officers who must complete the Regular Basic Course	Supplementary training required for in-service officers who did not receive in the Basic Course.
PC14304		Toxics Training for Peace Officers		Training never funded. Insufficient funds in the Hazardous Materials Enforcement and Training Account of Department of Toxic Substances Control to implement.
PC 13514.5	No hours speci-fied	Civil Disobedience	Peace officer who are required to complete the Regular Basic Course.	Telecourse developed.

DECLARATION OF DEPUTY ALEX NISHIMURA

I, Alex Nishimura, state:

That I am a deputy with the Sacramento County Sheriff's Department, and I am one of four training deputies who are responsible for the coordination of in-service training for the law enforcement personnel employed by this department. I have been in this position since July, 2001, and I have knowledge of the facts stated herein and if called upon to testify, I could do so competently.

In my role as a training deputy, I have to make sure that all required training mandates are met. For each such class, I must make sure that the curriculum is submitted to the Commission on Peace Officers Standards and Training (POST) and approved by them. I must make arrangements for appropriate instructors, dates of training, facilities for training, and other necessary equipment/supplies in order that the required training is provided.

POST requires that all peace officers have a minimum of 24 hours of training every two years. Attached hereto as Exhibit 6 is a true and correct copy of POST's Legislative Training Mandates, as of June, 2001. From a review of this document, it is evident that some officers will have to complete 24 hours of training exclusive of the requirement imposed by Chapter 684, Statutes of 2000 – Racial Profiling.

With regard to the requirement for training in bloodborne pathogens, this requirement is imposed by OSHA. We are required to have an annual refresher course, but there is no specification by OSHA or POST on what is to be covered or the amount of time that the course is required to take. We have thus included it in our First Aid Training/CPR course which we give every other year. Our training in bloodborne pathogens is approximately a two-hour block, which averages to one hour per year.

With regard to computer crimes, it is supposed to be a four-hour course. Once a deputy is assigned to the field or transferred to a detective position, that person must have that course within an 18 month period.

With regard to the course on Domestic Violence update, we do it on an annual basis, and the duration of the course varies between 2 and 4 hours. It, again, is required when a deputy is assigned to field duties or is transferred to detectives.

Elder and Dependent Abuse training must be completed within 18 months of assignment to field duties.

First Aid/CPR Refresher – we are presently redoing our course. POST requires 12 hours every 3 years; however, we are redoing our course so that there will be 9 hours every two years in order to meet the requirement.

With regard to the High Speed Vehicle Pursuit Training II, we include this in our Emergency Vehicle Operations Course (EVOC). This EVOC is a 20 hour course that we offer to all sworn personnel. The POST training was supposed to be every two years, but there is a new mandate coming from POST which will require this training more frequently.

The Interception of Wire, Pager, and Cellular Communications course has been offered, but we do not offer it on a regular basis. All officers probably have not been trained in this subject area.

Laser Operator and Radar Operator courses are not offered by our in-service training department, as our sheriff's department does not use laser or radar operations. However, for those deputies who serve in the cities of Elk Grove and Citrus Heights, these deputies are sent to outside training on the operation of these devices.

The Missing Persons course is now included in the basic course. However, if an officer completed his basic training prior to January 1, 1989, supplementary training is required.

Racial and Cultural Diversity Refresher is the course that is the subject of this test claim legislation. We will be offering the course starting in July 2002. It has taken that long to get this course ready for presentation because POST had not decided on the curriculum. POST has determined that this is to be a five hour course, however our course will be a little longer as we have an additional 2 hours of departmental specific material that will be included in the course.

Sexual Assault Training is required of those deputies who are assigned to these types of cases. It is a one-time 18 hour supplementary training.

From the foregoing, it is evident that depending upon assignment, an officer can readily exceed the 24 hours mandatory training required every two years, even prior to this new training mandate.

Officers have the ability to change assignments when one becomes open, and management also has the right to reassign a deputy upon appropriate notice. This is in order to provide management with the flexibility to appropriately staff each division depending upon need. As assignments do not remain stagnant, there is a requirement for additional training.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 18 day of June, 2002, at Sacramento, California.

Alex Nishimura

February 8, 2002

NOTICE OF PUBLIC HEARING

BULLETIN: 02-06

SUBJECT: PUBLIC HEARING: PROPOSAL TO ADOPT COMMISSION REGULATION 1081(a)(33) - MINIMUM STANDARDS FOR RACIAL PROFILING COURSE

A public hearing is being held to consider a proposal to adopt Commission Regulation 1081(a)(33) that would establish initial and refresher training course requirements on racial profiling as required by Penal Code Section 13519.4 (f) and (i). An initial four-hour training course is being recommended that would apply to "every law enforcement officer in this state" and should be completed by July 1, 2004. A two-hour refresher-training course is being recommended that would apply to law enforcement officers described in subdivision (a) of Section 13510 who adhere to POST's standards. The refresher course is required to be completed every five years after completing the initial training course.

The public hearing will be held:

Date: April 11, 2002
Time: 10:00 a.m.

Place: Ramada Plaza
6333 Bristol Parkway
Culver City, CA 90230

Pursuant to the provisions of the Administrative Procedures Act, the Commission invites input on this proposal. Written comments relative to the proposed actions must be received at POST no later than 4:30 p.m. on April 8, 2002.

The attached Notice of Proposed Regulatory Action provides details concerning the proposed regulatory changes. Inquiries concerning the proposed action may be directed to Leah Cherry, Associate Governmental Program Analyst, 1601 Alhambra Boulevard, Sacramento, CA 95816-7083, or by telephone at (916) 227-3891.

KENNETH J. O'BRIEN
Executive Director

Attachment

Commission on Peace Officer Standards and Training

NOTICE OF PROPOSED REGULATORY ACTION: ADD COMMISSION REGULATION 1081 (a)(33) MINIMUM STANDARDS FOR RACIAL PROFILING TRAINING

Notice is hereby given that the Commission on Peace Officer Standards and Training (POST), pursuant to authority vested by Section 13503 of the Penal Code (powers of the Commission on POST) and Section 13506 (authority for the Commission on POST to adopt regulations), and in order to interpret, implement and make specific Sections 13510 (authority of the Commission on POST to adopt and amend rules establishing minimum standards for California local law enforcement officers), and Section 13519.4 of the Penal Code which gives the Commission on POST the authority to develop a course of instruction for the training of law enforcement officers in California racial profiling, proposes to adopt a regulation in Chapter 2 of Title 11 of the California Code of Regulations. A public hearing to adopt the proposed regulation will be held before the full Commission on:

Date: April 11, 2002
Time: 10:00 a.m.

Place: Ramada Plaza
6333 Bristol Parkway
Culver City, CA 90230

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Senate Bill 1102, which amended Section 13519.4 of the Penal Code requires the Commission on Peace Officer Standards and Training to develop an initial training course on racial profiling, which is required of all law enforcement officers. A four-hour minimum curriculum is proposed to meet this requirement that must be completed by July 1, 2004. As part of the change in law, officers are required to complete a refresher course every five years after completing the initial training course. A two-hour minimum course curriculum is proposed to meet this requirement. It is proposed that officers completing the basic course after July 1, 2003 will satisfy the initial racial profiling requirement as this curriculum will be part of the basic course.

As required by Penal Code Section 13519.4, POST collaborated with a five-member Governor/Legislatively appointed panel along with subject matter experts from law enforcement and training organizations. The highly student interactive, instructional methodology was developed in accordance with the provisions of Section 13519.4(h). This section specifies that the course content will address certain topics. This was accomplished by including them in proposed course topics or videos that will be used by course instructors and facilitators.

The four-hour proposed initial training curriculum includes -- Why Are We Here, Racial Profiling Defined, Legal Considerations, History of Civil Rights, Impact of Racial Profiling, Community Considerations, and Ethical Considerations.

The two-hour proposed refresher training curriculum includes -- Review of Applicable Initial Training and Update on Changes in Law and Practices.

PUBLIC COMMENT

The Commission hereby requests written comments on the proposed actions. All written comments must be received at POST no later than April 8, 2002. Written comments should be directed to Kenneth J. O'Brien, Executive Director, Commission on Peace Officer Standards and Training, 1601 Alhambra Boulevard, Sacramento, CA 95816-7083, fax number (916) 227-2801, or email at kobrien@post.ca.gov.

ADOPTION OF PROPOSED REGULATIONS

Following the close of the public comment period, the Commission may adopt the proposal substantially as set forth without further notice or may modify the proposal if such modifications remain sufficiently related to the text as described in the Informative Digest. If the Commission makes changes to the language before the date of adoption, the text of any modified language, clearly indicated, will be made available at least 15 days before adoption to all persons whose comments were received by POST during the public comment period, and all persons who request notification from POST of the availability of such changes. A request for the modified text should be addressed to the agency official designated in this notice. The Commission will accept written comments on the modified text for 15 days after the date of which the revised text is made available.

TEXT OF PROPOSAL

Copies of the Initial Statement of Reasons and exact language of the proposed action may be obtained by submitting a request in writing to the contact person at the address below. This address also is the location of all information considered as the basis for these proposals. The information will be maintained for inspection during the Commission's normal business hours (8:00 a.m. to 5:00 p.m., Monday through Friday).

Copies of the Final Statement of Reasons, once it has been prepared pursuant to subdivision (a) of Section 11346.9, may be obtained from the address at the end of this notice.

ESTIMATE OF ECONOMIC IMPACT

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Saving in Federal Funding to the State: There will be training costs to state agencies that employ law enforcement officers. Training costs will include costs associated with instruction, trainee salaries, trainee travel, and per diem.

Nondiscretionary Costs/Savings to Local Agencies: None that are reimbursable by the state because the training mandate is upon individual peace officers.

Local Mandate: No. This is a training mandate upon individual officers.

Costs to Any Local Agency or School District for Which Government Code Section 17561 Requires Reimbursement: None that are reimbursable by the state because the training mandate is upon individual peace officers.

Significant Statewide Adverse Economic Impact Directly Affecting California Businesses, Including Small Business: The Commission on Peace Officer Standards and Training has made an initial determination that the proposed regulation will not have a significant statewide adverse economic impact directly affecting California businesses, including the ability to compete with business in other states, and has found that the proposed addition of Regulation 1081(a)(33) will have no affect on California business, including small businesses, because the Commission on Peace Officer Standards and Training sets selection and training standards for law enforcement and does not impact California business, including small businesses.

Cost Impacts on Representative Private Persons or Business: The Commission on Peace Officer Standards and Training is not aware of any cost impacts that representative private person or business would necessarily incur in reasonable compliance with this proposed action.

Effect on Housing Costs: The Commission on Peace Officer Standards and Training has made an initial determination that the proposed regulation would have no affect on housing costs.

ASSESSMENT

The adoption of the proposed amendments to this regulation will neither create nor eliminate jobs in the state of California, nor result in the elimination of existing businesses or create or expand businesses in the state of California.

CONSIDERATION OF ALTERNATIVES

In order to take this action, the Commission must determine that no reasonable alternative considered by the Commission, or that has otherwise been identified and brought to the attention of the Commission, would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons than the proposed action.

CONTACT PERSON

Inquiries concerning written material pertaining to the proposed action should be directed to Leah Cherry, Associate Governmental Program Analyst, 1601 Alhambra Boulevard, Sacramento, CA 95816-7083, or by telephone at (916) 227-3891, fax number (916) 227-3895, or email at leah.cherry@post.ca.gov. The back-up contact person as well as inquiries concerning the substance of the proposed action/text should be directed to Hal Snow, Assistant Executive Director, at (916) 227-2807, fax number (916) 227-2801, or e-mail at halsnow@post.ca.gov.

INTERNET ACCESS

The Commission has posted on its Internet Website (www.post.ca.gov) the information regarding this proposed regulatory action. Select "Regulation Notices" from the topics listed on the Website home page.

Commission on Peace Officer Standards and Training

ADD COMMISSION REGULATION 1081 (a)(33)
MINIMUM STANDARDS FOR RACIAL PROFILING TRAINING

INITIAL STATEMENT OF REASONS

The Commission on Peace Officer Standards and Training (POST) proposes to adopt Commission Regulation 1081 (a)(33) - Racial Profiling Training.

In calendar year 2000, the state Legislature mandated, in passage of SB 1102 (Murray), the modification of Penal Code Section 13519.4. Penal Code Section 13519.4 requires the Commission to develop and make available, an initial training course on racial profiling. This course is required to be completed by all law enforcement officers.

In response to this mandate the Commission developed an initial four-hour training curriculum. In response to the refresher training requirement, the Commission developed a two-hour course curriculum.

Justification for Proposed Addition of 1081(a)(33)

The proposed adoption of Commission Regulation 1081 (a)(33) is in concurrence with the mandate set forth in Penal Code Section 13519.4. The four-hour initial training curriculum was developed by experts from local and state agencies in collaboration with a Governor/Legislative, five-member racial profiling panel.

Change	Reason
Add (33) Racial Profile Training - Penal Code Section 13519.4 (f) (i)	POST required to establish training requirements.
Part I - Initial* - Four Hours	PC Section 13519.4 (f) requires POST to develop requirements for an initial course. Four hours were determined to be the minimum time needed to adequately address proposed content based upon input from subject matter experts and instructional designers.
A. Why Are we Here?	The topic was found necessary to provide background information to trainees and secure interest. This topic provides opportunity to secure trainees' views on topic.
B. Racial Profiling Defined	Penal Code Section 13519.4 provides a definition, but amplification is necessary.

Change	Reason
C. Legal Considerations	There exists several complexities in interpreting the 4th and 14th amendments as described in various court decisions.
D. History of Civil Rights	This is a required topic (PC 13519.4 (h)
E. Impact of Racial Profiling	This is a required topic (PC 13519.4 (h)
F. Community Considerations	This is a required topic (PC 13519.4 (h)
G. Ethical Considerations	While this topic is alluded to in PC 13519.4 (h), it is the belief of subject matter experts that this topic must be included because officers need to understand that racial profiling is an unethical practice.
Part II - Refresher** - Two Hours	The refresher-training course is specified by PC Section 13519.4(i). Two hours were determined to be the necessary minimum hours based upon the proposed content.
A. Review of Applicable Initial Training	A refresher course should include attention to reviewing content specified in the initial training course.
B. Update on Changes in Law and Practices	It is presumed there will be changes in law and practices after five years of completion of the initial course.
* Suggested to be completed by July 2004. Satisfaction of this training course is accomplished by completing the regular basic course after 7-1-03.	It is planned that appropriate curriculum will be developed for the regular basic course so as to obviate the need for law enforcement agencies to send their personnel to the initial training course.
** To be completed every five years after initial training.	Required by PC 13519.4 (i).

ADD COMMISSION REGULATION 1081 (a)(33)
MINIMUM STANDARDS FOR RACIAL PROFILING TRAINING

1081. Minimum Standards for Legislatively-Mandated Courses.

[(a)(1) through (a)(32) * * * continued]

(33) Racial Profiling Training
Penal Code Section 13519.4 (f)

Part I - Initial* - 4 hours

A. Why Are We Here?
B. Racial Profiling Defined.
C. Legal Considerations.
D. History of Civil Rights.
E. Impact of Racial Profiling.
F. Community Considerations.
G. Ethical Considerations.

Part II - Refresher** - Two Hours

A. Review of Applicable Initial Training
B. Update on Changes in Law and Practices

* Suggested to be completed by July 2004. Satisfaction of this training course is accomplished by completing the regular basic course after 7-1-03.

** To be completed every five years after initial training.

[1081(b) *** continued]

NOTE: Authority cited: Sections 831.4, 12002(f), 12403.5, 13503, 13506, 13510, 13511.3, 13515, 13519(f) and 13519.8, Penal Code.
Reference: Sections 832, 832.1, 832.2, 832.3, 832.6, 872(b), 12002(f), 12403, 12403.5, 13503(e), 13510, 13510.5, 13511.3, 13515, 13515.55, 13516, 13517, 13519, 13519(e), 13519.1, 13519.2, 13519.3, and 13519.8, Penal Code; Sections 40600 and 40802, Vehicle Code; Section 25755, Business and Professions Code; and Section 1797.187, Health and Safety Code.

PROOF OF SERVICE

Test Claim Name: "Racial Profiling: Law Enforcement Training"
Test Claim Number: CSM 01-TC-01

I, the undersigned, declare as follows:

I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 711 G Street, 4th Floor, Room 405, Sacramento, CA 95814.

On June 18, 2002, I served the original and two copies of the attached Rebuttal Letter from the Sacramento County Sheriff's Department, in said cause, in person, to the Commission on State Mandates (980 Ninth Street, Suite 300, Sacramento, CA 95814, and one other copy in a sealed envelope to Ms. Paula Higashi, also located at that address. I placed a copy in the mailbox for Sheriff Lou Blanas at his work location, 711 G Street, Room 401, Sacramento, CA 95814: I also placed a true copy thereof, to the other state agencies and non-state agencies on the mailing list, enclosed in a sealed envelope, in the United States Mail at the Sacramento County's Department of General Services, Support Services Division, 9650 Goethe Road, Sacramento, CA 95827.

Mr. Keith B. Petersen, President
Sixten & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Ms. Sandy Reynolds, President
Reynolds Consulting Group, Inc.
PO Box 987
Sun City CA 92586

Mr. Steve Smith, CEO
Mandated Cost Systems, Inc.
2275 Watt Avenue, Suite C
Sacramento CA 95825

Mr. Jim Spano
State Controller's Office
Division of Audits
300 Capitol Mall, Suite 518
Sacramento CA 95814

Ms. Pam Stone, Legal Counsel
MAXIMUS
4320 Auburn Blvd, Suite 2000
Sacramento CA 95841

Mr. David Wellhouse
Wellhouse & Associates
9175 Keifer Blvd, Suite 121
Sacramento CA 95826

Legislative Analyst's Office
Attention: Marianne O'Malley
925 L St, Suite 100
Sacramento CA 95814

Lou Blanas, Sheriff
Sacramento County Sheriff's Dept
711 G St
Sacramento CA 95814

Ms. Annette Chinn
Cost Recovery System
705-2 East Bidwell Street #294
Folsom CA 95630

Ms. Harmeet Barkschat
Mandate Resource Services
8254 Heath Peak Place
Antelope CA 95843

Mr. Glenn Haas, Bureau Chief
State Controller's Office
Div of Accounting & Reporting
3301 C St, Suite 500
Sacramento CA 95816

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple St, Rm 603
Los Angeles CA 90012

Mr. Dick Reed, Asst. Exec Director
Comm on Peace Officer Standards and Training
Administrative Services Division
1601 Alhambra Blvd
Sacramento CA 95816-7083

Mr. James Lombard, Principal Analyst
Department of Finance
915 L Street
Sacramento CA 95814

Mr. Manuel Medeiros,
Assistant Attorney General
Office of the General Attorney
PO Box 944255
Sacramento CA 95814

Mr. Steve Keil
California State Assoc of Counties
1100 K Street, Suite 101
Sacramento CA 95814-3941

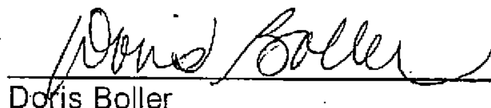
Mr. Andy Nichols, Senior Manager
Centration, Inc.
8316 Red Oak, Suite 101
Rancho Cucamonga CA 91730

Assistant Director
Office of Criminal Justice Planning
1130 K Street, Suite 300
Sacramento CA 95814

Mr. Paul Minney
Spector, Middleton, Young & Minney, LLP
7 Park Center Drive
Sacramento CA 95825

Ms. Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Building
980 Ninth Street, Suite 300
Sacramento CA 95814

I declare under penalty of perjury, under the laws of the State of California, that the forgoing is true and correct, and that this declaration was executed on June 18, 2002 at Sacramento, California.



Doris Boller

EXHIBIT E

STATE OF CALIFORNIA

ARNOLD SCH

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

August 3, 2005

Mr. Kenneth O'Brien
Executive Director
Commission on Peace Officer Standards and Training
1601 Alhambra Boulevard
Sacramento, CA 95816-7083

Ms. Nancy Gust
SB-90 Coordinator
County of Sacramento
711 G Street
Sacramento, CA 95814

And Interested Parties (See Attached Mailing List)

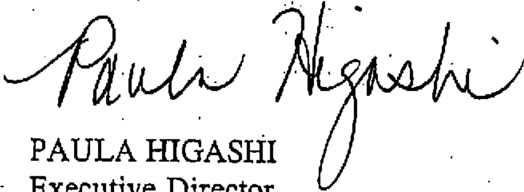
Re: **Request for Additional Comments**
Racial Profiling: Law Enforcement Training, CSM 01-TC-01
County of Sacramento, Claimant
Statutes of 2000, Chapter 684 (S.B. 1102)
Penal Code section 13519.4

Commission staff is currently analyzing the test claim *Racial Profiling: Law Enforcement Training* (01-TC-01). Commission staff has determined that additional information about the training's implementation is needed. We are requesting that POST provide written responses to the following questions by August 26, 2005.

- Who provides the racial profiling training required by Penal Code section 13519.4, subdivision (f), to the officers?
- What materials were provided by POST to implement the curriculum and how do local agencies receive these materials?
- POST's 02-06 bulletin states that the initial training course is four hours long. POST's 02-12 bulletin then states that the initial training course is five hours long. How long is the course that POST developed?
- Can the two-hour refresher course found in Penal Code section 13519.4, subdivision (i), be absorbed within the 24-hour continuing professional training requirement? (Cal. Code Regs., tit. 11, § 1005, subd. (d).)

The claimant and other interested parties may file rebuttals to the POST comments by September 9, 2005. Please contact Camille Shelton, Senior Commission Counsel, at (916) 323-8215 if you have any questions.

Sincerely,



PAULA HIGASHI
Executive Director

Cc: Mailing list

MAILED: Mail List
DATE: 8/3/05
CHRON: X
WORKING BINDER:
FAXED:
INITIAL: LJ
FILE:

Original List Date: 8/13/2001
Last Updated: 6/8/2005
List Print Date: 08/03/2005
Claim Number: 01-TC-01
Issue: Racial Profiling: Law Enforcement Training

Mailing Information: Other

Mailing List

Related

02-TC-05 Racial Profiling: Law Enforcement Training (K-14)

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Jim Spano
State Controller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Tel: (916) 323-5849
Fax: (916) 327-0832

Ms. Margaret Wanasamba
County of Sacramento
SB90/Grant Coordinator
700 H Street, Rm. 3650
Sacramento, CA 95814-1276

Tel: (916) 874-6453
Fax: (916) 874-5885

Mr. Pat Lunney
Department of Justice
Advanced Training Center
11181 Sun Center Drive
Rancho Cordova, CA 95670

Tel: (916) 464-1200
Fax:

Mr. Richard W. Reed
Commission on Peace Officers Standards & Training
Administrative Services Division
1601 Alhambra Blvd.
Sacramento, CA 95816-7083

Tel: (916) 227-2802
Fax: (916) 227-3895

Mr. Michael Havey
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Tel: (916) 445-8757
Fax: (916) 323-4807

Mr. Steve Keil
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941

Tel: (916) 327-7523
Fax: (916) 441-5507

Ms. Susan Geanacou
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814

Tel: (916) 445-3274
Fax: (916) 324-4888

Mr. Keith B. Petersen
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Tel: (858) 514-8605
Fax: (858) 514-8645

Ms. Jesse McGuinn
Department of Finance (A-15)
915 L Street, 8th Floor
Sacramento, CA 95814

Tel: (916) 445-8913
Fax: (916) 327-0225

Director
Office of Criminal Justice Planning (P-03)
1130 K Street, Suite 300
Sacramento, CA 95814

Tel: (916) 324-9132
Fax: (916) 324-9167

Ms. Annette Chinn
Cost Recovery Systems, Inc.
705-2 East Bidwell Street, #294
Folsom, CA 95630

Tel: (916) 939-7901
Fax: (916) 939-7801

Mr. Lou Blanas
Sacramento Co. Sheriff's Department
711 G Street
Sacramento, CA 95814

Tel: (916) 874-7146
Fax: (916) 875-0082

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Tel: (916) 368-9244
Fax: (916) 368-5723

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Tel: (916) 727-1350
Fax: (916) 727-1734

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Tel: (916) 485-8102
Fax: (916) 485-0111

Mr. Steve Smith
Steve Smith Enterprises, Inc.
4633 Whitney Avenue, Suite A
Sacramento, CA 95821
Tel: (916) 483-4231
Fax: (916) 483-1403

Ms. Pam Stone
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841
Tel: (916) 485-8102
Fax: (916) 485-0111

Ms. Sandy Reynolds
Reynolds Consulting Group, Inc.
P.O. Box 894059
Temecula, CA 92589
Tel: (951) 303-3034
Fax:

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012
Tel: (213) 974-8564
Fax: (213) 617-8106

Mr. Michael Cohen
Legislative Analyst's Office (B-29)
925 L Street, Suite 1000
Sacramento, CA 95814
Tel: (916) 319-8310
Fax: (916) 324-4281

Ms. Nancy Gust
County of Sacramento
711 G Street, Room 405
Sacramento, CA 95814
Claimant
Tel: (916) 874-6032
Fax: (916) 874-5263

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Boulevard, Suite #106
Roseville, CA 95661
Tel: (916) 677-4233
Fax: (916) 677-2283

Mr. Joe Rombold
School Innovations & Advocacy
11130 Sun Center Drive, Suite 100
Rancho Cordova, CA 95670
Tel: (800) 487-9234
Fax: (888) 487-6441

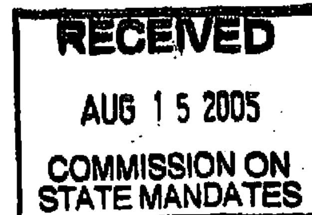
Mr. Kenneth J. O'Brien
Commission on Peace Officers Standards & Training
Administrative Services Division
1601 Alhambra Blvd.
Sacramento, CA 95816-7083
Tel: (916) 227-2802
Fax: (916) 227-2801

COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING

The mission of the California Commission on Peace Officer Standards and Training is to continually enhance the professionalism of California law enforcement in serving its communities.

EXHIBIT F

August 10, 2005



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

Arnold Schwarzenegger
Governor

Bill Lockyer
Attorney General

Dear Ms. Higashi:

In response to SB 1102, the Commission on POST assembled subject matter experts from throughout the State and worked in concert with the Governor's Panel on Racial Profiling to design the *Racial Profiling: Issues and Impact* curriculum.

The curriculum was designed to be presented in-house by a trained instructor within the law enforcement agency. It is believed that in-house instructors provide validity to the training and can relate the material directly to agency policies.

The curriculum was designed as a "course-in-a-box" and includes an instructor guide, facilitated discussion questions, class exercises, and a companion training video. The video covers additional instructional information and contains three scenarios that the students watch and then discuss among themselves with the instructor as a facilitator. The course was designed to ensure training consistency throughout the State.

Due to the complexity and sensitivity of the topic, POST regulation requires that each instructor complete the 24-hour Racial Profiling Train-the-Trainer Course prior to facilitating the training. The Training for Trainers course is presented on an on-going basis by the Museum of Tolerance in Los Angeles. The course is presented under contract and is of no cost to the agency. At the completion of the training, the instructor is provided with all the necessary course material to train their own officers.

The course was originally planned to be four hours in length. After two pilot presentations it was determined that the material could not be covered sufficiently in four hours; therefore, an additional hour was added, which extended the mandated curriculum to five hours.

1601 Alhambra Blvd. • Sacramento, CA 95816-7083 • 916.227.3909 • 916.227.3895 fax • www.post.ca.gov

The racial profiling course, as well as the two-hour update, can be certified by POST which would allow agencies to apply the training hours towards the 24-hour Continuing Professional Training requirement.

Feel free to contact me or Special Consultant Jill Taylor, Training Program Services Bureau, at (916) 227-0471 if you have additional questions regarding this most worthwhile program.

Sincerely,

KENNETH J. O'BRIEN
Executive Director

KJO:rb:dar

STATE OF CALIFORNIA

GRAY DAVIS, *Governor*

EXHIBIT G

COMMISSION ON STATE MANDATES

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

August 11, 2006

Ms. Nancy Gust
County of Sacramento
711 G Street
Sacramento, Ca 95814

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Draft Staff Analysis and Hearing Date
Racial Profiling: Law Enforcement Training (01-TC-01)
County of Sacramento, Claimant
Statutes of 2000, Chapter 684

Dear Ms. Gust:

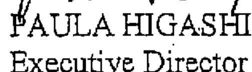
The draft staff analysis of this test claim is enclosed for your review and comment.

Written Comments
Any party or interested person may file written comments on the draft staff analysis by **Friday, September 1, 2006**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing
This test claim is set for hearing on **Thursday, October 26, 2006** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about October 12, 2006. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Deborah Borzelleri at (916) 322-4230 with any questions regarding the above.

Sincerely,



PAULA HIGASHI
Executive Director

Enc. Draft Staff Analysis

MAILED: ______ FAXED: ✓
DATE: 8/11/06 INITIAL: LD
CHRON: ______ FILE: ______
WORKING BINDER: ______

ITEM ____

TEST CLAIM
DRAFT STAFF ANALYSIS

Statutes 2000, Chapter 684

Penal Code section 13519.4

Racial Profiling: Law Enforcement Training
(01-TC-01)

County of Sacramento, Claimant

EXECUTIVE SUMMARY

STAFF WILL INSERT THE EXECUTIVE SUMMARY IN THE FINAL ANALYSIS.

STAFF ANALYSIS

Claimant

County of Sacramento

Chronology

08/13/01	County of Sacramento filed test claim with the Commission
09/14/01	The Department of Finance submitted comments on test claim with the Commission
09/24/01	The Commission on Peace Officer Standards and Training (POST) filed comments on test claim with the Commission
06/18/02	County of Sacramento filed reply to Department of Finance comments
08/03/05	Commission staff requested additional comments on test claim from POST
08/10/05	POST filed additional requested comments on test claim with the Commission
08/16/06	Commission staff issued draft staff analysis

Background

This test claim involves legislation that prohibits law enforcement officers from engaging in racial profiling, as defined, and establishes racial profiling training requirements for law enforcement officers, with the curriculum developed by the Commission on Peace Officer Standards and Training ("POST").

POST was established by the Legislature in 1959 to set minimum selection and training standards for California law enforcement.[1] The POST program is funded primarily by persons who violate the laws that peace officers are trained to enforce.[2] Participating agencies agree to abide by the standards established by POST and may apply to POST for state aid.[3]

In enacting the test claim legislation (Stats. 2000, ch. 684), the Legislature found that racial profiling[4] is a practice that presents a great danger to the fundamental principles of a democratic society, is abhorrent and cannot be tolerated.[5] The Legislature further found that

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[1] Penal Code section 13500 et seq.

[2] *About California POST*, <http://www.POST.ca.gov>

[3] Penal Code sections 13522 and 13523.

[4] Racial profiling is defined as "the practice of detaining a suspect based on a broad set of criteria which casts suspicion on an entire class of people without any individualized suspicion of the particular person being stopped." (Pen. Code § 13519.4, subd. (d), as enacted in Stats. 2000, ch. 684.)

[5] Penal Code section 13519.4, subdivision (c)(1) (as enacted in Stats. 2000, ch. 684).

motorists who have been stopped by the police for no reason other than the color of their skin or their apparent nationality or ethnicity are the victims of discriminatory practices.[6]

The test claim legislation required every law enforcement officer in the state to participate in expanded training regarding racial profiling, beginning no later than January 1, 2002.[7] The training shall be prescribed and certified by POST, in collaboration with a five-person panel appointed by the Governor, Senate Rules Committee and Speaker of the Assembly.[8]

Once the initial training on racial profiling is completed, each law enforcement officer in California, as described in subdivision (a) of Penal Code section 13510 who adheres to the standards approved by POST, is required to complete a two-hour refresher course every five years thereafter, or on a more frequent basis if deemed necessary.[9]

POST developed a five-hour approved curriculum to meet the initial training required by Penal Code section 13519.4, subdivision (f). The curriculum was designed to be presented in-house by a trained instructor within the law enforcement agency, who must complete a Racial Profiling Train-the-Trainer Course prior to facilitating the training. That course is given on an ongoing basis by the Museum of Tolerance in Los Angeles at no cost to the law enforcement agency, and the newly-trained instructor is provided with all necessary course material to train his or her own officers.[10]

The five-hour initial racial profiling training was incorporated into the Regular Basic Course[11] for peace officer applicants after January 1, 2004,[12] and POST suggested that incumbent peace officers complete the five-hour training by July 2004.[13] POST can certify a course retroactively,[14] thus it is possible for racial profiling courses that were developed and presented prior to the time POST developed its curriculum to be certified as meeting the requirements of Penal Code section 13519.4. Additionally, both the five-hour racial profiling course and the

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[6] Penal Code section 13519.4, subdivision (c)(2).

[7] Penal Code section 13519.4, subdivision (f); Statutes 2004, chapter 700 (SB 1234) renumbered subdivision *(f)* to subdivision *(g)*. Commission staff makes no findings regarding any substantive changes which may have been made in the 2004 legislation since it was not pled in the test claim. Accordingly, staff will continue to refer to this provision as "subdivision (f)" as originally set forth in the test claim statute.

[8] Penal Code section 13519.4, subdivision (f).

[9] Penal Code section 13519.4, subdivision (i).

[10] Comments filed by POST, August 10, 2005.

[11] Penal Code section 832.3 requires peace officers to complete a course of training prescribed by POST before exercising the powers of a peace officer.

[12] California Code of Regulations, title 11, section 1081, subdivision (a)(33).

[13] POST Legislative Training Mandates, updated August, 2004.

[14] California Code of Regulations, title 11, section 1052, subdivision (d).

two-hour refresher course can be certified by POST to allow agencies and officers to apply the training hours toward their 24-hour Continuing Professional Training requirement.[15, 16]

Prior Test Claim Decisions

In the past, the Commission has decided six other test claims addressing POST training for peace officers that are relevant for this analysis.

1. Domestic Violence Training

In 1991, the Commission denied a test claim filed by the City of Pasadena requiring new and veteran peace officers to complete a course regarding the handling of domestic violence complaints as part of their basic training and continuing education courses (*Domestic Violence Training*, CSM-4376). The Commission reached the following conclusions:

- the test claim legislation does not require local agencies to implement a domestic violence training program and to pay the cost of such training;
- the test claim legislation does not increase the minimum number of basic training hours, nor the minimum number of advanced officer training hours and, thus, no additional costs are incurred by local agencies; and
- the test claim legislation does not require local agencies to provide domestic violence training.

2. Domestic Violence and Incident Reporting

In January 1998, the Commission denied a test claim filed by the County of Los Angeles requiring veteran law enforcement officers below the rank of supervisor to complete an updated course of instruction on domestic violence every two years (*Domestic Violence Training and Incident Reporting*, CSM-96-362-01). Although the Commission recognized that the test claim legislation imposed a new program or higher level of service, the Commission found that local agencies incurred *no* increased "costs mandated by the state" in carrying out the two-hour course for the following reasons:

- *immediately before and after* the effective date of the test claim legislation, POST's minimum required number of continuing education hours for the law enforcement officers in question *remained the same at 24 hours*. After the operative date of the test claim statute these officers must still complete at least 24 hours of professional training every two years;
- the two hour domestic violence training update may be credited toward satisfying the officer's 24-hour minimum;
- the two hour training is *not* separate and apart nor "on top of" the 24-hour minimum;
- POST does not mandate creation and maintenance of a separate schedule and tracking system for this two hour course;

[15] Letter from POST, dated August 10, 2005.

[16] Title 11, section 1005(d)(1) requires peace officers to complete 24 hours of POST-qualifying training every two years.

- POST prepared and provides local agencies with the course materials and video tape to satisfy the training in question; and
- of the 24-hour minimum, the two hour domestic violence training update is the only course that is legislatively mandated to be continuously completed every two years by the officers in question. The officers may satisfy their remaining 22-hour requirement by choosing from *the many elective courses* certified by POST.

That test claim was subsequently litigated and decided in the Second District Court of Appeal (*County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176 [*County of Los Angeles II*]), where the Commission's decision was upheld and reimbursement was ultimately denied.

3. Sexual Harassment Training in the Law Enforcement Workplace

In September 2000, the Commission approved in part and denied in part a test claim filed by the County of Los Angeles regarding sexual harassment training for peace officers (*Sexual Harassment Training in the Law Enforcement Workplace*, 97-TC-07). The test claim statute required POST to develop complaint guidelines to be followed by local law enforcement agencies for peace officers who are victims of sexual harassment in the workplace. The statute also required the course of basic training for law enforcement officers to include instruction on sexual harassment in the workplace, and veteran peace officers that had already completed basic training were required to receive supplementary training on sexual harassment in the workplace. The Commission reached the following conclusions:

- the sexual harassment complaint guidelines to be followed by local law enforcement agencies developed by POST constituted a reimbursable state-mandated program;
- the modifications to the course of basic training did not constitute a reimbursable state-mandated program since it did not impose any mandated duties on the local agency; and
- the supplemental training that required veteran peace officers to receive a one-time, two-hour course on sexual harassment in the workplace constituted a reimbursable state-mandated program when the training occurred during the employee's regular working hours, or when the training occurred outside the employee's regular working hours and was an obligation imposed by a Memorandum of Understanding existing on the effective date of the statute which required the local agency to provide or pay for continuing education training.[17]

[17] Reimbursable "costs mandated by the state" for this test claim included: 1) salaries, benefits, and incidental expenses for each veteran officer to receive a one-time, two-hour course on sexual harassment in the workplace; and 2) costs to present the one-time, two-hour course in the form of materials and trainer time.

4. Law Enforcement Racial and Cultural Diversity Training

In October 2000, the Commission denied a test claim filed by the County of Los Angeles regarding racial and cultural diversity training for law enforcement officers (*Law Enforcement Racial and Cultural Diversity Training,* 97-TC-06). The test claim statute required that, no later than August 1, 1993, the basic training course for law enforcement officers include adequate instruction, as developed by POST, on racial and cultural diversity. The Commission found that the test claim statute did not impose any mandated duties or activities on local agencies since the requirement to complete the basic training course on racial and cultural diversity is a mandate imposed only on the individual who seeks peace officer status.

5. Elder Abuse Training

In January 2001, the Commission approved in part and denied in part a test claim filed by the City of Newport Beach regarding elder abuse training for city police officers and deputy sheriffs (*Elder Abuse Training,* 98-TC-12). The test claim statute required city police officers or deputy sheriffs at a supervisory level and below who are assigned field or investigative duties to complete an elder abuse training course, as developed by POST, by January 1, 1999, or within 18 months of being assigned to field duties. The Commission reached the following conclusions:

- The elder abuse training *did constitute* a reimbursable state-mandated program when the training occurred during the employee's regular working hours, or when the training occurred outside the employee's regular working hours and was an obligation imposed by a Memorandum of Understanding existing on the effective date of the statute which requires the local agency to provide or pay for continuing education training.[18]
- The elder abuse training *did not constitute* a reimbursable state-mandated program when applied to city police officers or deputy sheriffs hired after the effective date of the test claim statute, since such officers could apply the two-hour elder abuse training course towards their 24-hour continuing education requirement.

6. Mandatory On-The-Job Training For Peace Officers Working Alone

In July 2004, the Commission denied a consolidated test claim, filed by the County of Los Angeles and Santa Monica Community College District, regarding POST Bulletin 98-1 and POST Administrative Manual Procedure D-13, in which POST imposed field training requirements for peace officers that work alone and are assigned to general law enforcement patrol duties (*Mandatory On-The-Job Training For Peace Officers Working Alone*, 00-TC-19/02-TC-06). The Commission found that these executive orders do not impose a reimbursable

[18] Reimbursable "costs mandated by the state" for this test claim included: 1) costs to present the one-time, two-hour course in the form of trainer time and necessary materials provided to trainees; and 2) salaries, benefits and incidental expenses for each city police officer or deputy sheriff to receive the one-time, two-hour course on elder abuse in those instances where the police officer or deputy sheriff already completed their 24 hours of continuing education at the time the training requirement was imposed on the particular officer, and when a new two-year training cycle did not commence until after the deadline for that officer or deputy to complete elder abuse training.

state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the following reasons:

- state law does not require school districts and community college districts to employ peace officers and, thus, POST's field training requirements do not impose a state mandate on school districts and community college districts; and
- state law does not require local agencies and school districts to participate in the POST program and, thus, the field training requirements imposed by POST on their members are not mandated by the state.

Claimant's Position

The claimant contends that the test claim legislation constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Claimant asserts that costs for the following activities will be incurred and are reimbursable:

- Development costs for the racial profiling training beginning in fiscal year 2000/2001, including travel, training, salary and benefit costs.
- Implementation costs beginning in fiscal year 2001/2002 for over 1,000 incumbent police officers to receive an eight-hour racial profiling class during regular business hours, and may include some overtime pay at one and one-half pay rates for a total of least $65,269.
- Set up and preparation time for instructors at an additional $3,000.
- Ongoing racial profiling training for new officers, as they are hired, which includes the eight-hour class during regular business hours and may include some overtime pay at one and one-half pay rates.
- Ongoing training for the refresher course.

Position of Department of Finance

The Department of Finance stated in its comments that the test claim is without merit because the test claim legislation does not impose an obligation on any *law enforcement agency* to provide training; rather the statute imposes the requirement on the *law enforcement officer*. Further, no duty is imposed on any local government entity to pay the expense of training law enforcement officers, since the local agency has the option when hiring new law enforcement officers to hire only those persons who have already obtained the training. Finally, since the test claim legislation specifies that refresher courses are required only of each law enforcement officer who adheres to the standards imposed by POST, there is no mandate because local agency participation in and compliance with POST programs and standards is optional.

Position of POST

In its September 17, 2001 comments, POST stated the following:

> Pursuant to the passage of Senate Bill 1102, [POST] is presently in the process of developing a prescribed course that will meet the intent of Senate Bill 1102, as well as the needs of all law enforcement agencies that participate in the POST program.

Local agencies participate in the POST program on a voluntary basis. There is no requirement for any department to present this training. Because the prescribed curriculum for this training is still in the design phase, it is not possible to calculate the cost of presenting such training or the fiscal impact on agencies in the POST program. Suffice it to say that POST is desirous of finding a cost-efficient means of presenting the training so that fiscal impact on the field is not onerous.

In its August 10, 2005 comments, POST stated that subject matter experts from throughout the state in concert with the Governor's Panel on Racial Profiling developed the *Racial Profiling: Issues and Impact* curriculum. This curriculum was designed to be presented in-house by a trained instructor within the law enforcement agency. The comments further stated:

> It is believed that in-house instructors provide validity to the training and can relate the material directly to agency policies.
>
> The curriculum was designed as a "course-in-a-box" and includes an instructor guide, facilitated discussion questions, class exercises, and a companion training video. ... The course was designed to ensure training consistency throughout the State.
>
> Due to the complexity and sensitivity of the topic, POST regulation requires that each instructor complete the 24-hour Racial Profiling Train-the-Trainer Course prior to facilitation the training. The Training for Trainers course is presented on an on-going basis by the Museum of Tolerance in Los Angeles. The course is presented under contract and is of no cost to the [local law enforcement] agency. At the completion of the training, the instructor is provided with all necessary course material to train their own officers.

The mandated basic curriculum is five hours, and the refresher course is two hours. Both courses can be certified by POST to allow agencies to apply the training hours towards the 24-hour Continuing Professional Training requirement.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[19] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[20] "Its

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

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

purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[21] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[22] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[23]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[24] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[25] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[26]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[27]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[28] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as

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

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

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

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

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

[26] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878.

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

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

an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[29]

The analysis addresses the following issues:

- Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose "costs mandated by the state" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

A. Does the test claim legislation mandate any activities?

In order for the test claim legislation to impose a reimbursable state-mandated program under article XIII B, section 6, the statutory language must mandate an activity or task upon local governmental agencies. If the language does not mandate or require local agencies to perform a task, then article XIII B, section 6 is not triggered.

The test claim legislation, Statutes 2000, chapter 684, amended Penal Code section 13519.4 by adding subdivisions (c)(1) through (c)(4), and subdivisions (d) through (j). Each of these new provisions is summarized below.

Subdivisions (c)(1) through (c)(4): These subdivisions state the Legislature's findings and declarations regarding racial profiling and do not mandate any activities.

Subdivision (d): This subdivision provides a definition for racial profiling and does not mandate any activities.

Subdivision (e): This subdivision states that law enforcement officers "shall not engage in racial profiling" and thus prohibits, rather than mandates, an activity.

Subdivision (f): This subdivision states that every law enforcement officer in the state shall participate in expanded racial profiling training that is prescribed and certified by POST, to begin no later than January 1, 2002; it further sets forth requirements for POST to collaborate with a five-person panel appointed by the Governor and the Legislature in developing the training. Thus, the provision does mandate an activity on local law enforcement officers. Whether this mandates an activity on local agencies is analyzed below.

Subdivision (g): This subdivision states that members of the panel established pursuant to subdivision (f) shall not be compensated except for reasonable per diem related to their work for panel purposes, and does not mandate any activities on local government agencies.

Subdivision (h): This subdivision specifies that certain requirements be incorporated into the racial profiling curriculum, but does not mandate any activities on local agencies.

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[29] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Subdivision (i): This subdivision requires that once the initial racial profiling training is completed, each law enforcement officer as described in Penal Code section 13510, subdivision (a), who adheres to the standards approved by POST, complete a refresher course every five years thereafter or on a more frequent basis if deemed necessary. Thus, the provision does mandate an activity on specified law enforcement officers. Whether this mandates an activity on local agencies is analyzed below.

Subdivision (j): This provision requires the Legislative Analyst to conduct a study of data being voluntarily collected on racial profiling and provide a report to the Legislature. It does not mandate any activities on local agencies.

The Requirement for Initial Racial Profiling Training Mandates Activities on Local Agencies for Incumbent Officers Only

Penal Code section 13519.5, subdivision (f), states in pertinent part:

> Every law enforcement officer in this state shall participate in expanded training [in racial profiling] as prescribed and certified by [POST]. Training shall begin being offered no later than January 1, 2002.

The plain meaning of this provision requires that law enforcement officers participate in expanded training regarding racial profiling, that the training is prescribed and certified by POST, and that such training was required to begin being offered no later than January 1, 2002.

Claimant contends that subdivision (f) requires local agencies to develop a racial profiling course and is seeking reimbursement for travel, training, salary and benefit costs for developing an eight-hour racial profiling curriculum. The plain language of subdivision (f) does not require local agencies to develop the training; instead, the statute requires *POST*, in collaboration with a designated panel, to prescribe and certify the training. Thus, the activity of local agencies developing the racial profiling training is not mandated by the test claim statute and, therefore, is not reimbursable pursuant to article XIII B, section 6 of the California Constitution.

Claimant also contends that subdivision (f) requires local agencies to provide an initial racial profiling course to both its new recruits and incumbent officers, and is seeking reimbursement for salary and benefit costs, in some instances at overtime rates, for the time taken by these employees to attend an *eight-hour* course. However, POST states that it developed a *five-hour* course to meet the "expanded training" requirement in Penal Code section 13519.4, subdivision (f). Moreover, as of January 1, 2004, that five-hour racial profiling curriculum was incorporated into the Regular Basic Course requirements established by POST.

For the reasons cited below, staff finds that there is no requirement for new recruits, i.e., employees who have not yet received basic training, to participate in racial profiling training. Furthermore, there is no requirement for the local agency to provide basic training to its new recruits.

New recruits who have not received basic training are not yet considered "law enforcement officers."[30] Since 1971, Penal Code section 832 has required "every *person* described in this

[30] Penal Code section 13510 establishes that, for the "purpose of raising the level of competence of local law enforcement officers," POST sets minimum standards governing the

chapter as a peace officer" to satisfactorily complete an introductory course of training prescribed by POST before they can exercise the powers of a peace officer.[31] Any "person" completing the basic training course "who does not become employed as a peace officer" within three years is required to pass an examination developed or approved by POST.[32] Since 1994, POST has been authorized to charge a fee for the basic training examination to each "applicant" who is not sponsored or employed by a local law enforcement agency.[33]

For those "persons" who have acquired prior equivalent peace officer training, POST is required to provide the opportunity for testing instead of the attendance at a "basic training academy or accredited college."[34] Moreover, "each *applicant* for admission to a basic course of training certified by [POST] who is *not* sponsored by a local or other law enforcement agency ... shall be required to submit written certification from the Department of Justice ... that the *applicant* has no criminal history background...."[35] [Emphasis added.]

Thus, until an employee completes basic training, he or she is not a "law enforcement officer" for purposes of the test claim statute, and there is no requirement on the individual to attend racial profiling training.

With regard to new recruits, the Department of Finance states that there is no mandate on the local agency to provide the racial profiling training or pay for it, but rather the requirement is on the new recruit alone. The Department further asserts that the claimant has the option of hiring officers already trained in racial profiling as part of the required basic training for peace officers. Staff agrees there is no mandate on local agencies to provide basic training to their law enforcement recruits.

Staff determined that there is no provision in statute or POST regulations that requires local agencies to provide basic training. Since 1959, Penal Code section 13510 et seq. required POST to adopt rules establishing minimum standards relating to the physical, mental and moral fitness governing the recruitment of new local law enforcement officers.[36] In establishing the standards for training, the Legislature instructed POST to permit the required training to be conducted by *any* institution approved by POST.[37] In fact, there are 39 POST-certified basic training academies in California.

Staff acknowledges that some local law enforcement agencies hire persons who have not yet completed their basic training course, and then sponsor or provide the training themselves.

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recruitment of various types of "peace officers." Thus, the terms "law enforcement officer" and "peace officer" are used interchangeably in the Penal Code.

[31] See also POST's regulation, Title 11, California Code of Regulations, section 1005, subdivision (a)(1).

[32] Penal Code section 832, subdivision (e).

[33] Penal Code section 832, subdivision (g).

[34] *Ibid.*

[35] Penal Code section 13511.5.

[36] These standards are set forth in Title 11, California Code of Regulations.

[37] Penal Code section 13511.

However, other agencies require the successful completion of the POST Regular Basic Course before the applicant will be considered for the job.[38] There are several community colleges approved by POST to offer the Regular Basic Course, that are open to any interested individual, whether or not employed or sponsored by a local agency.

Thus, staff further finds that since the initial five-hour racial profiling training is, as of January 1, 2004, a required element of the basic training curriculum, and there is no state mandate for local agencies to provide to new recruits their basic training, the test claim legislation does not mandate local agencies to incur costs to send their new recruits to racial profiling training as part of the basic training course.

With regard to claimant's incumbent law enforcement officers who *had* completed basic training on or before January 1, 2004, and thus did not receive the initial racial profiling training in their basic training, the Department of Finance asserts that the test claim legislation does not impose any obligations on local agencies to provide the training. Instead, the Department contends, the statute imposes a training obligation on law enforcement officers alone.

Subdivision (f), requires "every law enforcement officer in this state" to attend expanded training in racial profiling. The plain language of the test claim statute does not mandate or require local agencies to provide or pay for the racial profiling training, and there are no other state statutes, regulations, or executive orders requiring local agencies to pay for continuing education training for every law enforcement officer in the state.

However, with regard to the POST-prescribed and certified initial five-hour racial profiling course, POST states the following:

> The curriculum was designed to be presented in-house by a trained instructor within the law enforcement agency. It is believed that in-house instructors provide validity to the training and can relate the material directly to agency policies....
>
> Due to the complexity and sensitivity of the topic, POST regulation requires that each instructor complete the 24-hour Racial Profiling Train-the-Trainer Course prior to facilitating the training. The Training for Trainers course is presented on an on-going basis by the Museum of Tolerance in Los Angeles. The course is presented under contract and is of no cost to the agency. At the completion of the training, the instructor is provided with all the necessary course material to train their own officers.
>
> The course was originally planned to be four hours in length. After two pilot presentations it was determined that the material could not be covered sufficiently in four hours; therefore, an additional hour was added, which extended the mandated curriculum to five hours.

Thus, there is evidence in the record that to implement the training requirement, there is an expectation on the local agency to be involved with providing the racial profiling training.[39]

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[38] See Job Bulletin for Police Officer for City of San Carlos.

[39] POST regulation requires trainers from the local agency to attend a 24-hour "Train-the-Trainer Racial Profiling Course" prior to providing the initial five-hour racial profiling course.

Although claimant states that it developed an *eight-hour* racial profiling course, POST's initial racial profiling curriculum is a *five-hour course* and represents both the minimum and maximum number of hours mandated by the state. Any hours exceeding five for this training is within the discretion of the local agency, and therefore cannot be considered an activity mandated by the state.

Claimant asserts that even if the training requirement is imposed upon the *officer*, the *employer* is responsible for compensating the employee for the training time — as if he or she is working — pursuant to the Fair Labor Standards Act ("FLSA"). Staff agrees that, where law enforcement officers are *employees* of local agencies, the FLSA is relevant to this claim.

The FLSA generally provides employee protection by establishing the minimum wage, maximum hours and overtime pay under federal law. In 1985, the United States Supreme Court found that the FLSA applies to state and local governments.[40] The FLSA is codified in Title 29 of the Code of Federal Regulations (CFR).

Claimant contends that since racial profiling training is required by the state and is not voluntary, training time needs to be counted as compensable working time under 29 CFR section 785.27, and treated as an obligation imposed on the local agency. Section 785.27 states the following:

> Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:
>
> (a) Attendance is outside of the employee's regular working hours;
>
> (b) Attendance is in fact voluntary;
>
> (c) The course, lecture or meeting is not directly related to the employee's job; and
>
> (d) The employee does not perform any productive work during such attendance.

All four criteria must be met for the employer to avoid paying the employee for time spent in training courses. Here, attendance at the initial course is *not* voluntary, and the racial profiling course *is* directly related to the employee's job. Therefore, staff agrees with the claimant that, pursuant to this section, local agencies are required to compensate their employees for racial profiling training *if the training occurs during the employee's regular working hours.*

Accordingly, staff finds that local agencies are mandated by the state through Penal Code section 13519.4, subdivision (f), to compensate incumbent officers for attendance at the initial racial profiling training *if* the training occurs during regular work hours. However, because POST has designated five hours as the necessary amount of time to present the curriculum, any claims must be based on a five-hour course.

The claimant has not requested reimbursement for this activity, and staff therefore makes no finding on it.

[40] *Garcia v. San Antonio Metropolitan Transit Authority et al.* (1985) 469 U.S. 528.

In 1987, an exception to the FLSA was enacted which provides that time spent by law enforcement officer employees of state and local governments in training required for certification by a higher level of government that occurs *outside of the employee's regular working hours* is noncompensable. The relevant provisions, located in 29 CFR section 553.226, state in pertinent part the following:

> (a) The general rules for determining the compensability of training time under the FLSA are set forth in §§ 785.27 through 785.32 of this title.
>
> (b) While time spent in attending training required by an employer is normally considered compensable hours of work, following are situations where time spent by employees of State and local governments in required training is considered to be noncompensable:
>
> . . .
>
> *(2) Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of government (e.g., where a State or county law imposes a training obligation on city employees), does not constitute compensable hours of work.* (Emphasis added.)

Staff finds that 29 CFR section 553.226, subdivision (b)(2), applies when the racial profiling training is conducted outside the employee's regular working hours. In such cases, the local agency is not required to compensate the employee. Rather, the cost of compensating officers attending racial profiling training *becomes a term or condition of employment subject to the negotiation and collective bargaining* between the local agency and the employee.

Collective bargaining between local agencies and their employees is governed by the Meyers-Milias-Brown Act. (Gov. Code, §§ 3500 et seq.) The Act requires the governing body of the local agency and its representatives to meet and confer in good faith regarding wages, hours and other terms of employment with representatives of employee organizations. If an agreement is reached, the parties enter into a collective bargaining agreement, or memorandum of understanding (MOU). Only upon the approval and adoption by the governing board of the local agency, does the MOU become binding on the local agency and its employees.[41]

Although paying for racial profiling training conducted outside the employee's regular working hours is an issue negotiated at the local level, staff recognizes that the California Constitution prohibits the Legislature from impairing obligations or denying rights to the parties of a valid, binding contract absent an emergency.[42] In the present case, the test claim statute became effective on January 1, 2001, and was not enacted as an urgency measure.

Accordingly, staff finds that compensating the officer for the initial racial profiling training outside the employee's regular working hours is an obligation imposed on those local agencies that, as of January 1, 2001 (the effective date of the statute) are bound by an existing MOU, which requires the agency to pay for continuing education training.

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[41] Government Code sections 3500, 3503, and 3505.1.

[42] California Constitution, article 1, section 9.

However, when the existing MOU terminates, or in the case of a local agency that is not bound by an existing MOU on January 1, 2001 requiring that the agency pay for continuing education training, the initial racial profiling training conducted outside the employee's regular working hours becomes a negotiable matter subject to the discretion of the local agency. Under those circumstances, staff finds that the requirement to pay for the initial racial profiling training is not an obligation imposed by the state on a local agency.

As a final matter, the test claim statute states that the training shall begin *no later than* January 1, 2002, which does not preclude the agency from providing racial profiling training sooner than that date. Where a local agency conducted the training *prior to* POST releasing its "prescribed and certified" racial profiling training, up to five hours of such training could be considered a mandated activity if the curriculum is approved and certified by POST as meeting the POST specifications for the racial profiling topic. POST can certify such training curriculum *retroactively*, pursuant to California Code of Regulations, title 11, section 1052.

In conclusion, staff finds that Penal Code section 13519.4, subdivision (f), mandates *up to five hours* of racial profiling training under the following conditions:

1. the training is provided to incumbent law enforcement officers who completed basic training on or before January 1, 2004;
2. the training is certified by POST;
3. the training is attended during the employee's regular working hours; and
4. the training occurs outside the employee's regular working hours *and* there is an obligation imposed by an MOU existing on January 1, 2001 (the effective date of the test claim statute), which requires that the local agency pay for continuing education training.

<u>The Requirement for Refresher Racial Profiling Training Mandates an Activity on Local Agencies</u>

Penal Code Penal Code section 13519.4, subdivision (i), states the following:

> Once the initial basic training [for racial profiling] is completed, each law enforcement officer in California as described in subdivision (a) of Section 13510 who adheres to the standards approved by [POST] shall be required to complete a refresher course every five years thereafter, or on a more frequent basis if deemed necessary, in order to keep current with changing racial and cultural trends.

Claimant is requesting reimbursement for salary and benefit costs, in some instances at overtime rates, for the officers' time spent in attending the refresher racial profiling course. POST has certified that two hours is needed for this refresher racial profiling course.

Since this requirement is applicable to law enforcement officers of specified local agencies that adhere to the standards approved by POST, the Department of Finance asserts there is no mandate because belonging to POST is *voluntary* on the part of local agencies. However, in *County of Los Angeles II*, a recent California Second District Court of Appeal case regarding

reimbursement for peace officer training mandated by state statute, the court stated that "[w]e agree that POST certification is, for all practical purposes, not a 'voluntary' program..."[43]

Additionally, as with the five-hour racial profiling course for incumbent law enforcement officers, FLSA similarly requires local agencies to compensate their officers for racial profiling training when it occurs during regular work hours and in some cases outside the employee's regular working hours depending on the MOU negotiated between the employees and the local agency.

Thus, staff finds that Penal Code section 13519.4, subdivision (i), does mandate up to two hours of refresher racial profiling training for incumbent law enforcement officers under the conditions set forth under the subdivision (f) analysis of this issue.

B. Does the test claim legislation constitute a "program?"

The test claim legislation must also constitute a "program" in order to be subject to article XIII B, section 6 of the California Constitution. Courts have defined a "program" as one that carries out the governmental function of providing a service to the public, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[44]

The *County of Los Angeles I* case further explained that the term "program" as it is used in article XIII B, section 6, "was [intended] to require reimbursement to local agencies for the costs involved in carrying out functions *peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities." (Emphasis added.)[45] Accordingly, the court found that no reimbursement was required for increases in workers' compensation and unemployment insurance benefits applied to all employees of private and public businesses.[46]

Here, on the other hand, the requirements imposed by the test claim legislation statute are carried out by state and local law enforcement agencies. Although both state and local entities are involved, these requirements do not apply "generally to all residents and entities in the state," as did the requirements for workers' compensation and unemployment insurance benefits in the *County of Los Angeles I* case.

Therefore, staff finds that the test claim legislation imposes requirements peculiar to government to implement a state policy which does not apply generally to all residents and entities in the state, and thus constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.

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[43] *County of Los Angeles II, supra,* 110 Cal.App.4th 1176, 1194.

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

[45] *County of Los Angeles I, supra,* 43 Cal.3d 46, 56-57.

[46] *County of Los Angeles I, supra,* 43 Cal.3d 46, 57-58.

Issue 2: Does the test claim legislation impose a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

The courts have held that a test claim statute imposes a "new program or higher level of service" when: a) the requirements are new in comparison with the preexisting scheme; *and* b) the requirements were intended to provide an enhanced service to the public.[47] Both of these conditions must be met in order to find that a "new program or higher level of service" was created by the test claim statute. The first step in making this determination is to compare the test claim legislation with the legal requirements in effect immediately before the enactment of the test claim legislation.

In 1990, the Legislature established requirements for law enforcement officers to be instructed in racial and cultural diversity.[48] As stated above, the test claim statute imposed additional requirements in Penal Code section 13519.4, subdivisions (f) and (i), to provide and compensate incumbent law enforcement officers for attending racial profiling training under certain circumstances. Those requirements are new in comparison to the preexisting scheme.

Furthermore, the test claim statute was intended to help prevent the "pernicious" practice of racial profiling by law enforcement officers,[49] which demonstrates the intent to provide an enhanced service to the public. Thus, the test claim statute does impose a "new program or higher level of service."

Issue 3: Does the test claim legislation impose "costs mandated by the state" on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

For the mandated activities to impose a reimbursable, state-mandated program, two additional elements must be satisfied. First, the activities must impose costs mandated by the state pursuant to Government Code section 17514. Second, the statutory exceptions to reimbursement listed in Government Code section 17556 cannot apply.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service.

<u>The Initial Racial Profiling Training Requirement Imposes "Costs Mandated by the State"</u>

The test claim alleged costs of $65,269 for providing the initial racial profiling training for incumbent officers pursuant to subdivision (f). Thus, there is evidence in the record, signed under penalty of perjury, that there are increased costs as a result of the test claim legislation.

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

[48] Statutes 1990, Chapter 480; Penal Code section 13519.4.

[49] Penal Code section 13519.4, subdivision (c).

However, POST stated that the initial racial profiling course can be "certified by POST which would allow agencies to apply the training hours towards the 24-hour Continuing Professional Training requirement."[50] POST regulations provide that local law enforcement officers must receive at least 24 hours of Advanced Officer continuing education training every two years.[51] Thus, the issue is whether there are *increased costs* as a result of the test claim statute, or whether any costs can be absorbed into *existing* 24-hour continuing education requirement.

In 1998, the Commission analyzed whether a statute that required continuing education training for peace officers imposed "costs mandated by the state" in the *Domestic Violence Training and Incident Reporting* (*"Domestic Violence"*) test claim. That test claim statute included the following language: "The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local government."

The issue was whether the domestic violence training could be absorbed into the 24-hour requirement which would ultimately result in no increased costs. The Commission determined that if the domestic violence training course caused an increase in the total number of required continuing education hours, then the increased costs associated with the new training course were reimbursable as "costs mandated by the state." On the other hand, if there was no overall increase in the total number of continuing education hours, then there were no increased training costs associated with the training course. Instead, the cost of the training course was accommodated or absorbed by local law enforcement agencies within their existing resources available for training.

The Commission found that there were no "costs mandated by the state" in the *Domestic Violence* test claim. The claim was denied for the following reasons:

- Immediately before and after the effective date of the test claim legislation, POST's minimum required number of continuing education hours for the law enforcement officers in question remained the same at 24 hours. After the operative date of the test claim statute these officers must still complete at least 24 hours of professional training every two years.
- The two-hour domestic violence training update may be credited toward satisfying the officer's 24-hour minimum.
- The two-hour training is neither "separate and apart" nor "on top of" the 24-hour minimum.
- POST does not mandate creation and maintenance of a separate schedule and tracking system for this two-hour course.
- POST prepared and provides local agencies with the course materials and video tape to satisfy the training in question.
- Of the 24-hour minimum, the two-hour domestic violence training update is the only course that is legislatively mandated to be continuously completed every two years by

[50] Letter from POST, dated August 10, 2005.

[51] California Code of Regulations, title 11, section 1005, subdivision (d).

the officers in question. The officers may satisfy their remaining 22-hour requirement by choosing from the many elective courses certified by POST.

That test claim was subsequently litigated and decided in the Second District Court of Appeal (*County of Los Angeles II, supra*), where reimbursement was ultimately denied. The court stated the following:

> POST training and certification is ongoing and extensive, and local law enforcement agencies may chose from a menu of course offerings to fulfill the 24-hour requirement. Adding domestic violence training obviously may displace other courses from the menu, or require the adding of courses. Officer downtime will be incurred. However, merely by adding a course requirement to POST's certification, the state has not shifted from itself to the County the burdens of state government. Rather, it has directed local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training.
>
> ...
>
> While we are mindful that legislative disclaimers, findings and budget control language are not determinative to a finding of a state mandated reimbursable program, [citations omitted], our interpretation is supported by the hortatory statutory language that, "The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local government."[52]

Here, staff finds the initial five-hour racial profiling course, when demonstrated that it exceeds the 24-hour continuing education requirement, does impose "costs mandated by the state" for the following reasons.

First, unlike the domestic violence training statute, the test claim statute did not establish legislative intent that racial profiling training be funded from existing resources and that annual training costs of local government should not be increased. Moreover, although POST states it is *possible* to certify the initial racial profiling training and make it part of the 24-hour continuing education, it did not interpret the test claim statute to *require its inclusion* within the 24-hour continuing education requirement as it did with the *Domestic Violence* test claim.

Second, the test claim statute requires a one-time initial five-hour racial profiling training to begin by January 1, 2002, and the Legislative Training Mandates document issued by POST suggests that incumbent officers complete the initial racial profiling course by July 2004. Thus, although not mandated, POST recommends the initial training be completed within a specified period of time. Such administrative interpretations of statutes are accorded great weight and respect.[53]

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[52] *County of Los Angeles II, supra*, 110 Cal.App.4th 1176, 1194-1195.

[53] *Hoechst Celanese Corp. V. Franchise Tax Board* (2001) 25 Cal.4th 508.

Third, claimant asserts that "an officer can readily exceed the 24 hours mandatory training required every two years, even prior to this new training mandate."[54] It is possible that some law enforcement officers could have already met their 24-hour continuing education requirements within their particular two-year continuing education period *before* they were required to take the initial racial profiling training.

Based on the foregoing, staff finds that Penal Code section 13519.4, subdivision (f), imposes "costs mandated by the state" to the extent that the initial racial profiling course causes law enforcement officers to exceed their 24-hour continuing education by having already met the 24-hour mandated continuing education *prior to* attending initial racial profiling training, for the period between January 1, 2002 and July 2004.

<u>None of the Exceptions in Government Code Section 17556 Are Applicable to Deny Reimbursement for the Initial Racial Profiling Training</u>

For the reasons stated below, staff finds that none of the exceptions apply to deny the portion of the test claim dealing with Penal Code section 13519.4, subdivision (f).

Government Code section 17556, subdivision (c), states that the Commission shall not find costs mandated by the state if, after a hearing, the Commission finds that:

> The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government...

Here, because the federal FLSA requires employee training time to be compensated under certain circumstances, this raises the issue of whether the obligation to pay for racial profiling training is an obligation imposed by the state, or an obligation arising out of existing federal law through the provisions of the FLSA.

Staff finds that there is no federal statutory or regulatory scheme requiring local agencies to provide racial profiling training to incumbent officers. Rather, what triggers the provisions of the FLSA requiring local agencies to compensate incumbent officers for racial profiling training is the test claim statute. If the state had not created this program, incumbent officers would not be required to receive racial profiling training, and local agencies would not be obligated to compensate those officers for such training. Therefore, Government Code section 17556, subdivision (c), is inapplicable to deny the claim.

Government Code section 17556, subdivision (e), states that the Commission shall not find costs mandated by the state if, after a hearing, the Commission finds that:

> The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

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[54] Declaration of Deputy Alex Nishimura, dated June 18, 2002.

The Penal Code provides authority for POST to allocate from the Peace Officers' Training Fund state aid to cities, counties or districts which have applied and qualified for aid.[55] Although any aid provided under the Penal Code for racial profiling training must be considered an offset to reimbursable amounts, there is no evidence in the record that this provision does not result in "no net costs" or "sufficient" funding for the mandated activities. Therefore, Government Code section 17556, subdivision (e), is inapplicable to deny the claim.

The Racial Profiling Refresher Training Does Not Impose "Costs Mandated by the State"

Claimant asserted in the test claim that it would incur ongoing costs in employee salaries and benefits to provide the refresher course "every five years, or on a more frequent basis if deemed necessary, in order to keep current with changing racial and cultural trends."

However, POST stated that the two-hour racial profiling refresher course can be "certified by POST which would allow agencies to apply the training hours towards the 24-hour Continuing Professional Training requirement."[56] Thus, the issue is whether there are *increased costs* as a result of the requirement for a racial profiling refresher course, or whether those costs can be absorbed into the *existing* 24-hour continuing education requirement.

Unlike the five-hour initial racial profiling course required under subdivision (f), staff finds the two-hour racial profiling refresher course required under subdivision (i) *does not* impose "costs mandated by the state" for the following reasons.

As determined by POST, the two-hour racial profiling refresher course, required to be completed every five years, applies to the existing 24-hour continuing education training requirement imposed on officers. In *County of Los Angeles II*, the court focused on the fact that any increased costs resulting from the two-hour domestic violence update training, required only every *two* years, were "incidental" to the cost of administering the POST certification. The court stated:

> Thus, while the County may lose some flexibility in tailoring its training programs, such loss of flexibility does not rise to the level of a state mandated reimbursable program because the loss of flexibility is incidental to the greater goal of providing domestic violence training. Every increase in cost that results from a new state directive does not automatically result in a valid subvention claim where, as here, the directive can be complied with by a minimal reallocation of resources within the entity seeking reimbursement.[57]

Since the two-hour racial profiling refresher training is only required every *five* years, beginning *after* the initial course is provided, officers can more easily plan for incorporating the training into their 24-hour, two-year continuing education requirement.

Based on the foregoing, staff finds that Penal Code section 13519.4, subdivision (i), does not impose "costs mandated by the state."

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[55] Penal Code section 13523.

[56] Letter from POST, dated August 10, 2005.

[57] *County of Los Angeles II, supra,* 110 Cal.App.4th 1176, 1194-1195.

Conclusion

Staff finds that Penal Code section 13519.4, subdivision (f), imposes a reimbursable state-mandated program within the meaning of article XIII, section 6 of the California Constitution, and Government Code section 17514, for *up to five hours* of initial racial profiling training under the following conditions:

1. the training is provided to incumbent law enforcement officers who completed basic training on or before January 1, 2004;
2. the training is certified by POST;
3. the training is attended during the officer's regular working hours;
4. the training is attended outside the officer's regular working hours *and* there is an obligation imposed by an MOU existing on January 1, 2001 (the effective date of the test claim statute), which requires that the local agency pay for continuing education training; and
5. the training causes the officer to exceed his or her 24-hour continuing education requirement because he or she had already met the 24-hour mandated continuing education *prior to* attending initial racial profiling training, during the period of January 1, 2002 to July 2004.

Staff further finds that Penal Code section 13519.4, subdivision (i), does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, for refresher racial profiling training since it does not impose "costs mandated by the state."

Recommendation

Staff recommends the Commission adopt this analysis and partially approve the test claim.

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Last Updated: 8/8/2006
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Claim Number: 01-TC-01
Issue: Racial Profiling: Law Enforcement Training

Mailing Information: Draft Staff Analysis

Mailing List

Related Matter(s)

02-TC-05 Racial Profiling: Law Enforcement Training (K-14)

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Mr. Jim Spano
State Controller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Tel: (916) 323-5849
Fax: (916) 327-0832

Mr. Steve Keil
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941

Tel: (916) 327-7523
Fax: (916) 441-5507

Ms. Susan Geanacou
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814

Tel: (916) 445-3274
Fax: (916) 324-4888

Mr. Dan Metzler
Sacramento Co. Sheriff's Department
711 G Street
Sacramento, CA 95814

Tel: (916) 874-5350
Fax: (916) 875-0082

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Tel: (916) 368-9244
Fax: (916) 368-5723

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000

Tel: (916) 485-8102
Fax: (916) 485-0111

Sacramento, CA 95841

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA. 90012

Tel: (213) 974-8564
Fax: (213) 617-8106

Mr. Keith B. Petersen
SixTen & Associates
5252 Balboa Avenue, Suite 900
San Diego, CA 92117

Tel: (858) 514-8605
Fax: (858) 514-8645

Ms. Jeannie Oropeza
Department of Finance (A-15)
Education Systems Unit
915 L Street, 7th Floor
Sacramento, CA 95814

Tel: (916) 445-0328
Fax: (916) 323-9530

Mr. Dick Reed
Peace Officers Standards and Training
Administrative Services Division
1601 Alhambra Boulevard
Sacramento, CA 95816-7083

Tel: (916) 227-2802
Fax: (916) 227-3895

Ms. Nancy Gust
County of Sacramento
711 G Street
Sacramento, CA 95814

Claimant
Tel: (916) 874-6032
Fax: (916) 874-5263

Ms. Annette Chinn
Cost Recovery Systems, Inc.
705-2 East Bidwell Street, #294
Folsom, CA 95630

Tel: (916) 939-7901
Fax: (916) 939-7801

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Boulevard, Suite #106
Roseville, CA 95661

Tel: (916) 677-4233
Fax: (916) 677-2283

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

Tel: (916) 445-3274
Fax: (916) 323-9584

Mr. Jim Jaggers

P.O. Box 1993
Carmichael, CA 95609

Tel: (916) 848-8407
Fax: (916) 848-8407

Ms. Ginny Brummels
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Tel: (916) 324-0256

Fax: (916) 323-6527

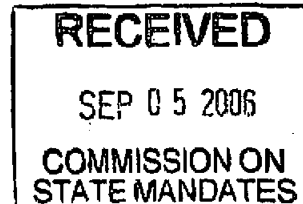
DEPARTMENT OF FINANCE

ARNOLD SCHWARZENEGGER, GOVERNOR

915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

EXHIBIT H

August 29, 2006



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

Dear Ms. Higashi:

As requested in your letter of August 10, 2006, the Department of Finance has reviewed the draft staff analysis of Claim No. CSM-01-TC-01 "Racial Profiling: Law Enforcement Training."

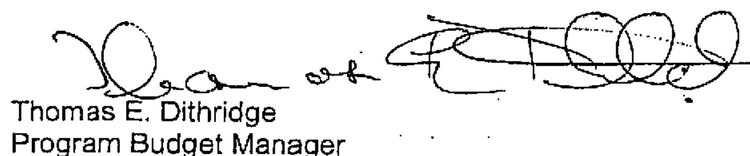
As the result of further review, Finance has modified the position filed September 14, 2001, that Chapter 684, Statutes of 2000, does not mandate a reimbursable activity. Since racial profiling training was not included in the basic course required of an individual wanting to become a peace officer until January 1, 2004, and given the specific criteria required by the Fair Labor Standards Act to exempt compensation for employee training, Finance agrees with the staff analysis concluding that up to five hours of initial racial profiling training is reimbursable under the following conditions:

1. Training is provided to incumbent law enforcement officers who have completed basic training on or before January 1, 2004.
2. Training is POST certified.
3. Training causes the officer to exceed his or her 24-hour continuing education requirement because he or she has already met the 24-hour mandated continuing education prior to attending initial racial profiling training, during the period of January 1, 2002, to July 31, 2004.
4. Training is attended during the officer's regular working hours, or training is attended outside of the officer's regular working hours and there was an obligation imposed by a Memorandum of Understanding in force on January 1, 2001, which requires that the local agency pay for continuing training.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your August 10, 2006 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Carla Castañeda, Principal Program Budget Analyst at (916) 445-3274.

Sincerely,



Thomas E. Dithridge
Program Budget Manager

Attachments

Attachment A

DECLARATION OF CARLA CASTAÑEDA
DEPARTMENT OF FINANCE
CLAIM NO. CSM-01-TC-01

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the Chapter 684, Statutes of 2000, sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

August 29, 2006
at Sacramento, CA

[signature] for Carla Castañeda
Carla Castañeda

PROOF OF SERVICE

Test Claim Name: Racial Profiling: Law Enforcement Training
Test Claim Number: CSM-01-TC-01

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 12 Floor, Sacramento, CA 95814.

On August 29, 2006, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 12 Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

Mr. Steve Keil
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941

Mr. Dan Metzler
Sacramento Co. Sheriff's Department
711 G Street
Sacramento, Ca 95814

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Mr. Keith B. Petersen
SixTen & Associates
5252 Balboa Avenue, Suite 900
San Diego, CA 92117

B-08
Mr. Jim Spano
State Controller's Office
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, Ca 95814

A-15
Ms. Susan Geanacou
Department of Finance
915 L Street, Suite 1190
Sacramento, Ca 95814

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd., Suite 121
Sacramento, Ca 95826

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

A-15
Ms. Jeannie Oropeza
Department of Finance
Education Systems Unit
915 L Street, 7th Floor
Sacramento, CA 95814

Mr. Dick Reed
Peace Officers Standards and Training
Administrative Services Division
1601 Alhambra Blvd.
Sacramento, CA 95816-7083

Ms. Annette Chinn
Cost Recovery Systems, Inc.
705-2 East Bidwell Street, #294
Folsom, CA 95630

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

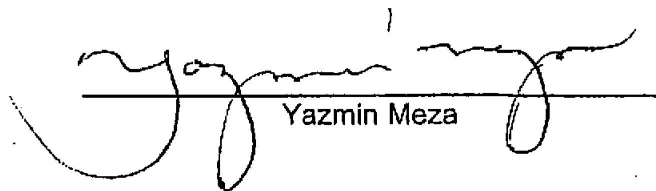
B-08
Ms. Ginny Brummels
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Ms. Nancy Gust
County of Sacramento
711 G Street
Sacramento, CA 95814

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Blvd., Suite 106
Roseville, CA 95661

Mr. Jim Jaggers
P.O. Box 1993
Carmichael, CA 95609

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 29, 2006 at Sacramento, California.



Yazmin Meza

Legislative Training Mandates
(Updated 8/2004)

Disclaimer: This handout is intended for use as a quick reference. Its purpose is not regulatory. For complete text refer to appropriate law section.

This document shows those courses with specific curriculum as adopted in Commission Regulation 1081. The Training Delivery Bureau may require specific curriculum for certification of other courses.

LAW SECTION	HOURS	COURSE TITLE *** = requires POST certification** **Bold type = POST specified curriculum in Regulation 1081.**	REQUIRED FOR	OTHER PERTINENT INFORMATION
B&P 25755	160	Alcoholic Beverage Control, Narcotic Enforcement – **Narcotic Investigation Course*** and Narcotic Investigation Field Training Program (see information in Reg. 1081)	All peace officer investigators of the Department of Alcoholic Beverage Control.	The 160 hours of training is satisfied by combination of the 80-hour POST certified Narcotics Investigation Course* plus the 80-hour Narcotics Investigation Field Training Program. POST curriculum specified for the Narcotic Investigation Course only. *The Narcotics Inv. Course may be satisfied by a single training course, or by completion of two or more POST-certified courses (totaling a minimum of 80 hours) which include the Narcotic. Inv. curriculum.

				POST curriculum required. Refer to Regulation 1081 for information on Narcotic Inv. Field Training Programs.
PC 832	64	**Arrest and Firearms*** (comprised of two modules – Arrest Module (40 hours), and Firearms Module (24 hours).	All peace officers described in Chapter 4.5 of the Penal Code.	This requirement must be met prior to the exercise of the powers of a peace officer. Training can be satisfied by a stand- alone course or completion of a larger course which includes the Arrest and Firearms curriculum and testing, e.g. Regular Basic Course. POST reserves the right to make this determination. IVD format is available and meets the requirements. Refer to Regulation 1080 for "3-year rule" on this training. POST curriculum specified.
PC 832.1	40	**Aviation Security***	Any ... airport policeman, or ... of a city, county, city and county or district must complete within 90 days of hire or shall not continue to have peace officer powers after 90 days until satisfactory completion.	Hours were increased to 40 effective August 1, 2000. POST curriculum specified.
PC 832.3	664	**Basic Course (Regular)***	Entry level requirement for all peace officers in the POST program except Level II and Level III reserve officers, custodial deputy sheriffs appointed pursuant to 830.1(c), coroners, and peace officers whose primary duties are investigative (Reg. 1005).	This requirement must be met prior to the exercise of the powers of a peace officer. There is a waiver process for the Regular Basic Course. There is a 3-year rule and 6-year rule for requalification specified in Commission Regulation 1008.

				POST curriculum specified.
Cal OSHA Regulation 5193	See Cal OSHA reg.	Bloodborne Pathogens (LD34)	All public and private employees who are exposed to blood in the workplace.	Training included in the Regular Basic Course (RBC). Annual refresher training required.
PC 832.2 (school police reserves) PC832.3(g) (school police)	32	**Campus Law Enforcement**	School police reserve officers and school police officers.	School police first employed by a K-12 public school district or CA Comm. College district before 7-1-99 must complete no later than 7-1-02. Other school police must complete within 2 years of hire date. No deadline specified for school police reserve officers. POST curriculum specified.
H&S1797.187	4	**Carcinogenic Materials (LD41)**	POST requires for all peace officers who must complete the Regular Basic Course.	Curriculum included in the Regular Basic Course and SIBC. POST curriculum specified.
PC 12403	 4 2 4	**Chemical Agents (LD 35)** **Module A** **Module B** **Module C**	All peace officers as defined in Chapter 4.5 of Title 3 of Part 2 commencing with Penal Code section 830.	Completion of this training is required for peace officers purchasing, possessing, transporting, or using tear gas or a tear gas weapon. Training that satisfies the requirements of PC 12403 for peace officers who will be using aerosol chemical agents and who are expected to use a gas mask in a chemical environment is included in the Regular Basic Course and SIBC (referred to as Modules A & B in Regulation 1081). The addition of a Module C (as specified in Reg. 1081) satisfies the training requirement for peace officers responsible for the deployment of tactical chemical agent munitions.

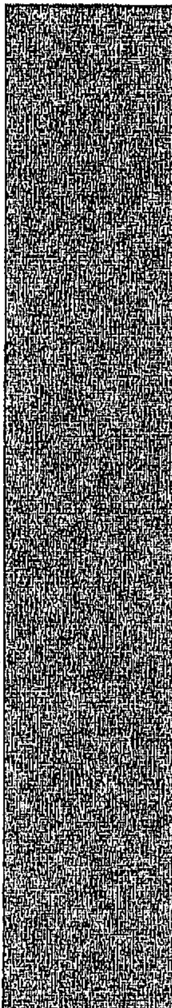
				These modules, A B & C, refer to the structure of the training and are in no way associated with reserve training modules. POST curriculum specified.
PC 13517	40	**Child Abuse Investigation (LD 30)**	Mandates Commission to include training in the Basic Course by July 1, 1979. Any individual completing the Regular Basic Course after this date has completed the training. No mandate placed on officers.	Included in the Regular Basic Course and SIBC. POST curriculum specified.
PC 13519.2	4	**Developmental Disabilities and Mental Illness (LD 37)**	Mandates Commission to include training in the Basic Course by July 1, 1990. Any individual completing the Regular Basic Course after this date has completed the training.	Included in the Regular Basic Course and SIBC. POST curriculum specified.
PC 13515.25	8	**Mental Illness and Developmental Disabilities**	Continuing training for peace officers, but not mandated.	POST curriculum specified.
GC 8607		Disaster Response	All emergency response personnel	The Office of Emergency Services mandated to develop course in coordination with POST and others. No POST curriculum specified.
PC 13519	8	**Domestic Violence* (LD25)**	Mandates Commission to include training in the Basic Course. Mandates various classifications of peace officers to complete training by certain dates (see PC 13519). Obsolete now because time periods have	Included in the Regular Basic Course and SIBC. Officers who did not complete in Basic Course must complete supplementary training. Prior to January 1, 1986, peace officers who did not complete in the Regular Basic Course were required to complete supplementary training with various deadlines

			expired.	depending on individual's peace officer category. POST curriculum specified.
PC 13519(g)	2	**Domestic Violence Update**	Each law enforcement officer below the rank of supervisor who is assigned to patrol duties and would normally respond to domestic violence shall complete every two years.	For all other officers local law enforcement agencies are encouraged to include update training but not mandatory. Update training available as a POST-certified course. POST curriculum specified.
PC 13515	2	**Elder and Dependent Adult Abuse***	Every city police officer or deputy sheriff at a supervisory level or below who is assigned field or investigative duties shall complete within 18 months of assignment.	POST curriculum specified.
PC 13518	21	First Aid/CPR	Every city police officer, sheriff or deputy, marshal or deputy, CHP officer, or police officer of a district authorized by statute to maintain a police department, except those whose duties are primarily clerical or administrative. Mandates the Commission to include training in the Basic Course.	Included in the Regular Basic Course and SIBC. Curriculum standards set by Emergency Medical Services Authority (EMSA) (Reference California Code of Regulations, Title 22, Division 9, Chapter 1.5, sections 100005-100028.)
PC 13518(a)	12	First Aid/CPR Refresher (LD 34)	Peace officers subject to initial training shall complete refresher training.	Frequency and content as prescribed by EMSA.
PC13519.5	No hours specified	Gang and Drug Enforcement (LD12, 38)	Mandates the Commission to implement course of training. Statute specifies training is for "appropriate" officers.	Included in the Regular Basic Course and SIBC. Also available as POST Telecourse training. Other POST-certified technical training available. No deadline specified for completion. No POST curriculum specified.

PC 13519.6	4	Hate Crimes (LD 42)	Mandates the Commission to include training in the Regular Basic Course. Specifically states that training is for peace officers designated in 830.1 and 830.2.	Included in the Regular Basic Course and SIBC. No deadline specified for completion. No POST curriculum specified.
CF 910.120(q)(6)	Set by OES	Hazardous Materials Response	Training mandate varies based on the duties and functions of the responder in an emergency response organization.	OES sets hour and curriculum standards for training. No POST curriculum specified.
PC 872(b)	1	**Hearsay Testimony* (LD 17)**	All peace officers with less than five years of service and who wish to testify to hearsay evidence in preliminary hearings.	Included in the Regular Basic Course and SIBC. Also available in video training. POST curriculum specified.
PC 13515.55	4	**High Technology Crimes***	City police and deputy sheriff supervisors assigned to field or investigative duties.	Must be completed by 1-1-00 or within 18 months of assignment to supervisory duties. POST curriculum specified.
PC629.94		Interception of Wire, Pager, and Cellular Communications	Those who apply for orders authorizing the interception of private wire, electronic digital pager, or cellular ...(see statute)	Training not developed.
VC40802	8	**Laser Operator***	Peace officers issuing speed violation citations using laser or any other electronic speed measuring devices and where a traffic and engineering survey is beyond five years.	Prerequisite Radar Operator Course. POST curriculum specified.
PC 13519.1	4 or 2 in service	**Missing Persons* (LD 27)**	Peace officers and dispatchers of a local police department, sheriff's department or California Highway Patrol	Included in the Regular Basic Course and P.S. Dispatcher's Basic Course. If Regular Basic Course or Public Safety Dispatcher's Basic Course was completed prior to 1-1-89, completion of supplementary in-service training is required. POST curriculum specified.

VC 40802	24	**Radar Operator***	Peace officers issuing speed violation citations using radar speed measuring devices and where a traffic and engineering survey is beyond five years.	POST curriculum specified.
PC 13519.4 (a)	No hours specified	Racial and Cultural Diversity (LD42)	All peace officers specified in Penal Code section 13510(a) [Note: this includes reserves].	Racial and Cultural Diversity is included in the Regular Basic Course and SIBC. A POST-certified Cultural Diversity Course is offered for officers who did not receive training in the Regular Basic Course. No POST curriculum specified.
PC13519.4 (f)	5	**Racial Profiling***	All law enforcement officers	Incumbent officers are suggested to complete by July 2004. Included in Regular Basic Course after 7-1-03. POST curriculum specified.
PC 13519.4 (i)	2	**Racial Profiling Refresher***	All peace officers specified in Penal Code section 13510(a) [Note this includes reserves].	Required every five years or on a more frequent basis if deemed necessary, in order to keep current with changing racial and cultural trends. POST curriculum specified.
PC 832.6	340 LI 228 LII 162 LIII	**Reserve Level I Module*** **Reserve Level II Module*** **Reserve Level III Module (2 parts)***	Level I Reserve officers must complete all three modules (730 hours) or the Regular Basic Course. Level II Reserve officers must complete Reserve Level II and III Modules (390 hours). Reserve Level III officers must complete Reserve Level III Module (162 hours).	Training must be completed before being assigned duties which include the exercise of peace officer powers. POST curriculum specified.
PC 13516(c)	40	**Sexual Assault Investigation*** (LD 30)	Investigator specialists who handle cases of	Partial curriculum included in the Regular Basic Course and SIBC, but

			sexual exploitation or sexual abuse of children within six months of the date of assignment.	does not satisfy mandate for specialists. POST curriculum specified.
PC 13519.7(b) PC 13519.7 (c)	2	**Sexual Harassment* (LD 42)**	Peace officers who completed the Regular Basic Course before January 1, 1995, shall complete supplementary training.	Included in the Regular Basic Course and SIBC. Supplementary training is available for peace officers who did not complete in the Regular Basic Course. POST curriculum specified.
PC 12020 (b)(1)	16 16	**Shotgun (Long/Short Barrel) (LD 35) [see comment A]** **Rifle (Long/Short Barrel) [see comment B]**	Peace officers of local police departments, sheriffs departments, marshals departments, California Highway Patrol or Department of Justice and reserve officers of these departments. Completion of this training exempts these officers from the provisions of PC12020(a).	Comment A – This training requirement is satisfied by completing the Regular Basic Course or Reserve Training Modules I or II. Previously satisfied by now obsolete Reserve Modules A, B, C, and D. Comment B – Prerequisite for Rifle training is completion of the Regular Basic Course or Reserve Training Modules I , II and III, or Reserve Modules A, B, C, and D. POST curriculum specified.
PC 13519.05	2	**Stalking Course***	Peace officers of local police departments, sheriff's dept., Dept. of Parks & Recreation, Universities of CA, CA State Univ. Also peace officers defined in PC 830.31(d) and 830.32 (a & b).	POST curriculum specified.
PC 13519.3	2	**Sudden Death of Infants, Investigation of***	All peace officers specified in PC13510 (a), who	Included in the Regular Basic Course and SIBC. Supplementary training



		(LD 30)	are assigned to patrol or investigations.	required for in-service officers who did not receive in the Basic Course. POST curriculum specified.
PC 13519.8(a)	2	**Vehicle Pursuit Training I* (LD 19)**	Peace officers of a local police department, sheriff's department or California Highway Patrol who are below middle management rank and who completed the Regular Basic Course prior to 7-15-95.	Included in the Regular Basic Course. Penal Code 13519.8 encourages periodic update training. POST curriculum specified.
PC13519.8(c)	1	**Vehicle Pursuit Training II***	Middle managers and above of local police departments, sheriff departments or California Highway Patrol who completed the Regular Basic Course prior to 7-15-95.	This training can be satisfied by completion of either High Speed Vehicle Pursuit Training I or II. POST curriculum specified.

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BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

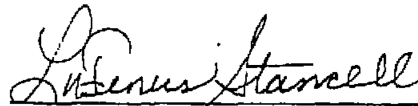
Claim of:	CSM-4376
City of Pasadena, Claimant	Penal Code Section 13519, Subdivisions (b) and (c) Chapter 1609, Statutes of 1984 Domestic Violence Training

DECISION

The attached Proposed Statement of Decision of the Commission on State Mandates is hereby adopted by the Commission on State Mandates as its decision in the above-entitled matter.

This Decision shall become effective on February 28, 1991.

IT IS SO ORDERED February 28, 1991.



Lafenus Stancell, Chairperson
Commission on State Mandates

WP0554h(12)

1
2
3 BEFORE THE
COMMISSION ON STATE MANDATES
4 STATE OF CALIFORNIA
5
6
7
8 Claim of:
9 City of Pasadena,
10 Claimant
11
12

No, CSM-4376
Penal Code Section 13519,
Subdivisions (b) and (c)
Chapter 1609, Statutes of 1984
Domestic Violence Training

13 PROPOSED STATEMENT OF DECISION

14
15 This claim was heard by the Commission on State Mandates
16 (Commission) on August 23, 1990, in Sacramento, California,
17 during a regularly scheduled hearing.
18
19 Ms. Ann Higginbotham, Assistant City Attorney for Pasadena; Mr.
20 Louis Chappuie, David M. Griffith & Associates, Ltd.,
21 representing the City of Pasadena: Mr. Norman Coppinger, League
22 of California Cities; Sgt. Kevin White, Pasadena Police
23 Department; Ms. Marsha Bedwell, Deputy Attorney General,
24 representing the Commission on Peace Officer Standards and
25 Training (POST): Mr. Norman Boehm, Executive Director of POST;
26 and Mr. Jim Apps, Department of Finance, introduced themselves
27 and appeared in conjunction with this item. There were no
other appearances.

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13 REV 8-72
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1 Evidence both oral and documentary having been introduced, the
2 matter submitted, and vote taken, the Commission finds:
3
4 ISSUES
5
6 Do the provisions of Penal Code section 23519, subdivisions (b)
7 and (c), as added by Chapter 1609, Statutes of 1984
8 (Chapter 1609/84), require local agencies to implement a new
9 program or provide a higher level of service in an existing
10 program, within the meaning of Government 'Code section 17514
11 and section 6, article XIII B of the California Constitution?
12
13 If so, are local agencies entitled to reimbursement under the
14 provisions of section 6 of article XIIIB?
15
16 FINDINGS OF FACT
17
18 The test claim was filed with the Commission on March 28, 1990,
19 by the City of Pasadena. The elements for filing a test claim,
20 as specified in section 1183 of Title 2 of the California Code
21 of Regulations, were satisfied.
22
23 The subject of this test claim pertains to the provisions of
24 Penal Code section 13519, subdivisions (b) and (c), as added by
25 Chapter 1609/84. This legislation requires domestic violence
26 training to become a part of a law enforcement officer's basic
27 training course. In addition, all law enforcement officers who

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have received their basic training before January 1, 1986, shall participate in supplemental training on domestic violence subjects, as prescribed and certified by POST.

Prior to the passage of Chapter 1609/84, law enforcement officers were not required to obtain domestic violence training.

The City of Pasadena alleged that it incurred $22,274.00 in unrecovered salary costs in providing domestic violence training pursuant to Penal Code section 13519, subdivisions (b) and (c).

The Department of Finance and POST recommended that the test claim be denied because the provisions of Penal Code section 13519, subdivisions (b) and (c), do not constitute a reimbursable state mandated program upon local government.

The Office of Criminal Justice Planning recommended that the claim be approved because the legislation subject to the test claim results in a reimbursable state mandated program.

Penal Code section 13519 states, in pertinent part:

> "(a) The commission [POST] shall implement by January 1, 1986, a course or courses of instruction for the training of law enforcement officers in California in the handling of domestic violence complaints and also shall develop guidelines for law enforcement response to domestic violence. The course or courses of instruction and the guidelines shall stress

enforcement of criminal laws in domestic violence situations, availability of civil remedies and community resources, and protection of the victim. . . .

"As used in this section, 'law enforcement officer' means any officer or employee of a local police department or sheriff's office.

"(b) The course of basic training for law enforcement officers shall, no later than January 1, 1986, include adequate instruction in the procedures and techniques described below:

". . . . .

"(c) All law enforcement officers who have received their basic training before January 1, 1986, shall participate in supplementary training on domestic violence subjects, as prescribed and certified by the commission. This training shall be completed no later than January 1, 1989.

"Local law enforcement agencies are encouraged to include, as part of their advanced officer training program, periodic updates and training of domestic violence. The commission shall assist where possible."

The Commission found that the provisions of Penal Code section 13519, subdivisions (b) and (c), impose upon law enforcement officers the requirements of domestic violence training.

Moreover, the Commission found that the provisions of Penal Code section 13519, subdivisions (b) and (c), do not require local agencies to train law enforcement officers in domestic violence and to pay for the cost of such training.

Furthermore, the Commission found that some local agencies may have incurred the cost of training their law enforcement

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1 officers in domestic violence subjects through collective
2 bargaining agreements.
3
4 Section 1005, subdivision (a), of Title 11, Code of California
5 Regulations, states in pertinent part:

6 "**Basic** Training (Required).

7 "(1) Every regular officer except those
participating in a POST-approved field training
8 program, **shall** satisfactorily meet the training
requirements of the Basic Course before being
9 assigned duties which include the exercise of
peace officer power.

10
11 "**Requirements** for the Basic Course are set forth
in PAM [POST Administrative **Manual**], Section
D-1-3.

12 ". . . . ."
13

14 The basic training **portion** of the POST Administrative Nanual
15 under **sections** D-1-2, subdivision **(d)**, and D-1-3 provide that a
16 minimum of 520 hours of instruction in the Basic Course is
17 required.
18

19 section 1005, subdivision (d), **of** Title 11, **California** Code of
20 Regulations, states in pertinent part:

21 "**Continuing** Professional Training (Required).

22 "(1) Every peace officer below the rank of a
middle management position as defined in
23 Section 100 (p) shall satisfactorily complete the
Advanced Officer Course of 24 or more hours at
24 least once every two years after completion of
the Basic Course,

25 ". . . . .* . . . .

26
27 "(4) Requirements for the Advanced Officer
Course are set forth in the POST Administrative
Manual, Section D-2."

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The advanced officer course set forth in section D-2-5 of the POST Administrative Manual states:

> "Minimum Hours: The Advanced Officer Course shall consist of time blocks of not less than two hours each, regardless of subject matter, with an overall minimum of no less than 24 hours. . . ."

Section 1005, subdivision (g), of Title 11, California Code of Regulations, provides in pertinent part:

> "Approved Courses.
>
> "(1) Approved courses pertain only to training mandated by the Legislature for various kinds of peace officers and other groups. The Commission may designate training institutions or agencies to present approved courses.
>
> "(2) Requirements for Approved Courses are set forth in PAM [POST Administrative Manual], Section D-7."

The approved courses set forth in the POST Administrative Manual, section D-7-2, provides that a minimum of 8 hours of domestic violence training is required pursuant to Penal Code section 13519.

The Commission found that section 1005, subdivision (g), of Title 11, California Code of Regulations and POST Administrative Manual, section D-7-2, required the inclusion of 8 hours of domestic violence training.

In addition, the Commission found that domestic violence training was included within the existing 520 minimum basic course training hours and that the 520 minimum hours remained the same before and after the enactment of Penal Code section 13519, subdivisions (b) and (c).

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1 Also, the Commission found that domestic violence training may
2 be included within the existing 24 minimum advanced officer
3 training program hours and that the 24 minimum hours remained
4 the same before and after the enactment of Penal Code
5 section 13519, subdivisions (b) and (c).
6
7 Section 1005, subdivision (f), of Title 11, California Code of
8 Regulations, states in pertinent part:

9 "Technical Courses (Optional).

10 "(1) Technical Courses are designed to develop
11 skills and knowledge in subjects requiring special expertise,

12 ". . . . ."

13 The Commission found that domestic violence training through
14 the skills and knowledge module are optional courses and not
15 required by the provisions of Penal Code section 13519,
16 subdivisions (b) and (c).
17
18 APPLICABLE LAW RELEVANT TO THE DETERMINATION
19 OF A REIMBURSABLE STATE MANDATED PROGRAM
20
21 Government Code section 17500 reads, in pertinent part:

22 " . . . The Legislature finds and declares
23 that the failure of the existing process to adequately and consistently resolve the
24 complex legal questions involved in the determination of state-mandated costs has
25 led to an increasing reliance by local agencies and school districts on the
26 judiciary and, therefore, in order to relieve unnecessary congestion of the
27 judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi--judicial decisions and providing

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> an effective means of resolving disputes over the existence of state-mandated local programs.
>
> "It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIII B of the California Constitution and to consolidate the procedures for reimbursement of statutes specified in the Revenue and Taxation Code with those identified in the Constitution. Further, the Legislature intends that the Commission on State. Mandates, as a quasi-judicial 'body, will act in a deliberative manner in accordance with the requirements of Section 6 of Article XIII B of the California Constitution2

Government Code section 17514 provides:

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

Government Code section 17551, subdivision (a), provides:

> "The commission, pursuant to the provisions of this chapter, shall hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution."

Government Code section 17552 reads:

> "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/

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Section 6, article XIIIB of the California Constitution reads:

> "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:
>
> "(a) Legislative mandates requested by the local agency affected;
> "(b) Legislation defining a new crime or changing an existing definition of a crime; or
> "(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

CONCLUSION

The Commission determines that it has the authority to decide this claim under the provisions of Government Code sections 17508 and 17551, subdivision (a).

The Commission concludes that the provisions of Penal Code section 13519, subdivisions (b) and (c), as added by Chapter 1609/84:

1. do not require local agencies to implement a domestic violence training program for their law enforcement officers and to pay for the cost of such training;

2. do not increase the minimum basic course training hours nor the minimum advanced officer training hours and,

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consequently, no additional costs are. incurred by local agencies: and

3. do not require local agencies to provide domestic violence training pursuant to the POST skills and knowledge module.

Accordingly, the Commission further concludes that the legislation subject to this test claim does not constitute a reimbursable state mandated program upon local agencies within the meaning of Government Code section 17514 and section 6, article XIIIB of the California Constitution,,

PER ALIFORNIA REV 8.72

<u>DECLARATION OF SERVICE BY MAIL</u>

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of, employment and business address is 1414 K Street, Suite 315, Sacramento, California 95814.

On March 14, 1991, I served the attached Statement of Decision regarding Domestic Violence Training by placing a true copy thereof in an envelope addressed to each of the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully prepaid.

See attached service list

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 14, 1991 at Sacramento, California.

Charlotte Smith
CHARLOTTE SMITH

WP0554h(14)

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Penal Code Sections 13519 and 13730, as amended by Chapter 965, Statutes of 1995 And filed on December 27, 1996; By the County of Los Angeles, Claimant.	NO. CSM - 96-362-01 DOMESTIC VIOLENCE TRAINING AND INCIDENT REPORTING PROPOSED STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (Presented for adoption on January 29, 1998)

PROPOSED STATEMENT OF DECISION

This test claim was heard by the Commission on State Mandates (Commission) on December 18, 1997, during a regularly scheduled hearing. Mr. Leonard Kaye appeared for the County of Los Angeles; Mr. Glen Fine, appeared for the Commission on Peace Officer Standards and Training; and Mr. James Apps and Mr. James Foreman appeared for the Department of Finance. The following persons were witnesses for the County of Los Angeles: Captain Dennis D. Wilson, Deputy Bernice K. Abram, and Ms. Martha Zavala.

At the hearing, evidence both oral and documentary was introduced, the test claim was submitted, and the vote was taken.

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

PART I. DOMESTIC VIOLENCE TRAINING

Issue 1: Does the domestic violence continuing education requirement upon law enforcement officers under Penal Code section 13519, subdivision (e), impose a new program or higher level of service

upon local agencies under section 6 of article XIII B of the California Constitution?

The County of Los Angeles alleged that Penal Code section 13519, subdivision (e), as amended by Chapter 965, Statutes of 1995, imposes a new program or higher level of service in an existing program upon local agencies within the meaning of section 6, article XIII B of the California Constitution. The statute which is the subject of this test claim is as follows:

> "(e) Each law enforcement *officer* below the rank of supervisor who is assigned to patrol duties and would normally respond to domestic violence calls or incidents of domestic violence *shall complete, every two years, an updated course of instruction on domestic violence that is developed according to the standards and guidelines developed pursuant to subdivision (d)*. The instruction required pursuant to this subdivision *shall be funded from existing resources* available for the training required pursuant to this section. It is the intent of the Legislature *not* to increase the annual training costs of local government." (Emphasis added.)

COMMISSION FINDINGS:

In order for a statute, which is the subject of a test claim, to impose a reimbursable state mandated program, the statutory language (1) must direct or obligate an activity or task upon local governmental entities, and (2) the required activity or task must be new or it must create an increased or higher level of service over the former required level of service. To determine if a required activity is new or imposes a higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately prior to the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must be state mandated.[1]

The foregoing provisions require each law enforcement *officer* below the rank of supervisor, who is assigned to patrol duties and normally responds to domestic violence calls or incidents, to complete an updated course of instruction on domestic violence every two years. This course of instruction must be developed according to POST's standards and guidelines, which are described in subdivision (d) of section 13519. Although the statute imposes an express continuing education requirement upon individual officers and not local agencies, the last sentence of subdivision (e) indicates the Legislature's awareness of the potential impact of this training course upon local

[1] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835.

governments (i.e., "[i]t is the intent of the Legislature not to increase the annual training costs of local government.")

Thus, the Commission found this continuing education activity is imposed upon local agencies whose local law enforcement officers carry out a basic governmental function by providing services to the public. Such activity is not imposed on state residents generally.[2] In sum, the Commission found that the first requirement to determine whether the test claim legislation imposes state-mandated program is satisfied.

Second, subdivision (e) of section 13519 imposes a new requirement on certain law enforcement officers below the rank of supervisor to complete an updated course of instruction on domestic violence every two years. This training obligation was not required immediately prior to the enactment of subdivision (e). Instead, local law enforcement agencies were *encouraged*, but not required, to include periodic updates and training on domestic violence *as part of their advance officer training program only*. (Former Pen. Code § 13519, subd. (c).) Accordingly, the Commission found that the second requirement to determine whether the test claim legislation imposes a state mandated program is satisfied.

Third, the Commission found that subdivision (e) is state mandated because local agencies have no options or alternatives available to them and, therefore, the officers described in subdivision (e) must attend and complete the updated domestic violence training course from a POST-certified class.[3]

Based on the foregoing, the Commission found that section 13519, subdivision (e), imposes a new program upon local agencies.

Issue 2: Does section 13519, subdivision (e), impose costs mandated by the state upon local agencies which are reimbursable from the State Treasury?

The latter portion of Penal Code section 13519, subdivision (e), provides in pertinent part:

> ". . . . The instruction required pursuant to this subdivision *shall be funded from existing resources* available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local governmental entities."
> (Emphasis added.)

Given the above statutory language, the Commission continued its inquiry to determine whether local law enforcement agencies incur any increased costs as a result of the test claim statute.

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[2] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835.

[3] *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 832 and 836.

COMMISSION FINDINGS:

Government Code section 17514 defines *costs mandated by the state* as:

> ". . . . [A]ny increased costs which a local agency . . . is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, . . . which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

If the claimant's domestic violence training course, under section 13519, subdivision (e), caused an increase in the total number of continuing education hours required for these certain officers, then the increased costs associated with the new training course are reimbursable as "costs mandated by the state" (subject to any offset from the receipt of any state moneys received for the costs incurred in attending and completing the subdivision (e) domestic violence training course).

On the other hand, if there is no overall increase in the total number of continuing education hours for these officers attributable to the subdivision (e) domestic violence training course, then there are no increased training costs associated with this training course. Instead, the subdivision (e) course is accommodated or absorbed by local law enforcement agencies within their existing resources available for training.

Based on the evidence submitted by the parties, and the plain language of the test claim statute, the Commission found that local agencies incur *no* increased "costs mandated by the state" in carrying out the two hour domestic violence update training.

POST regulations provide that local law enforcement officers must receive at least 24 hours of Advanced Officer continuing education training every two years. Section 1005, subdivision (d), of Title 11, California Code of Regulations, states in pertinent part:

> "Continuing Professional Training (Required).
>
> "(1) Every peace officer below the rank of a middle management position as defined in section 1001 and every designated Level 1 Reserve Officer as defined in Commission Procedure H-1-2 (a) *shall satisfactorily complete the Advanced Officer Course of 24 or more hours at least once every two years after meeting the basic training requirement.*"
>
> "(2) The above requirement may be met by satisfactory completion of one or more Technical Courses totaling 24 or more hours, or satisfactory completion of an alternative method of compliance as determined by the Commission..."
>
> "(3) Every regular officer, regardless of rank, may attend a certified Advanced Officer Course and the jurisdiction may be reimbursed."
>
> "(4) Requirements for the Advanced Officer Course are set forth in the POST Administrative Manual, section D-2."

The evidence submitted by the parties reveals that the updated training is accommodated or absorbed within the 24-hour continuing education requirement provided in the above regulation.

POST Bulletin 96-2 was forwarded to local law enforcement agencies shortly after the test claim statute was enacted. The Bulletin specifically recommends that local agencies make the required updated domestic violence training part of the officer's continuing professional training. It does not mandate creation and maintenance of a separate schedule and tracking system for the required domestic violence training. To satisfy the training in question, POST prepared and provided local agencies with course materials and a two-hour videotape.

Additionally, the letter dated July 11, 1997, from Glen Fine of POST indicates POST's interpretation of the test claim statute that the domestic violence update training be included *within* the 24 hour continuing education requirement set forth above. Accordingly, the two-hour course may be credited toward satisfying the officer's 24-hour continuing education requirement.

The Commission disagreed with the claimant's contention that it is entitled to reimbursement as a result of the test claim statute since it cannot redirect funds for salary reimbursement from other non-funded POST training modules. The POST memorandum submitted by the claimant, dated July 6, 1993, reveals that the claimant has not received salary reimbursement for officer training since 1993, before the enactment of the test claim statute.

Accordingly, the Commission found that local agencies incur no increased costs mandated by the state in carrying out this two hour course because:

- *immediately before and after* the effective date of the test claim legislation, POST's minimum required number of continuing education hours for the law enforcement officers in question *remained the same at 24 hours*. After the operative date of the test claim statute these officers must still complete at least 24 hours of professional training every two years,
- the two hour domestic violence training update may be credited toward satisfying the officer's 24 hour minimum,
- the two hour training is *not* separate and apart nor "on top of" the 24 hour minimum,
- POST does not mandate creation and maintenance of a separate schedule and tracking system for this two hour course,
- POST prepared and provides local agencies with the course materials and video tape to satisfy the training in question, and
- of the 24 hour minimum, the two hour domestic violence training update is the only course that is legislatively mandated to be continuously completed every two years by the officers in question. The officers may satisfy their remaining 22 hour requirement by choosing from *the many elective courses* certified by POST.

In sum, the Commission found that local agencies do *not* incur increased training costs for the two hour domestic violence training update because the course is accommodated or absorbed by local law enforcement agencies within their existing resources available for training as spelled out in the test claim statute. The minimum POST requirement for continuing education for the officers in question *immediately before and after* the effective date of the test claim statute was and remains at 24 hours. Of the 24 hours, the Legislature requires that two out of the 24 must be an updated course on domestic violence certified by POST.

PART I CONCLUSION

Based on the foregoing evidence, the Commission concludes that Penal Code section 13519, subdivision (e), does not impose a reimbursable state mandated program upon local law enforcement agencies and denies this portion of the test claim.

PART II: DOMESTIC VIOLENCE INCIDENT REPORTING

Issue 1: Do the provisions of Penal Code section 13730, subdivision (c), as amended by Chapter 965, Statutes of 1995, impose a new program or higher level of service upon local agencies within the meaning of section 6, article XIII B of the California Constitution?

BACKGROUND:

Penal Code section 13730 was originally added by Chapter 1609, Statutes of 1984. At that time, the statute required each law enforcement agency to develop a domestic violence incident report. The 1984 statute provided the following:

> "(a) Each law enforcement agency shall develop a system, by January 1, 1986 for recording all domestic violence-related calls for assistance made to the department including whether weapons are involved. Monthly, the total number of domestic violence calls received and the numbers of such cases involving weapons shall be compiled by each law enforcement agency and submitted to the Attorney General.
>
> (b) The Attorney General shall report annually to the Governor, the Legislature, and the public, the total number of domestic violence-related calls received by California law enforcement agencies, the number of cases involving weapons, and a breakdown of calls received by agency, city, and county.
>
> (c) *Each law enforcement agency shall develop an incident report form that includes a domestic violence identification code by January 1, 1986. In all incidents of domestic violence, a report shall be written and shall be thus identified on the face of the report as a domestic violence incident.*" (Emphasis added.)

Chapter 1609, Statutes of 1984, was the subject of a previous test claim (CSM-4222) approved by the Commission on January 22, 1987. The Parameters and Guidelines for Chapter 1609, Statutes of 1984, provided that the following costs were reimbursable:

(1) the "costs associated with the *development of a Domestic Violence Incident Report form* used to record and report domestic violence calls"; and

(2) costs incurred "for the *writing of mandated reports which shall include domestic violence reports, incidents or crime reports directly related to the domestic violence incident*."

In 1993, the Legislature made minor nonsubstantive changes to section 13730 and amended subdivision (a) to include the second underlined sentence relating to the written incident report required under subdivision (c):

> "(a) Each law enforcement agency shall develop a system, by January 1, 1986 for recording all domestic violence-related calls for assistance made to the department including whether weapons are involved. <u>All domestic violence-related calls for assistance shall be supported with a written incident report, as described in subdivision (c), identifying the domestic violence incident.</u> Monthly, the total number of domestic violence calls received and the numbers of such cases involving weapons shall be compiled by each law enforcement agency and submitted to the Attorney General." (Chapter 1230, Statutes of 1993.)

Since the Legislature required local law enforcement agencies to develop and complete the domestic violence incident report form in subdivision (c) under the 1984 legislation, the 1993 amendment to subdivision (a) merely *clarified* this reporting requirement, rather than mandating a new or additional requirement. The Commission further noted that a test claim has never been filed on Chapter 1230, Statutes of 1993, requesting that the amendment constitute a new program or higher level of service.

During fiscal years 1992/93 through 1996/97, the Legislature no longer mandated the incident reporting requirements set forth in Penal Code section 13730 pursuant to Government Code section 17581. Accordingly, it was optional for local law enforcement agencies to implement the domestic violence incident reporting activity during these fiscal years. The fiscal year 1997/98 budget continues the suspension, effective August 18, 1997. (Chapter 282, Statutes of 1997, Item 9210-295-0001, par. 2, pp. 587-588.)

In 1995, the Legislature amended Penal Code section 13730, subdivision (c), in Chapter 965, Statutes of 1995. Subdivision (c), as amended by Chapter 965, Statutes of 1995, provides the following:

> "Each law enforcement agency shall develop an incident report form that includes a domestic violence identification code by January 1, 1986. In all incidents of domestic violence, a report shall be written and shall be

identified on the face of the report as a domestic violence incident. A report shall include at least both of the following:

(1) A ***notation*** of whether the officer or officers who responded to the domestic violence call observed any signs that the alleged abuser was under the influence of alcohol or a controlled substance.

(2) A ***notation*** of whether the officer or officers who responded to the domestic violence call determined if any law enforcement agency had previously responded to a domestic violence call at the same address involving the same alleged abuser or victim." (Underscored text added by Chapter 965, Statutes of 1995)

The County of Los Angeles alleged that Penal Code section 13730, subdivision (c), as amended by Chapter 965, Statutes of 1995, imposes a new program or higher level of service in an existing program upon local agencies within the meaning of section 6, article XIII B of the California Constitution.

COMMISSION FINDINGS:

The Commission found that Penal Code section 13730, subdivision (c), obligates local law enforcement agencies to include in the domestic violence incident reports additional information relating to the use of alcohol or controlled substances by the abuser, and any prior domestic violence responses to the same address. This additional reporting activity is performed by local law enforcement agencies that carry out basic governmental functions by providing a service to the public. Such activities are not imposed on state residents generally.[4] Thus, the Commission found that the first requirement to determine whether a statute imposes a reimbursable state mandated program is satisfied.

Second, before the enactment of the test claim statute, local law enforcement agencies were required to develop and complete domestic violence incident reports. However, local agencies were *not* required to include in the report specific information relating to the alleged abuser's use of alcohol or controlled substances, or information relating to any prior domestic violence calls made to the same address.

Accordingly, the Commission found that Penal Code section 13730, subdivision (c), constitutes a new program by satisfying two of the requirements necessary to determine whether legislation imposes a reimbursable state mandated program.

The Commission's inquiry continued to determine whether the test claim legislation is state mandated for purposes of reimbursement from the State Treasury.[5] As previously indicated, the original statute, which required the development and completion of a

[4] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835.

[5] *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 832 and 836.

domestic violence incident report was determined by the Commission to be a reimbursable state mandated program. However, this program was made optional by the Legislature under Government Code section 17581.

Issue 2: If Penal Code section 13730, as originally added by Chapter 1609, Statutes of 1984, is made optional by the Legislature pursuant to Government Code section 17581, are subsequent legislative amendments to section 13730 also made optional?

The County of Los Angeles contended that Chapter 965, Statutes of 1995, is not included in the Legislature's suspension of the original statute. The County contended that the chapters need to be addressed separately. The County further contended that Chapter 965, Statutes of 1995, is not automatically made optional by association with the original statute. Rather the determination of whether a statute is suspended is up to Legislature.

COMMISSION FINDINGS:

Government Code section 17581 provides, in pertinent part, the following:

> "(a) No local agency shall be required to implement or give effect to any statute or executive order, or portion thereof, during any fiscal year if all of the following apply:
>
> "(1) The statute or executive order, or portion thereof, has been determined by the Legislature, the commission, or any court to mandate a new program or higher level of service requiring reimbursement of local agencies pursuant to section 6 of article XIIIB of the California Constitution.
>
> "(2) The statute or executive order, or portion thereof, has been specifically identified by the Legislature in the Budget Act for that fiscal year as being one for which reimbursement is not provided for that fiscal year. For purposes of this paragraph, a mandate shall be considered to have been specifically identified by the Legislature only if it has been included within the schedule of reimbursable mandates shown in the Budget Act and it is specifically identified in the language of a provision of the item providing the appropriation for mandate reimbursements.
>
> "(b) Notwithstanding any other provision of law, if a local agency elects to implement or give effect to a statute or executive order described in subdivision (a), the local agency may assess fees to persons or entities which benefit from the statute or executive order. Any fee assessed pursuant to this subdivision shall not exceed the costs reasonably borne by the local agency.
>
> " . . . ."

The provisions of section 17581 provide that if both of the conditions set forth therein are satisfied, the identified state mandated program becomes optional and the affected local agencies are not required to carry out the state program. If the local agency elects to carry out the identified state program, however, it is authorized to assess a fee to recover the costs reasonably borne by the local agency.

The Commission determined that Penal Code section 13730, as originally added by Chapter 1609, Statutes of 1984, imposed a reimbursable state mandated program upon local law enforcement agencies. As previously indicated, this program required all law enforcement agencies to develop and complete an incident report relating to all domestic violence calls.

However, during fiscal years 1992/93 through 1997/98, the Legislature specifically identified Chapter 1609, Statutes of 1984 in the Budget Act for the periods in question pursuant to Government Code section 17581, assigning zero dollar appropriations to the original state mandated program under Chapter 1609, Statutes of 1984. Both conditions set forth in section 17581 were met, i.e., (1) the Commission determined that Penal Code section 13730 of Chapter 1609, Statutes of 1984, imposed a state mandated program and (2) the Legislature identified Chapter 1609, Statutes of 1984, and appropriated zero funds. Thus, the domestic violence incident report program was optional and no longer state mandated. Notwithstanding, the Commission recognized that during the period from July 1, 1997 through August 17, 1997, and during subsequent periods when the state operates without a budget, the original suspension of the mandate would not be in effect.

The test claim statute (Chapter 965, Statutes of 1995) amends Penal Code section 13730 by requiring additional information to be contained within the domestic violence incident report. Since the development and completion of the incident report has been made optional by the Legislature pursuant to Government Code section 17581, the Commission inquired whether the additional requirements imposed by the test claim are also optional.

On its face, the 1997/98 State Budget Act does not identify Chapter 965, Statutes of 1995, as a suspended mandate. However, the Commission found that, in substance, the test claim legislation *is* affected by the Legislature's actions making the original test claim legislation optional.

The 1995 amendment to subdivision (c) of section 13730 requires information relating to the alleged abuser's use of alcohol or controlled substances, and any prior responses to the same address be *added to the domestic violence incident report form itself.* The Commission agreed that the additional notations required under the test claim statute constitute an additional activity. For this reason, the Commission found that the test claim statute constitutes a new program or higher level of service.

However, with the Legislature's use of the word "notation" in subdivision (c), the Commission disagreed that the 1995 amendment to section 13730 made the domestic violence incident report "very different" from what was required in 1984. The test

claim statute does not require a new or different report. It simply specifies the minimum content of the underlying report.

Therefore, the Commission found that the new requirements imposed by Chapter 965, Statutes of 1995, are *not* independent of the incident report as suggested by the claimant; rather, they are encompassed and directly connected to the underlying incident reporting program established by the Legislature in Chapter 1609, Statutes of 1984.[6].

The Commission further found that section 13730, subdivision (c), requires additional information to be included on the domestic violence incident report, the performance of domestic violence incident reporting is *not* state mandated because the development and completion of the report itself was made optional by the Legislature. In other words, since the development and completion of the incident report are not state mandated, then the new information to be included on the incident report is likewise not state mandated.

On the other hand, *if* a local agency voluntarily opts or elects to complete the incident report, then the additional information must be included on the report pursuant to the provisions of the test claim statute. In this respect, Chapter 965, Statutes of 1995, is not a meaningless and unnecessary law as suggested by the claimant.

Therefore, the Commission determined that the new additional information to the domestic violence incident report is not a reimbursable state-mandated program because:

- Presently, the State Budget Act of 1997/98 makes the completion of the incident report *optional* and
- The new additional information under the test claim statute comes into play only after a local agency opts or elects to complete the incident report.

Notwithstanding the foregoing, the Commission determined that for the *limited* window period from July 1, 1997 through August 17, 1997, the domestic violence incident reporting, including the inclusion and completion of the new additional information to the form, is a reimbursable state mandated activity because the 1997/98 Budget Act was not chaptered until August 18, 1997. (Chapter 282, Statutes of 1997.)

The Commission further determined that in all subsequent "window periods" when the state operates without a budget, the domestic violence incident reporting program,

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[6] This test claim is to be distinguished from the previously decided test claim (September 25, 1997), entitled *Domestic Violence Arrest Policies and Standards*, where the Commission determined that the legislation in question imposed new and distinct activities and, therefore, was not affected by Government Code section 17581. In the *Domestic Violence Arrest Policies and Standards* test claim, the Legislature made optional the original requirement to develop, adopt and implement written policies for *response* to domestic violence calls pursuant to Government Code section 17581. The test claim legislation amended the statute adding the requirement to develop and implement *arrest* policies for domestic violence offenders, a new and distinct requirement not encompassed by the previously suspended requirement to develop response policies.

including the inclusion and completion of the new additional information to the form, is a reimbursable state mandated activity until the Budget Act is chaptered and makes the incident reporting program optional under Government Code section 17581.

PART II CONCLUSION

The Commission concludes that pursuant to section 6 of article XIII B of the California Constitution and section 17514 of the Government Code that:

- Penal Code section 13730, subdivision (c), as amended by Chapter 965, Statutes of 1995, does not impose a reimbursable state mandated program for the period in which the underlying incident reporting program is made optional under Government Code section 17581.
- Penal Code section 13730, subdivision (c), as amended by Chapter 965, Statutes of 1995, does impose a reimbursable state mandated program for the *limited* window period from July 1, 1997 (the start of the new fiscal year) through August 17, 1997, when the State Budget Act makes the incident reporting program optional.
- Penal Code section 13730, subdivision (c), as amended by Chapter 965, Statutes of 1995, does impose a reimbursable state mandated program for all *subsequent* window periods from July 1 (the start of the new fiscal year) until the Budget Act is chaptered and makes the incident reporting program optional under Government Code section 17581.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:	NO. CSM 97-TC-07
Penal Code Section 13519.7,	*Sexual Harassment Training in the Law Enforcement Workplace*
As Amended by Statutes of 1993, Chapter 126; and	STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7
Filed on December 23, 1997;	
By the County of Los Angeles, Claimant.	(Adopted on September 28, 2000)

STATEMENT OF DECISION

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

This Decision shall become effective on September 29, 2000.

Paula Higashi, Executive Director

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:

Penal Code Section 13519.7,

As Amended by Statutes of 1993, Chapter 126; and

Filed on December 23, 1997;

By the County of Los Angeles, Claimant.

NO. CSM 97-TC-07

Sexual Harassment Training in the Law Enforcement Workplace

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7

(Adopted on September 28, 2000)

STATEMENT OF DECISION

On August 24, 2000 the Commission on State Mandates (Commission) heard this test claim during a regularly scheduled hearing. Mr. Leonard Kaye appeared for the County of Los Angeles. Captain Tom Laing and Lieutenant Randy Olson appeared as witnesses for the Los Angeles County Sheriff's Department. Mr. James W. Miller and Ms. Amber D. Pearce appeared for the Department of Finance. Mr. Hal Snow appeared for the Commission on Peace Officer Standards and Training (POST). Mr. Allan Burdick appeared on behalf of the California State Association of Counties (CSAC).

At the hearing, oral and documentary evidence was introduced, the test claim was submitted, and the vote was taken.

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

The Commission, by a vote of 6 to 1, partially approved this test claim.

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BACKGROUND

The test claim statute, Penal Code section 13519.7, addresses the implementation of complaint guidelines and training on sexual harassment in the workplace for local law enforcement officers. The test claim statute became effective on January 1, 1994, and requires the Commission on Peace Officer Standards and Training (POST) to develop complaint guidelines by August 1, 1994 to be followed by local law enforcement agencies for peace officers who are victims of sexual harassment in the workplace. The test claim statute also requires the course of basic training for law enforcement officers to include instruction on sexual harassment in the workplace no later than January 1, 1995. Peace officers that completed basic training before January 1, 1995 are required to receive supplementary training on sexual harassment in the workplace by January 1, 1997.

In the past, the Commission has decided three test claims addressing training for peace officers and firefighters. In 1991, the Commission denied a test claim filed by the City of Pasadena requiring new and veteran peace officers to complete a course regarding the handling of domestic violence complaints as part of their basic training and continuing education courses (*Domestic Violence Training*, CSM-4376). The Commission reached the following conclusions:

- The test claim legislation does not require local agencies to implement a domestic violence training program and to pay the cost of such training;
- The test claim legislation does not increase the minimum number of basic training hours, nor the minimum number of advanced officer training hours and, thus, no additional costs are incurred by local agencies; and
- The test claim legislation does not require local agencies to provide domestic violence training.

In January 1998, the Commission denied a test claim filed by the County of Los Angeles requiring veteran law enforcement officers below the rank of supervisor to complete an updated course of instruction on domestic violence every two years (*Domestic Violence Training and Incident Reporting*, CSM-96-362-01). Although the statute imposed an express continuing education requirement upon individual officers and not local agencies, the last sentence of the test claim statute stated that "it is the intent of the Legislature not to increase the annual training costs of local government." Thus, the Commission recognized the Legislature's awareness of the potential impact of the training course upon local governments and found that the continuing education activity was imposed upon local agencies. The Commission denied the test claim, however, based on the finding that local agencies incur *no* increased "costs mandated by the state" in carrying out the two-hour course for the following reasons:

- *Immediately before and after* the effective date of the test claim legislation, POST's minimum required number of continuing education hours for the law enforcement officers in question *remained the same at 24 hours*. After the operative date of the test claim statute these officers must still complete at least 24 hours of professional training every two years,

- The two hour domestic violence training update may be credited toward satisfying the officer's 24-hour minimum,
- The two hour training is *not* separate and apart nor "on top of" the 24-hour minimum,
- POST does not mandate creation and maintenance of a separate schedule and tracking system for this two hour course,
- POST prepared and provides local agencies with the course materials and video tape to satisfy the training in question, and
- Of the 24-hour minimum, the two hour domestic violence training update is the only course that is legislatively mandated to be continuously completed every two years by the officers in question. The officers may satisfy their remaining 22-hour requirement by choosing from *the many elective courses* certified by POST.

In December 1998, the Commission approved a test claim filed by the County of Los Angeles and remanded by the court, which required new and veteran firefighters to complete a training course on Sudden Infant Death Syndrome (*Sudden Infant Death Syndrome (SIDS) for Firefighters*, CSM-4412). The test claim statute further authorized local agencies to provide the instruction and training, and to assess a fee to pay for the costs of the training. In its order, the court found that there were no state training programs available to provide SIDS training to new and veteran firefighters. Thus, the court concluded that the SIDS training program was a new program imposed on the county. The court remanded the case to the Commission to determine if the fee authority provided by the statute could be realistically recovered from firefighters. In this respect, the Commission recognized that local agencies have the unilateral authority to impose changes regarding terms of employment, such as training fees, on employees. However, based on the evidence presented at the hearing, the Commission found that the fee authority could not be realistically exercised. The Commission also recognized that, unlike POST, an agency charged with overseeing peace officer training, there is no state agency charged with developing and overseeing firefighter training. Accordingly, the Commission reached the following conclusions:

- The SIDS training program is a new program imposed on local agencies and does not impose requirements on firefighters alone.
- When SIDS instruction is provided by a private facility, local agencies still incur "costs mandated by the state" in the form of salaries, benefits, and other incidental expenses for the time that its employees spend in training (trainee time), registration and materials.
- When SIDS training is provided by the local agency, the local agency incurs "costs mandated by the state" for the development of the training, trainee time, trainer time and materials since the fee authority provided in the statute cannot be realistically exercised.

COMMISSION FINDINGS

In order for a statute or an executive order to impose a reimbursable state mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514, the statutory language must first direct or obligate an activity or task upon local governmental agencies. If the statutory language does not direct or obligate local agencies to perform a task, then compliance with the test claim statute or executive order is within the discretion of the local agency and a reimbursable state mandated program does not exist.

In addition, the required activity or task must constitute a new program or create an increased or higher level of service over the former required level of service. The California Supreme Court has defined a "new program" or "higher level of service" as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the State. To determine if the "program" is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must impose "costs mandated by the state".[1]

This decision addresses the following issues:

- Do the sexual harassment complaint guidelines developed by POST in response to Penal Code section 13519.7, subdivision (a), constitute a reimbursable state mandated program for local agencies?
- Does the requirement that the course of basic training for law enforcement officers include instruction on sexual harassment in the workplace no later than January 1, 1995 constitute a reimbursable state mandated program?
- Does the requirement for peace officers that completed basic training before January 1, 1995 to receive supplementary training on sexual harassment in the workplace by January 1, 1997 constitute a reimbursable state mandated program?

The Commission's findings on these issues are presented below.

Issue 1: Do the sexual harassment complaint guidelines developed by POST in response to Penal Code section 13519.7, subdivision (a), constitute a reimbursable state mandated program for local agencies?

Penal Code section 13519.7, subdivision (a), states the following:

> "On or before August 1, 1994, [POST] shall develop complaint guidelines to be followed by city police departments, county sheriffs' departments, districts, and state university departments, for peace officers who are victims of sexual harassment in the workplace. In developing the

[1] Article XIII B, section 6 of the California Constitution; *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 66; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; Gov. Code, § 17514.

complaint guidelines, [POST] shall consult with appropriate groups and individuals having an expertise in the area of sexual harassment."

The Department of Finance contended that this provision does not constitute a reimbursable state mandated program because it is not unique to local government. The Department contended that the test claim statute affects all peace officers in the State, including those in the University of California and California State University systems. The Department cites the *County of Los Angeles* v. *State of California* and *City of Sacramento* v. *State of California* cases in support of its position.[2]

The claimant disagreed. The claimant argued that the test claim statute is unique to government and that the cases cited by the Department are not applicable here. The claimant also submitted with the test claim a document prepared by POST entitled "Sexual Harassment in the Workplace, Guidelines and Curriculum, 1994" in support of its position that Penal Code section 13519.7, subdivision (a), imposes reimbursable state mandated activities on local agencies.

The Commission found that POST's "Sexual Harassment in the Workplace, Guidelines and Curriculum, 1994" constitutes an executive order under Government Code section 17516. That section defines an "executive order," in relevant part, as any order, plan, requirement, rule, or regulation issued by any agency, department, board, or commission of state government.

The Commission also found that the Department's reliance on the *County of Los Angeles* and *City of Sacramento* cases, to support its argument that sexual harassment complaint guidelines for peace officers is not unique to government, is misplaced. Both cases involved state-mandated increases in workers' compensation benefits, which affected public and *private* employers alike. The California Supreme Court found that the term "program" as used in article XIII B, section 6, and the intent underlying section 6 "was to require reimbursement to local agencies for the costs involved in carrying out functions *peculiar to government*, not for expenses incurred as an incidental impact of law that apply generally to all state residents and entities." (Emphasis added.)[3] Since the increase in workers' compensation benefits applied to all employees of private and public businesses, the court found that no reimbursement was required.

Here, on the other hand, the sexual harassment complaint guidelines are to be followed by city police departments, county sheriffs' departments, districts, and state university departments. They do not apply "generally to all state residents and entities" in the state, such as private businesses. In addition, the Court of Appeal, Third Appellate District, has recognized that police protection is a peculiarly governmental function.[4] Accordingly, the Commission found that the sexual harassment complaint guidelines developed by POST in response to Penal Code section 13519.7, subdivision (a), are unique to government and constitute a "program" within the meaning of article XIII B, section 6 of the California Constitution.

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[2] *County of Los Angeles* v. *State of California*, supra; 43 Cal.3d 46; *City of Sacramento* v. *State of California, supra*, 50 Cal.3d 51.

[3] *County of Los Angeles, supra*, 43 Cal.3d at 56-57; *City of Sacramento, supra*, 50 Cal.3d at 67.

[4] *Carmel Valley Fire Protection Dist., supra*, 190 Cal.App.3d 521, 537.

The Commission further found that the complaint guidelines prepared by POST in response to Penal Code section 13519.7, subdivision (a), constitute a "new program" and impose "costs mandated by the state" on local law enforcement agencies. The document lists twelve guidelines, nine of which *require* local agencies to develop a formal written complaint procedure containing specified procedures. The nine required guidelines state the following:

- "Each law enforcement agency . . . *shall* develop a formal written procedure for the acceptance of complaints from peace officers who are the victims of sexual harassment in the work place."
- "Each law enforcement agency . . . *shall* provide a written copy of their complaint procedure to every peace officer employee."
- "Agency sexual harassment complaint procedures *shall* include the definitions and examples of sexual harassment as contained in the Code of Federal Regulations (29 CFR 1604.11) and California Government Code Section 12950."
- "Agency sexual harassment complaint procedures *shall* identify the specific steps complainants should follow for initiating a complaint."
- "Agency sexual harassment complaint procedures *shall* address supervisory/management responsibilities to intervene and/or initiate an investigation when possible sexual harassment is observed in the work place."
- "Sexual harassment complaint procedures *shall* state that agencies must attempt to prevent retaliation, and, under the law, sanctions can be imposed if complainants and/or witnesses are subjected to retaliation."
- "[T]he agency procedure *shall* identify parties to whom the incident should/may be reported . . . , *shall* allow the complainant to circumvent their normal chain of command in order to report a sexual harassment incident [and] *shall* include a specific statement that the complainant is always entitled to go directly to the California Department of Fair Employment and Housing (DFEH) and/or the Federal Equal Employment Opportunity Commission (EEOC) to file a complaint."
- "Agency sexual harassment complaint procedures *shall* require that all complaints shall be fully documented by the person receiving the complaint."
- "All sexual harassment prevention training *shall* be documented for each participant and maintained in an appropriate file."

The Commission determined that local law enforcement agencies were not required to follow the sexual harassment guidelines developed by POST prior to the enactment of the test claim statute.

Accordingly, the Commission found that the sexual harassment complaint guidelines entitled "Sexual Harassment in the Workplace, Guidelines and Curriculum, 1994," which were developed by POST in response to Penal Code section 13519.7, subdivision (a), constitute a reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Issue 2: Does the requirement that the course of basic training for law enforcement officers include instruction on sexual harassment in the workplace no later than January 1, 1995 constitute a reimbursable state mandated program?

Penal Code section 13519.7, subdivision (b), states the following:

> "The course of basic training for law enforcement officers shall, no later than January 1, 1995, include instruction on sexual harassment in the workplace. The training shall include, but not be limited to, the following:
>
> (1) The definition of sexual harassment.
>
> (2) A description of sexual harassment, utilizing examples.
>
> (3) The illegality of sexual harassment.
>
> (4) The complaint process, legal remedies, and protection from retaliation available to victims of sexual harassment.
>
> In developing this training, [POST] shall consult with appropriate groups and individuals having an interest and expertise in the area of sexual harassment."

Article XIII B, section 6 of the California Constitution states that "whenever the Legislature or any state agency *mandates* a new program or higher level of service *on any local government*, the state shall provide a subvention of funds." (Emphasis added.)

Thus, in order for a statute to be subject to article XIII B, section 6 of the California Constitution, the statutory language must direct or obligate an activity or task upon local governmental agencies. If the statutory language does not mandate local agencies to perform a task, then compliance with the test claim statute is within the discretion of the local agency and a reimbursable state mandated program does not exist.

The claimant contended that local agencies are required to provide basic training, including sexual harassment training, to new recruit employees. Even if an agency hires persons who have already obtained the training, the claimant states that the first law enforcement agency that actually provides the training should be reimbursed. The claimant is requesting reimbursement for the salaries, benefits and other incidental expenses for the time that its new recruit employees spend in training and the costs incurred to present the course at its basic training academy.

At the hearing, Mr. Leonard Kaye, Certified Public Accountant, Office of Auditor-Controller, testified on behalf of the claimant. Mr. Kaye acknowledged that local agencies are not specifically required by state law to be responsible for basic training. However, he contended that when the Legislature requires a new basic training component or course, the basic training academies, which include cities, counties, and community colleges, are required to provide the new basic training course.[5]

The Department of Finance contended that Penal Code section 13519.7, subdivision (b), does not impose a new program or higher level of service since there is no obligation

[5] Hearing Transcript (August 24, 2000), page 35, lines 4-15.

imposed on any local law enforcement agency to provide the training. Rather, the Department contended that the statute imposes a training obligation on recruits alone. Since the statute applies to new recruits, the Department contended that the local agency has the option of hiring only those persons who have already obtained the sexual harassment training. Thus, the Department concluded that if a local agency trains its recruit employees on sexual harassment, the local agency does so at its option.

POST did not submit any written comments on the issue of whether Penal Code section 13519.7, subdivision (b), mandates a new program or higher level of service on local agencies. However, Mr. Hal Snow, Assistant Executive Director of POST, provided testimony at the hearing. Mr. Snow testified that POST certifies about 39 academies in the state as basic training institutions. Mr. Snow stated that the academies are not required to be certified. Rather, it is an option on the part of the entity. Mr. Snow's testimony is as follows:

> "We certify about 39 academies around the state, and they are certified voluntarily; that is, no agency or community college or other organization is required to be certified. For those who are certified, they, of course, incur substantial costs in operating those academies, most of which are not reimbursable by POST. Some of them are subvented by community college funding, but, in every case, it is - - it's an option on the part of the entity, whether it's an agency or a community college, to be certified as a basic training institution."[6]

Mr. Snow further testified that roughly 6,000 people graduate from basic academy per year. Of the 6,000 graduates, about 2,000 are unemployed and pay for their own training.[7]

For the reasons stated below, the Commission found that Penal Code section 13519.7, subdivision (b), does not impose any activities or duties upon local law enforcement agencies. Rather, the requirement to complete the basic training course on sexual harassment is a mandate imposed on the individual who seeks peace officer status.

The test claim statute states that "the course of basic training for law enforcement officers" shall include sexual harassment in the workplace. The test claim statute itself does not mandate local agencies to provide the course of basic training to recruits. Rather, the statute is silent in this respect and does not specify who is required to provide the basic training course.

In addition, the Commission determined that there are no provisions in other statutes or regulations issued by POST that require local agencies to provide basic training. Since 1959, Penal Code section 13510 and following have required POST to adopt rules establishing minimum standards relating to the physical, mental and moral fitness governing the recruitment of new local law enforcement officers.[8] In establishing the standards for training, the Legislature instructed POST to permit the required training to

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[6] Hearing Transcript (August 24, 2000), page 36, lines 18-25, and page 37, lines 1-2.

[7] Hearing Transcript (August 24, 2000) page 32, lines 8-21.

[8] These standards can be found in Title 11 of the California Code of Regulations.

be conducted at *any* institution approved by POST.[9] For those "persons" who have acquired prior equivalent peace officer training, POST is required to provide the opportunity for testing instead of the attendance at a "basic training academy or accredited college."[10] Moreover, "each *applicant* for admission to a basic course of training certified by [POST] who is *not* sponsored by a local or other law enforcement agency . . . shall be required to submit written certification from the Department of Justice . . . that the applicant has no criminal history background. . . . "

Since 1971, Penal Code section 832 has required "every *person* described in this chapter as a peace officer" to satisfactorily complete an introductory course of training prescribed by POST before they can exercise the powers of a peace officer.[11] Any "*person*" completing the basic training course "who does *not become employed* as a peace officer" within three years is required to re-take and pass the basic training examination. Since 1994, POST has been authorized to charge a fee for the basic training examination to each "*applicant*" who is *not* sponsored or employed by a local law enforcement agency.[12]

The Commission acknowledged that some local law enforcement agencies, including the claimant, employ persons who have not yet completed their basic training course, and then sponsor or provide the training themselves.[13] Based on the statutory and regulatory scheme outlined above, however, the state has *not* mandated local agencies to do so.

In fact, the Commission recognized that there are several community colleges approved by POST offering basic training academy courses, including the course on sexual harassment in the workplace, that are open to any interested individual, whether or not employed or sponsored by a local agency. The colleges charge an average of $2000 to cover their costs for law enforcement basic training and financial assistance is available to those students in need.[14]

Thus, the Commission found that the test claim statute does not mandate local agencies to provide basic training, including the course on sexual harassment, and does not mandate local agencies to incur costs to send their new employees to basic training.

The Commission further disagreed with the claimant's arguments contained in its comments to the Draft Staff Analysis submitted on February 10, 2000, and comments to the Final Staff Analysis submitted on July 19, 2000. The claimant contended that the Commission's past decisions regarding training are precedential and hold that when the Legislature imposes training, it is a mandate upon the local law enforcement agency. The

[9] Pen. Code, § 13511.

[10] *Id.*

[11] See also POST's regulation, tit. 11, Cal. Code Regs., § 1005, subd. (a)(9).

[12] Pen. Code, § 832, subd. (g), added by Stats. 1994, c. 43.

[13] Other agencies, however, require the successful completion of POST Basic Training *before* the applicant will be considered for the job. (See, Job Announcement for Amador County Deputy Sheriff.)

[14] POST Certified Basic Training Academies including Los Medanos College Basic Training Academy, charging $2200 for California State residents and offering financial assistance; Allan Hancock College Law Enforcement Academy stating that "the course is open to law enforcement agency 'sponsored' recruits and other interested students"; and Golden West College, whose mission statement promises that "90% of the academy graduates received jobs within three years of completion of the academy course."

claimant cited the Commission's decisions in *Domestic Violence Training and Incident Reporting* (CSM – 96-362-01) and *SIDS* (CSM – 4412). The Commission determined that these prior Commission decisions are distinguishable from this test claim and should not be applied.

Domestic Violence Training and Incident Reporting involved a statute that required *veteran* law enforcement officers below the rank of supervisor to complete an updated course of instruction on domestic violence every two years. The Commission denied the test claim finding no increased "costs mandated by the state".

The Commission recognized that the test claim statute at issue here, on the other hand, involves basic training for recruits who may or may not be employed. Thus, the Commission found that its findings in *Domestic Violence Training and Incident Reporting* do not apply to this test claim.

The Commission further determined that the statutory scheme presented by this test claim is different than the *SIDS* training test claim approved by the Commission in 1998 following the remand from the court. In *SIDS*, the Commission found that the training program for both new and veteran firefighters was a new program imposed on local agencies and not on firefighters alone. In contrast to the present claim, the *SIDS* statute expressly authorized local agencies to provide the instruction and training, and to assess a fee to cover their costs. Furthermore, unlike the training provided for law enforcement recruits, the court found *no* state training programs available to provide SIDS training to new and veteran firefighters. Thus, the Commission concluded that its findings in *SIDS* do not apply to this test claim.

Based on the foregoing, the Commission found that Penal Code section 13519.7, subdivision (b), is not subject to article XIII B, section 6 of the California Constitution because it does not impose any mandated duties or activities on any local governmental agency to provide basic training, including the course on sexual harassment, or to incur costs to send their new employees to basic training. Rather, the requirement to complete the basic training course on sexual harassment is a mandate imposed on the individual who seeks peace officer status.

Issue 3: Does the requirement for peace officers that completed basic training before January 1, 1995 to receive supplementary training on sexual harassment in the workplace by January 1, 1997 constitute a reimbursable state mandated program?

Penal Code section 13519.7, subdivision (c), states the following:

> "All *peace officers* who have received their basic training before January 1, 1995, shall receive supplementary training on sexual harassment in the workplace by January 1, 1997."

A. Is Penal Code section 13519.7, subdivision (c), subject to article XIII B, section 6 of the California Constitution?

In order for a statute to be subject to article XIII B, section 6 of the California Constitution, the statutory language must direct or obligate an activity or task upon local governmental agencies. If the statutory language does not mandate local agencies to

perform a task, then compliance with the test claim statute is within the discretion of the local agency and a reimbursable state mandated program does not exist.

The claimant contended that Penal Code section 13519.7, subdivision (c), requires local agencies to provide supplementary sexual harassment training to veteran officers. The claimant is requesting reimbursement for the salaries, benefits and other incidental expenses for the time that its veteran employees spend in training and the costs incurred to present the course.

The Department of Finance contended that reimbursement is not required under article XIII B, section 6 since Penal Code section 13519.7, subdivision (c), does not impose any obligations on any local law enforcement agency to provide the training. Rather, the Department contended that the statute imposes a training obligation on law enforcement officers alone.

Penal Code section 13519.7, subdivision (c), requires veteran peace officers to receive continuing education training on sexual harassment by January 1, 1997. The plain language of the test claim statute does not mandate or require local agencies to provide or pay for the supplemental training. In addition, there are no other state statutes or executive orders requiring local agencies to pay for continuing education training.

Nevertheless, Penal Code section 13519.7, subdivision (c), specifically refers to "peace officers." Section 830.1 of the Penal Code defines "peace officers" as those persons who are "*employed*" by a public safety agency of a county, city or special district.

Since peace officers, by definition, are employed by local agencies, the Commission agreed with the claimant that the federal Fair Labor Standards Act (FLSA), which requires local agencies to compensate their employees for training under specified circumstances, is relevant to this claim.

Generally, the FLSA provides employee protection by establishing the minimum wage, maximum hours and overtime pay under federal law. In 1985, the United States Supreme Court found that the FLSA applies to state and local governments.[15] The FLSA is codified in title 29 of the Code of Federal Regulations (CFR).

The requirement to compensate employees for training time under the FLSA is described below.

<u>Training Conducted During Regular Working Hours</u>

The claimant contended that since sexual harassment training is required by the state, is not voluntary, and is conducted during regular working hours, training time needs to be counted as compensable working time under 29 CFR section 785.27 of the FLSA and treated as an obligation imposed on the local agency. Section 785.27 states the following:

> "Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:
>
> (a) Attendance is outside of the employee's regular workings hours;

[15] *Garcia v. San Antonio Metropolitan Transit Authority et al.* (1985) 469 U.S. 528.

(b) Attendance is in fact voluntary;

(c) The course, lecture, or meeting is not directly related to the employee's job; and

(d) The employee does not perform any productive work during such attendance."

The Commission agreed with the claimant that local agencies are required under the FLSA to compensate their employees for mandatory training *if* the training occurs during the employee's regular working hours. However, this raises the issue whether the obligation to pay for sexual harassment training is an obligation imposed by the state, or an obligation arising out of existing federal law through the provisions of the FLSA.

The Commission found that there is no federal statutory or regulatory scheme requiring local agencies to provide sexual harassment training to veteran officers. Rather, what sets the provisions of the FLSA in motion requiring local agencies to compensate veteran officers for sexual harassment training is the test claim statute. If the state had not created this program, veteran officers would not be required to receive sexual harassment training and local agencies would not be obligated to compensate their veteran employees for such training.

Accordingly, the Commission found that local agencies are mandated by the state though subdivision (c) of the test claim statute to provide sexual harassment training to veteran officers *if* the training occurs during the employee's regular working hours.

Training Conducted Outside Regular Working Hours

The Commission noted, however, that an exception to the FLSA was enacted in 1987, which provides that time spent by employees of state and local governments in training required for certification by a higher level of government that occurs outside of the employee's regular working hours is noncompensable. In this regard, 29 CFR section 553.226 states in pertinent part the following:

> "(a) The general rules for determining the compensability of training time under the FLSA are set forth in §§ 785.27 through 785.32 of this title.
>
> (b) While time spent in attending training required by an employer is normally considered compensable hours of work, following are situations where time spent by employees of State and local governments in required training is considered to be *noncompensable*:
>
> (2) *Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of government (e.g., where a State or county law imposes a training obligation on city employees), does not constitute compensable hours of work.*" (Emphasis added.)

The Commission found that 29 CFR section 553.226, subdivision (b)(2), applies when the sexual harassment training is conducted outside the employee's regular working hours. In such cases, the local agency is not required to compensate the employee. Rather, the cost of sexual harassment training becomes a term or condition of

employment subject to the negotiation and collective bargaining between the local agency and the employee.[16]

Collective bargaining between local agencies and their employees is governed by the Meyers-Milias-Brown Act. (Gov. Code, §§ 3500 et al.) The Act requires the governing body of the local agency and its representatives to meet and confer in good faith regarding wages, hours and other terms of employment with representatives of employee organizations. If an agreement is reached, the parties enter into a collective bargaining agreement, or memorandum of understanding (MOU). Only upon the approval and adoption by the governing board of the local agency, the MOU becomes binding on the local agency and employees.[17]

Although providing or paying for sexual harassment training conducted outside the employee's regular working hours is an issue negotiated at the local level, the Commission recognized that the California Constitution prohibits the Legislature from impairing obligations or denying rights to the parties of a valid, binding contract absent an emergency.[18] In the present case, the test claim statute became effective on January 1, 1994, and was not enacted as an urgency measure.

Accordingly, the Commission found that providing sexual harassment training outside the employee's regular working hours is an obligation imposed on those local agencies that, as of January 1, 1994 (the effective date of the statute) are bound by an existing MOU, which requires that the agency provide or pay for continuing education training.

However, when the existing MOU terminates, or in the case of a local agency that is not bound by an existing MOU on January 1, 1994 requiring that the agency pay for continuing education training, sexual harassment training conducted outside the employee's regular working hours becomes a negotiable matter subject to the discretion of the local agency. Thus, under such circumstances, the Commission found that the requirement to provide or pay for sexual harassment training is not an obligation imposed by the state on a local agency.

Conclusion

Based on the foregoing, the Commission found that Penal Code section 13519.7, subdivision (c), is subject to article XIII B, section 6 of the California Constitution because it imposes an obligation on local agencies to provide sexual harassment training under the following circumstances:

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[16] The claimant contended that 29 CFR section 553.226 is not relevant since that section addresses overtime pay. While Commission agreed that many of the 1985 amendments to the FLSA involved overtime pay for state and local governmental employees, section 553.226 addresses the compensability of training only. (52 Federal Register 2012.)

[17] Gov. Code, §§ 3500, 3505, and 3505.1. The Commission analyzed the Meyers-Milias-Brown Act in the *SIDS* test claim to determine if the fee authority established in the statute could realistically be imposed on firefighter employees. Based on evidence presented at the hearing, the Commission found that even though local agencies have the unilateral authority to impose changes regarding the terms of employment, the use of the unilateral authority is rare. Therefore, the Commission determined that the authority to impose fees upon firefighters in the SIDS case could not be realistically exercised by local agencies.

[18] Cal. Const., art. 1, § 9.

- When the sexual harassment training occurs during the employee's regular working hours; and
- When the sexual harassment training occurs outside the employee's regular working hours *and* there is an obligation imposed by an MOU existing on January 1, 1994 (the effective date of the statute), which requires that the local agency provide or pay for continuing education training.

B. Does Penal Code section 13519.7, subdivision (c), constitute a new program or higher level of service, and impose "costs mandated by the state"?

Veteran peace officers were not required to receive sexual harassment training before the enactment of the test claim statute. Thus, the Commission found that Penal Code section 13519.7, subdivision (c), constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution. The Commission continued its inquiry to determine if there are any "costs mandated by the state."

Government Code section 17514 defines "costs mandated by the state" as any *increased* costs which a local agency is required to incur as a result of any statute or executive order that mandates a new program or higher level of service.

The claimant contended that Penal Code section 13519.7, subdivision (c), results in increased costs mandated by the state in the form of salaries, benefits and other incidental expenses for the time that its veteran employees spend in training and the costs incurred to present the course. The claimant submitted cost data and records to support its claim. The claimant further contended that the costs are reimbursable, regardless of whether the county's annual training costs increase, since the test claim statute results in work being redirected by the state.

On July 19, 2000, the claimant submitted supplemental comments to the Final Staff Analysis further describing its sexual harassment training program. Attached to the supplemental comments is a document signed by Lt. Randy Olson, which states that the claimant's approved sexual harassment curriculum requires eight (8) hours of training for chiefs and above, eight (8) hours of training for managers (area and unit commanders), six (6) hours of training for supervisors (lieutenants, sergeants, and civilian equivalents), and four (4) hours of training for line personnel. The claimant has also hired a consultant to design and implement a sexual harassment prevention program.

POST stated that it developed a two-hour telecourse on sexual harassment for in-service, or veteran officers and made the telecourse available to local agencies. POST contended that since it developed the telecourse, POST estimates *no* increased costs to local agencies to present the training. However, POST estimates increased costs to local agencies for the salaries of the veteran officers attending the two-hour training while on duty.

The Department of Finance did not provide any comments on the issue of whether Penal Code section 13519.7, subdivision (c), imposes costs mandated by the state.

In order to determine if there are any costs mandated by the state, the Commission first determined the scope of the mandate.

The test claim statute expressly requires POST to develop the sexual harassment training. In this regard, the test claim statute states the following:

> "In developing this training, the commission [i.e., POST] shall consult with appropriate groups and individuals having an interest and expertise in the area of sexual harassment."

Therefore, the Commission found that local agencies are *not* required by the state to incur costs to develop or design the training course and, thus, such costs are not reimbursable under article XIII B, section 6 of the California Constitution.

The Commission further found that a *one-time, two-hour course* for each veteran officer is mandated by the state. The test claim statute requires veteran officers to receive supplemental training on sexual harassment *by* January 1, 1997. Based on the express completion date for training, the Commission found that the Legislature intended to require sexual harassment training on a one-time basis. Additionally, the sexual harassment training course developed by POST consists of two hours of training. Thus, any training on sexual harassment beyond two hours is within the discretion of the local agency.

The Commission also found that local agencies may have incurred increased costs mandated by the state to present the training in the form of materials provided to employees and/or trainer time during the two-hour course. The POST document entitled "Sexual Harassment in the Workplace, Guidelines and Curriculum" states that a written copy of the complaint procedure shall be provided to every employee. The POST document further suggests that "all instructors should have training expertise regarding sexual harassment issues."

The question remains, however, if there are increased costs mandated by the state for the time the veteran employees spend in training.

In 1998, the Commission analyzed whether a statute requiring continuing education training for peace officers imposed "costs mandated by the state" in the *Domestic Violence Training and Incident Reporting* test claim. That test claim statute included a the following language: "The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local government."

Thus, the Commission determined in the *Domestic Violence Training and Incident Reporting* test claim that if the domestic violence training course caused an increase in the total number of required continuing education hours, then the increased costs associated with the new training course were reimbursable as "costs mandated by the state". On the other hand, if there was no overall increase in the total number of continuing education hours, then there were no increased training costs associated with the training course. Instead, the cost of the training course was accommodated or absorbed by local law enforcement agencies within their existing resources available for training.

The Commission recognized POST regulations, which provide that local law enforcement officers must receive at least 24 hours of Advanced Officer continuing education training every two years. POST regulations state in pertinent part the following:

> "Continuing Professional Training (Required).
>
> "(1) Every peace officer below the rank of a middle management position as defined in section 1001 and every designated Level 1 Reserve Officer as defined in Commission Procedure H-1-2 (a) *shall satisfactorily complete the Advanced Officer Course of 24 or **more hours** at least once every two years after meeting the basic training requirement.*"
>
> "(2) The above requirement may be met by satisfactory completion of one or more Technical Courses totaling 24 or more hours, or satisfactory completion of an alternative method of compliance as determined by the Commission..."
>
> "(3) Every regular officer, regardless of rank, may attend a certified Advanced Officer Course and the jurisdiction may be reimbursed."
>
> "(4) Requirements for the Advanced Officer Course are set forth in the POST Administrative Manual, section D-2."[19]

The Commission found that there were no costs mandated by the state in the *Domestic Violence Training and Incident Reporting* test claim and, thus, denied the claim for the following reasons:

- *Immediately before and after* the effective date of the test claim legislation, POST's minimum required number of continuing education hours for the law enforcement officers in question *remained the same at 24 hours.* After the operative date of the test claim statute these officers must still complete at least 24 hours of professional training every two years,
- The two hour domestic violence training update may be credited toward satisfying the officer's 24-hour minimum,
- The two hour training is *not* separate and apart nor "on top of" the 24-hour minimum,
- POST does not mandate creation and maintenance of a separate schedule and tracking system for this two hour course,
- POST prepared and provides local agencies with the course materials and video tape to satisfy the training in question, and
- Of the 24-hour minimum, the two-hour domestic violence training update is the only course that is legislatively mandated to be continuously completed every two years by the officers in question. The officers may satisfy their remaining 22-hour requirement by choosing from *the many elective courses* certified by POST.

[19] Cal.Code Regs., tit. 11, § 1005, subd. (d).

The Commission found that the facts of this case are different than the facts in the *Domestic Violence Training and Incident Reporting* test claim. Unlike the test claim statute in *Domestic Violence Training and Incident Reporting*, the test claim statute here does not contain legislative intent language that sexual harassment training shall be funded from existing resources and that the annual training costs of local government should not be increased.

Additionally, in *Domestic Violence Training and Incident Reporting*, the Commission recognized a bulletin issued by POST recommending that local agencies make the required updated domestic violence training part of the officer's continuing education. Moreover, POST interpreted the *Domestic Violence Training* statute to require the inclusion of the domestic violence training within the 24-hour continuing education requirement. These facts are not present here. Rather, POST estimates increased costs to local agencies for the sexual harassment training for the officer's salaries in the approximate amount of $2,839,208.00.

Further, the Commission recognized that the purpose of the *Domestic Violence Training* course, as well as the other courses mandated by the Legislature during the training period in question, is to provide training to officers in their role as peace officers in the community. Sexual harassment training in the workplace, on the other hand, addresses internal employment issues and relationships with fellow co-workers.

Moreover, the Commission agreed with the claimant that a substantial number of officers may have already met their 24-hour requirement before they had to take sexual harassment training.

Thus, the Commission found that the two-hour sexual harassment training is not accommodated or absorbed by local law enforcement agencies within their existing resources available for training. Rather, the Commission determined that local agencies incur increased "costs mandated by the state" for the time spent by veteran officers in the one-time, two-hour sexual harassment training course. In this regard, the Commission found that Penal Code section 13519.7, subdivision (c), does impose "costs mandated by the state".

Conclusion

Based on the foregoing, the Commission found that Penal Code section 13519.7, subdivision (c), constitutes a reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 when the sexual harassment training occurs during the employee's regular working hours, or when the sexual harassment training occurs outside the employee's regular working hours *and* is an obligation imposed by an MOU existing on

January 1, 1994 (the effective date of the statute), which requires that the local agency provide or pay for continuing education training, for the following increased "costs mandated by the state":

- Salaries, benefits, and incidental expenses for each veteran officer to receive a one-time, two-hour course on sexual harassment; and
- Costs to present the one-time, two-hour course in the form of materials and trainer time.

CONCLUSION

Based on the foregoing, the Commission concluded the following:

Issue 1

The sexual harassment complaint guidelines, entitled "Sexual Harassment in the Workplace, Guidelines and Curriculum, 1994," which were developed by POST in response to Penal Code section 13519.7, subdivision (a), constitute a reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514;

Issue 2

Penal Code section 13519.7, subdivision (b), which requires that the course of basic training include instruction on sexual harassment, does not constitute a reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution since it does not impose any mandated duties on the local agency; and

Issue 3

Penal Code section 13519.7, subdivision (c), which requires peace officers to receive a one-time, two-hour course on sexual harassment by January 1, 1997, constitutes a reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 when the sexual harassment training occurs during the employee's regular working hours, or when the sexual harassment training occurs outside the employee's regular working hours *and* is an obligation imposed by an MOU existing on January 1, 1994 (the effective date of the statute), which requires that the local agency provide or pay for continuing education training, for the following increased "costs mandated by the state":

- Salaries, benefits, and incidental expenses for each veteran officer to receive a one-time, two-hour course on sexual harassment; and
- Costs to present the one-time, two-hour course in the form of materials and trainer time.

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 350, Sacramento, California 95814.

September 29, 2000, I served the:

Adopted Statement of Decision
Sexual Harassment Training (CSM – 97-TC-07)
Penal Code Section 13519.7
Statutes of 1993, Chapter 126
County of Los Angeles, Claimant

by placing a true copy thereof in an envelope addressed to:

Mr. Leonard Kaye
Department of Auditor-Controller
County of Los Angeles
Kenneth Hahn Hall of Administration
500 West Temple Street, Suite 603
Los Angeles, CA 90012

State Agencies and Interested Parties (See attached mailing list);

and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully paid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 29, 2000, at Sacramento, California

Julie Shelton

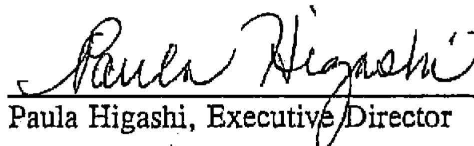
BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM: Penal Code Section 13519.4, As Amended by Statutes of 1992, Chapter 1267; and Filed on December 24, 1997; By the County of Los Angeles, Claimant.	NO. CSM 97-TC-06 *Law Enforcement Racial and Cultural Diversity Training* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (Adopted on October 26, 2000)

STATEMENT OF DECISION

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

This Decision shall become effective on October 31, 2000.



Paula Higashi, Executive Director

BEFORE THE
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IN RE TEST CLAIM: Penal Code Section 13519.4, As Amended by Statutes of 1992, Chapter 1267; and Filed on December 24, 1997; By the County of Los Angeles, Claimant.	NO. CSM 97-TC-06 *Law Enforcement Racial and Cultural Diversity Training* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (Adopted on October 26, 2000)

STATEMENT OF DECISION

On August 24, 2000 and September 28, 2000, the Commission on State Mandates (Commission) heard this test claim during a regularly scheduled hearing. Mr. Leonard Kaye appeared for the County of Los Angeles. Captain Tom Laing and Lieutenant Randy Olson appeared as witnesses for the Los Angeles County Sheriff's Department. Mr. James W. Miller, Ms. Amber D. Pearce, Mr. James Foreman, and Mr. Tom Lutzenberger appeared for the Department of Finance. Mr. Hal Snow appeared for the Commission on Peace Officer Standards and Training (POST). Mr. Allan Burdick appeared on behalf of the California State Association of Counties (CSAC). Mr. Steve Johnson appeared for the Los Angeles Police Department.

At the hearings, oral and documentary evidence was introduced, the test claim was submitted, and the vote was taken.

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

The Commission, by a vote of 6 to 0, denied this test claim.

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BACKGROUND

In order to foster mutual respect and cooperation between law enforcement and members of all racial and cultural groups, the Legislature enacted the test claim legislation in 1992 by amending Penal Code section 13519.4. The test claim statute requires that, no later than August 1, 1993, the basic training course for law enforcement officers include adequate instruction, as developed by the Commission on Peace Officer Training (hereafter "POST"), on racial and cultural diversity.[1]

In the past, the Commission has decided three test claims addressing training for peace officers and firefighters. In 1991, the Commission denied a test claim filed by the City of Pasadena requiring new and veteran peace officers to complete a course regarding the handling of domestic violence complaints as part of their basic training and continuing education courses (*Domestic Violence Training*, CSM-4376). The Commission reached the following conclusions:

- The test claim legislation does not require local agencies to implement a domestic violence training program and to pay the cost of such training;
- The test claim legislation does not increase the minimum number of basic training hours, nor the minimum number of advanced officer training hours and, thus, no additional costs are incurred by local agencies; and
- The test claim legislation does not require local agencies to provide domestic violence training.

In January 1998, the Commission denied a test claim filed by the County of Los Angeles requiring veteran law enforcement officers below the rank of supervisor to complete an updated course of instruction on domestic violence every two years (*Domestic Violence Training and Incident Reporting*, CSM-96-362-01). Although the Commission recognized that the test claim legislation imposed a new program or higher level of service, the Commission found that local agencies incurred *no* increased "costs mandated by the state" in carrying out the two-hour course for the following reasons:

- *Immediately before and after* the effective date of the test claim legislation, POST's minimum required number of continuing education hours for the law enforcement officers in question *remained the same at 24 hours*. After the operative date of the test claim statute these officers must still complete at least 24 hours of professional training every two years;
- The two hour domestic violence training update may be credited toward satisfying the officer's 24-hour minimum;
- The two hour training is *not* separate and apart nor "on top of" the 24-hour minimum;

[1] The phrase "cultural diversity" includes, but is not limited to, gender and sexual orientation issues. (Pen. Code, § 13519.4, subd. (c).)

- POST does not mandate creation and maintenance of a separate schedule and tracking system for this two hour course;
- POST prepared and provides local agencies with the course materials and video tape to satisfy the training in question; and
- Of the 24-hour minimum, the two hour domestic violence training update is the only course that is legislatively mandated to be continuously completed every two years by the officers in question. The officers may satisfy their remaining 22-hour requirement by choosing from *the many elective courses* certified by POST.

In December 1998, the Commission approved a test claim filed by the County of Los Angeles and remanded by the court, which required new and veteran firefighters to complete a training course on Sudden Infant Death Syndrome (*Sudden Infant Death Syndrome (SIDS) for Firefighters*, CSM-4412). The test claim statute further authorized local agencies to provide the instruction and training, and to assess a fee to pay for the costs of the training. In its order, the court found that there were no state training programs available to provide SIDS training to new and veteran firefighters. Thus, the court concluded that the SIDS training program was a new program imposed on the county. The court remanded the case to the Commission to determine if the fee authority provided by the statute could be realistically recovered from firefighters. In this respect, the Commission recognized that local agencies have the unilateral authority and the discretion to impose changes regarding terms of employment, such as training fees, on employees. However, based on the evidence presented at the hearing, the Commission found that the fee authority could not be realistically exercised. The Commission also recognized that, unlike POST, an agency charged with overseeing peace officer training, there is no state agency charged with developing and overseeing firefighter training. Accordingly, the Commission reached the following conclusions:

- The SIDS training program is a new program imposed on local agencies and does not impose requirements on firefighters alone;
- When SIDS instruction is provided by a private facility, local agencies still incur "costs mandated by the state" in the form of salaries, benefits, and other incidental expenses for the time that its employees spend in training (trainee time), registration and materials; and
- When SIDS training is provided by the local agency, the local agency incurs "costs mandated by the state" for the development of the training, trainee time, trainer time and materials since the fee authority provided in the statute cannot be realistically exercised.

COMMISSION FINDINGS

In order for a statute to impose a reimbursable state mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514, the statutory language must first direct or obligate an activity or task upon local governmental agencies. If the statutory language does not mandate or require local

agencies to perform a task, then compliance with the test claim statute is within the discretion of the local agency and a reimbursable state mandated program does not exist.

In addition, the required activity or task must constitute a new program or create an increased or higher level of service over the former required level of service. The California Supreme Court has defined a "new program" or "higher level of service" as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the State. To determine if the "program" is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation. Finally, the new program or increased level of service must impose "costs mandated by the state."[2]

The test claim statute amended Penal Code section 13519.4 by requiring that the basic training course for law enforcement officers include adequate instruction on racial and cultural diversity. The test claim statute states in relevant part the following:

> "*The course of basic training* for law enforcement officers shall, no later than August 1, 1993, include adequate instruction on racial and cultural diversity in order to foster mutual respect and cooperation between law enforcement and members of all racial and cultural groups...." (Emphasis added.)

Issue 1: Is the test claim statute, which requires that the basic training course for law enforcement officers include adequate instruction on racial and cultural diversity, subject to article XIII B, section 6 of the California Constitution?

The claimant contends that racial and cultural diversity training is a mandated new program or higher level of service imposed on local agencies within the meaning of article XIII B, section 6 of the California Constitution. The claimant states that local agencies are required to provide basic training, including racial and cultural diversity training, to new officer employees. The claimant is requesting reimbursement for the salaries, benefits and other incidental expenses for the time that its new officer employees spend in training and the costs incurred to present the course at its basic training academy.

At the Commission hearing on August 24, 2000, the claimant clarified that its test claim is limited to the alleged reimbursable state mandated program to provide racial and cultural diversity training to new employees.

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[2] Article XIII B, section 6 of the California Constitution; *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 66; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; Government Code section 17514.

On August 31, 2000, the claimant submitted supplemental information stating, in relevant part, the following:

> "Mr. Kaye noted that Commission staff claim, on page 10 of their analysis that the test claim statute does not specify who is required to provide the basic training course. However, to us (POST and the County) it is obvious, Basic training academies must provide this course. Indeed, only basic training academies can provide this course.
>
> The Legislature need not state the obvious - repeat and recite California's basic training scheme in every passing measure. Such a mandate was obvious to the County. It was obvious to POST. Indeed, it was obvious to all basic training academies in California.
>
> We all complied. And who are we? We are cities, counties, community colleges that operate basic training academies. The same cities, counties, community colleges that are eligible for state subvention under article XIII B, section 6 of the California Constitution and Government Code section 17514."

The Department of Finance contends that the test claim statute does not impose a new program or higher level of service since there is no obligation imposed on any local law enforcement agency to provide the training. Rather, the Department contends that the statute imposes a training obligation on law enforcement officers alone. Since the statute applies to new officers, the Department contends that the local agency has the option of hiring only those persons who have already obtained the racial and cultural diversity training. Thus, the Department concludes that if a local agency trains its officers on racial and cultural diversity, the local agency does so at its option. The Department urges the Commission to adopt a decision similar to the Commission's 1991 decision in *Domestic Violence Training* (CSM-4376) and find that the test claim legislation does not require local agencies to implement a racial and cultural diversity training program.

POST contends that the test claim statute does not impose a mandate on local agencies to undertake the training, but does impose a mandate on "academy training for recruit officers."

Article XIII B, section 6 of the California Constitution states that "whenever the Legislature or any state agency *mandates* a new program or higher level of service *on any local government*, the state shall provide a subvention of funds." (Emphasis added.)

Thus, in order for a statute to be subject to article XIII B, section 6 of the California Constitution, the statutory language must direct or obligate an activity or task upon local governmental agencies. If the statutory language does not mandate local agencies to perform a task, then compliance with the test claim statute is within the discretion of the local agency and a reimbursable state mandated program does not exist.

For the reasons stated below, the Commission finds that the test claim statute does not impose any activities or duties upon local law enforcement agencies. Rather, the

requirement to complete the basic training course on racial and cultural diversity is a mandate imposed only on the individual who seeks peace officer status.

The test claim statute states that "the course of basic training for law enforcement officers" shall include adequate instruction on racial and cultural diversity. The test claim statute itself does not mandate local agencies to provide the course of basic training to recruits. Rather, the statute is silent in this respect and does not specify who is required to provide the basic training course.

In addition, there are no provisions in other statutes or regulations issued by POST that require local agencies to provide basic training to recruits. Since 1959, Penal Code section 13510 and following have required POST to adopt rules establishing minimum standards relating to the physical, mental and moral fitness governing the recruitment of new local law enforcement officers.[3] In establishing the standards for training, the Legislature instructed POST to permit the required training to be conducted at *any* institution approved by POST.[4] For those "persons" who have acquired prior equivalent peace officer training, POST is required to provide the opportunity for testing instead of the attendance at a "basic training academy or accredited college."[5] Moreover, "each *applicant* for admission to a basic course of training certified by [POST] who is *not* sponsored by a local or other law enforcement agency . . . shall be required to submit written certification from the Department of Justice . . . that the applicant has no criminal history background. . . . "

Since 1971, Penal Code section 832 has required "every *person* described in this chapter as a peace officer" to satisfactorily complete an introductory course of training prescribed by POST before they can exercise the powers of a peace officer.[6] Any "*person*" completing the basic training course "who does *not become employed* as a peace officer" within three years is required to re-take and pass the basic training examination. Since 1994, POST has been authorized to charge a fee for the basic training examination to each "*applicant*" who is *not* sponsored or employed by a local law enforcement agency.[7]

The Commission acknowledges that some local law enforcement agencies, such as the claimant, employ persons who have not yet completed their basic training course, and then sponsor or provide the training themselves.[8] Based on the statutory and regulatory scheme outlined above, however, the state has *not* mandated local agencies to do so.

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[3] These standards can be found in Title 11 of the California Code of Regulations.

[4] Penal Code section 13511.

[5] *Id.*

[6] See also POST's regulation, Title 11, California Code of Regulations, section 1005, subdivision (a)(9).

[7] Penal Code section 832, subdivision (g), added by Statutes of 1994, Chapter 43.

[8] Other agencies, however, require the successful completion of POST Basic Training *before* the applicant will be considered for the job. (Job Announcement for Amador County Deputy Sheriff.)

In fact, there are several community colleges approved by POST offering basic training academy courses, including the course on racial and cultural diversity, that are open to any interested individual, whether or not they are employed or sponsored by a local agency. The colleges charge an average of $2000 to cover their costs for law enforcement basic training and financial assistance is available to those students in need.[9]

Thus, the Commission finds that the test claim statute does not mandate local agencies to provide basic training, including the course on racial and cultural diversity, and does not mandate local agencies to incur costs to send their new employees to basic training.

The Commission further disagrees with the claimant's additional arguments contained in its comments to the Draft Staff Analysis submitted on February 10, 2000 and in the comments to the Final Staff Analysis dated July 19, 2000. The claimant contends that the "Guidelines for Law Enforcement's Design of Cultural Awareness Training Programs" issued by POST in February 1992 imposes new duties on local law enforcement agencies and not their employees.

However, the guidelines issued by POST were prepared in response to Senate Bill 2680, which added section 13519.4 to the Penal Code in 1990, *before* the test claim statute was enacted to amend that section.[10] As originally enacted, Penal Code section 13519.4 required POST to develop and disseminate training guidelines on the racial and cultural differences among the residents of this state. Although the guidelines provide suggestions to local law enforcement agencies, they do *not* require local agencies to provide basic training to recruits and/or train recruits on racial and cultural diversity.

Moreover, the claimant submitted a declaration from Captain Dennis Wilson with the test claim agreeing that Penal Code section 13519.4, as originally enacted by Senate Bill 2680, did not impose any state-mandated duties on local law enforcement agencies. In the declaration, Captain Wilson states the following:

> "I declare that under prior law (PC 13519.4, as added by Chapter 480, Statutes of 1990), the County of Los Angeles had no State-mandated duty to provide the subject training and that only the California Commission on Peace Officer Standards and Training's duties were addressed and that such commission duties were only to develop and disseminate guidelines for the subject training. . . ."

Thus, the Commission finds that the "Guidelines for Law Enforcement's Design of Cultural Awareness Training Programs" issued by POST in February 1992 do not impose any state mandated duties on local law enforcement agencies.

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[9] See List of POST Certified Basic Training Academies; Los Medanos College Basic Training Academy, charging $2200 for California State residents and offering financial assistance; Allan Hancock College Law Enforcement Academy stating that "the course is open to law enforcement agency 'sponsored' recruits and other interested students"; and Golden West College, whose mission statement promises that "90% of the academy graduates received jobs within three years of completion of the academy course."

[10] Statutes of 1990, Chapter 480.

The claimant also contends that the Commission's past decisions regarding training are precedential and hold that when the Legislature imposes training, it is a mandate upon the local law enforcement agency. The claimant cites the Commission's decisions in *Domestic Violence Training and Incident Reporting* (CSM – 96-362-01), *SIDS* (CSM – 4412), and the parameters and guidelines in *Domestic Violence Arrest Policies* (CSM – 96-362-02). However, these prior Commission decisions are distinguishable from this test claim and should not be applied.

The *Domestic Violence Training and Incident Reporting* test claim involved a statute that required *veteran* law enforcement officers below the rank of supervisor to complete an updated course of instruction on domestic violence every two years. The Commission denied the test claim finding no increased "costs mandated by the state".

The test claim statute at issue here, on the other hand, involves basic training for recruit officers who may or may not be employed, and does not address the continuing education of veteran officers. Thus, the Commission finds that the Commission's findings in *Domestic Violence Training and Incident Reporting* do not apply to this test claim.

The statutory scheme presented by this test claim is also different than the *SIDS* training test claim approved by the Commission in 1998 following the remand from the court. In *SIDS*, the Commission found that the training program was a new program imposed on local agencies and not on firefighters alone. In contrast to the present claim, the *SIDS* statute expressly authorized local agencies to provide the instruction and training, and to assess a fee to cover their costs. Furthermore, the SIDS training requirement applied to veteran firefighters already employed by a local agency. In addition, unlike the training provided for law enforcement officers, the court found that there were *no* state training programs available to provide SIDS training to new and veteran firefighters. Thus, the Commission finds that the Commission's findings in *SIDS* do not apply to this test claim.

Moreover, the parameters and guidelines adopted by the Commission in *Domestic Violence Arrest Policies and Standards* should not be applied here. The test claim statute in *Domestic Violence Arrest Policies and Standards* required local law enforcement agencies to develop, adopt and implement written arrest policies for domestic violence offenders. Although the Commission authorized reimbursement in the parameters and guidelines for training employed officers about the new arrest policies as an activity reasonably related to the mandated program, the test claim statute itself did not address training at all. Thus, unlike the present test claim, training recruits was *not* the "program" in question. Accordingly, the Commission finds that the *Domestic Violence Arrest Policies and Standards* test claim is not relevant here.

Finally, the claimant cites the federal Fair Labor Standards (FLSA) and the court case of *Wilson v. County of Santa Clara*[11] to support its position that local law enforcement agencies are required to pay for training. For the reasons stated below, however, the

[11] *Wilson v. County of Santa Clara* (1977) 68 Cal.App.3d 78.

Commission finds that these authorities are *not* controlling and do not apply to this test claim.

The FLSA provides employee protection by establishing the minimum wage, maximum hours and overtime pay under federal law. It is codified in title 29 of the Code of Federal Regulations (CFR). The claimant supports its position that federal law requires local agencies to pay for racial and cultural diversity training by citing 29 CFR section 785.27. Section 785.27 establishes the general rules for determining compensability of training time under the FLSA. Section 785.27 states the following:

> "Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:
>
> (a) Attendance is outside of the employee's regular workings hours;
>
> (b) Attendance is in fact voluntary;
>
> (c) The course, lecture, or meeting is not directly related to the employee's job; and
>
> (d) The employee does not perform any productive work during such attendance."

The claimant contends that since racial and cultural diversity training is required by the state and is not voluntary, then training time needs to be counted as compensable working time under section 785.27.

The Commission agrees that section 785.27 establishes the general rules for compensability of training time for employees. As stated above, however, the test claim statute applies to people enrolled in a basic training course approved by POST, whether or not they are employed or sponsored by a local agency. Since the state has not mandated local agencies to employ persons who have not yet completed basic training, the wage provisions of the FLSA are not relevant to this claim.

In addition, there is an exception to the general rules of compensability under the FLSA in 29 CFR section 553.226, which applies to those people who are employed by a local agency as a recruit and are enrolled in a basic training course outside their regular working hours. Section 553.226 describes the situations where time spent by employees of state and local governments in required training is *noncompensable*. Section 553.226 states, in pertinent part, the following:

> "(a) The general rules for determining the compensability of training time under the FLSA are set forth in §§ 785.27 through 785.32 of this title.
>
> (b) While time spent in attending training required by an employer is normally considered compensable hours of work, following are situations where time spent by employees of State and local governments in required training is considered to be *noncompensable*:

(2) *Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of government (e.g., where a State or county law imposes a training obligation on city employees); does not constitute compensable hours of work.*" (Emphasis added.)

The test claim statute requires that the course of basic training for recruit officers include adequate instruction on racial and cultural diversity. As stated above, recruits are required by statute and POST regulations to complete a basic training course before they can be "certified" to exercise the powers of a peace officer.[12]

Thus, the Commission finds that under section 553.226, subdivision (b)(2), the time taken by recruits, who are employed by a local agency, to receive racial and cultural diversity training outside of regular working hours is noncompensable under the FLSA.

The claimant also cites the 1977 case of *Wilson v. County of Santa Clara* for the proposition that attendance at the employer's school of instruction requires full compensation under the FLSA.[13] The Commission finds, however, that the *Wilson* case is distinguishable from this test claim and does not apply.

The *Wilson* case involves Health and Safety Code section 217, which requires law enforcement officers to receive training to administer first aid, including cardiopulmonary resuscitation. The last sentence of the statute expressly stated that "[s]uch training shall be provided *at no cost to the trainee*." (Emphasis added.) The plaintiff, a deputy sheriff, contended that this last sentence required the county to compensate the officer for the time spent in training if the training occurred outside an officer's normal duty hours. Alternatively, the plaintiff contended that officers were entitled to overtime compensation.

The *Wilson* court analyzed the history of Health and Safety Code section 217 and found that the last sentence, providing that the trainee shall not bear the cost of the training, was added six years after the statute was originally enacted. The court noted that until the statute was amended to add the last sentence, "the time, cost and manner in which such training would be secured was a matter to be *negotiated* between the public employee and his public employer." (Emphasis added.) The court found that the addition of the last sentence to the statute restricted the bargaining between the employer and employee. The court, however, expressed no opinion as to whether the state or the public employer would bear the expense.[14]

Unlike the statute in the *Wilson* case, the test claim statute contains *no* provision regarding who shall bear the cost of the training. Thus, based on the language of the test claim statute and as noted by the court in *Wilson*, the Commission finds that the

[12] Penal Code section 832; Title 11, California Code of Regulations section 1005, subdivision (a)(9).

[13] *Wilson, supra*, 68 Cal.App.3d 78.

[14] Id. at pg. 84.

time, cost and manner in which racial and cultural diversity training is to be secured for recruits is a *negotiable* matter between the local agency and the employee, and is not a mandate imposed on the local agency.

The *Wilson* court also analyzed the plaintiff's claim under the FLSA. The court stated that the "time spent in attending the employer's school of instruction are properly included in the hours of employment, and, under the act, compensation must be paid for those hours."[15] However, the *Wilson* case is a 1977 case and the court analyzed the FLSA as written in 1977. At that time, the FLSA did not contain the exception found in 29 CFR section 553.226 (described above), which provides that specialized training outside of regular work hours required for certification of employees of a governmental jurisdiction by law of a higher level of government does *not* constitute compensable hours of work. That exception was added to the FLSA in 1987.[16] Therefore, the Commission finds that the court's holding and analysis of the FLSA in the *Wilson* case is not controlling.

CONCLUSION

Based on the foregoing, the Commission concludes that the test claim statute is not subject to article XIII B, section 6 of the California Constitution because it does not impose any mandated duties or activities on any local governmental agency to provide the training, or to incur costs to send their new employees to basic training. Rather, the requirement to complete the basic training course on racial and cultural diversity is a mandate imposed only on the individual who seeks peace officer status.

Accordingly, the Commission denies this test claim.

[15] Id. at pg. 87.

[16] 52 Federal Register 2012.

Commission on State Mandates

List Date: 12/26/1997 **Mailing Information** Draft Staff Analysis

Mailing List

Claim Number 97-TC-06 **Claimant** Claim of the County of Los Angeles

Subject 1267/92, amending Penal Code section 13519.4

Issue Law Enforcement Racial and Cultural Diversity Training

Mr. Allan Burdick,
DMG-MAXIMUS

4320 Auburn Blvd., Suite 2000
Sacramento CA 95841

Tel: (916) 485-8102
FAX: (916) 485-0111

Ms. Annette Chinn,
Cost Recovery Systems

1750 Creekside Oaks Drive, Suite 290
Sacramento CA 95833-3640

Tel: (916) 939-7901
FAX: (916) 939-7801

Mr. Glen Fine (P-8), Assistant Executive Director
Peace Officers Standards and Training
Administrative Services Division
1601 Alhambra Boulevard
Sacramento CA 95816-7083

Tel: (916) 227-2802
FAX: (916) 227-3895

Mr. Leonard Kaye, Esq.,
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles CA 90012

Tel: (213) 974-8564
FAX: (213) 617-8106

Mr. James Lombard (A-15), Principal Analyst
Department of Finance

915 L Street
Sacramento CA 95814

Tel: (916) 445-8913
FAX: (916) 327-0225

Subject 1267/92, amending Penal Code section 13519.4

[illegible]e Law Enforcement Racial and Cultural Diversity Training

Ms. Laurie McVay,
DMG-MAXIMUS

4320 Auburn Blvd. Suite 2000 *Tel:* (916) 485-8102
Sacramento CA 95841 *FAX:* (916) 485-0111

Mr. Paul Minney,
Girard & Vinson

1676 N. California Blvd. Suite 450 *Tel:* (925) 746-7660
Walnut Creek CA 94596 *FAX:* (925) 935-7995

Mr. Andy Nichols,
Vavrinek Trine Day & Co., LLP

12150 Tributary Point Drive, Suite 150 *Tel:* (916) 353-1050
Gold River CA 95670 *FAX:* (916) 351-1020

[illegible]s. Virgina Papan, Deputy Director
Office of Criminal Justice Planning

1130 K Street Suite 300 *Tel:* (916) 324-9132
Sacramento CA 95814 *FAX:* (916) 324-9167

Ms. Sandy Reynolds, President (Interested Person)
Reynolds Consulting, Inc.

P.O. Box 987 *Tel:* (909) 672-9964
Sun City CA 92586 *FAX:* (909) 672-9963

Mr. Mark Sigman, Accountant II
Riverside Co. Sheriff's Office

4095 Lemon Street P O Box 512 *Tel:* (909) 955-2709
Riverside Ca 92502 *FAX:* (909) 955-2428

Interested Person

Claim Number 97-TC-06 **Claimant** Claim of the County of Los Angeles

Subject 1267/92, amending Penal Code section 13519.4

Issue Law Enforcement Racial and Cultural Diversity Training

Jim Spano,
State Controller's Office
Division of Audits (B-8)
300 Capitol Mall, Suite 518 P.O. Box 942850 *Tel:* (916) 323-5849
Sacramento CA 95814 *FAX:* (916) 324-7223

Mr. Paige Vorhies (B-8), Bureau Chief
State Controller's Office
Division of Accounting & Reporting
3301 C Street Suite 500 *Tel:* (916) 445-8756
Sacramento CA 95816 *FAX:* (916) 323-4807

Mr. David Wellhouse,
Wellhouse & Associates

9175 Kiefer Blvd Suite 121 *Tel:* (916) 368-9244
Sacramento CA 95826 *FAX:* (916) 368-5723

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

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

October 31, 2000, I served the:

Adopted Statement of Decision
Law Enforcement Racial and Cultural Diversity Training (CSM – 97-TC-06)
Penal Code Section 13519.4
Statutes of 1992, Chapter 1267
County of Los Angeles, Claimant

by placing a true copy thereof in an envelope addressed to:

Mr. Leonard Kaye
Department of Auditor-Controller
County of Los Angeles
Kenneth Hahn Hall of Administration
500 West Temple Street, Suite 603
Los Angeles, CA 90012

State Agencies and Interested Parties (See attached mailing list);

and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully paid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 31, 2000, at Sacramento, California

Thomas Dempsey

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:	NO. CSM 98-TC-12
Penal Code Section 13515,	*Elder Abuse Training*
Statutes of 1997, Chapter 444; and	STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7
Filed on January 21, 1999;	
By the City of Newport Beach	(Adopted on January 25, 2001)

STATEMENT OF DECISION

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

This Decision shall become effective on January 29, 2001.

Paula Higashi, Executive Director

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:	NO. CSM-98-TC-12
Penal Code Section 13515,	*Elder Abuse Training*
Statutes of 1997, Chapter 444; and	STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7
Filed on January 21, 1999;	
By the City of Newport Beach	(Adopted on January 25, 2001)

STATEMENT OF DECISION

On November 30, 2000, the Commission on State Mandates (Commission) heard this test claim during a regularly scheduled hearing. Ms. Pamela Stone and Mr. Glen Everroad, appeared for the City of Newport Beach. Sergeant Kent Stoddard appeared as a witness for the City of Newport Beach Police Department. Mr. Tom Lutzenberger and Mr. Daniel Stone, Deputy Attorney General, appeared for the Department of Finance.

At the hearing, oral and documentary evidence was introduced, the test claim was submitted, and the vote was taken.

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

The Commission, by a vote of 7 to 0, approved this test claim.

Background

Test Claim Statute

The test claim legislation, Statutes of 1997, Chapter 444, enacted Penal Code section 13515 which provides:

> Every city police officer or deputy sheriff at a supervisory level and below who is assigned field or investigative duties shall complete an elder abuse training course certified by the Commission on Peace Officers Standards and Training [POST] by January 1, 1999, or within 18 months of assignment of field duties. . . .

COMMISSION FINDINGS

In order for a statute or executive order, which is the subject of a test claim, to impose a reimbursable state mandated program, the language: (1) must direct or obligate an activity or task upon local governmental entities; and (2) the required activity or task must be new, thus constituting a "new program," or it must create an increased or "higher level of service" over the former required level of service. The court has defined a "new program" or "higher level of service" as a program that carries out the governmental function of providing services to the public, or a law, which to implement a state policy, imposes unique requirements on local agencies or school districts that do not apply generally to all residents and entities in the state. To determine if a required activity is new or imposes a higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must be state mandated.[1] To determine if the new program of higher level of service is state mandated, a review of state and federal statutes, regulations, and case law must be undertaken.[2]

This test claim presents the following issues:

- Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose a new program or higher level of service upon local agencies within the meaning of article XIII B, section 6 of the California Constitution and constitute costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?
- Does Government Code section 17556, subdivision (a), apply to the test claim?

Issue 1

Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

In order for a statute to be subject to article XIII B, section 6 of the California Constitution, the statutory language must direct or obligate an activity or task upon local governmental agencies. If the statutory language does not mandate local agencies to perform a task, then compliance with the test claim statute is within the discretion of the local agency and a reimbursable state mandated program does not exist.

The claimant contends that Penal Code section 13515 requires cities to provide elder abuse training to all police officers or deputy sheriffs at a supervisory level or below that are assigned field or investigative duties. The claimant is requesting reimbursement for the salaries and benefits for officers attending the training and for costs associated with a sergeant's time to set up and prepare the training. The claimant is also requesting reimbursement for ongoing costs associated with training new officers as they are hired by the City of Newport Beach.

The Department of Finance (DOF) contends that reimbursement is not required under article XIII B, section 6 since the training requirements detailed in Penal Code section 13515 are imposed upon the peace officers themselves, and not the city.

Penal Code section 13515 requires that every city police officer or deputy sheriff at a supervisory level and below assigned field or investigative duties shall receive elder abuse training by

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[1] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835.

[2] *City of Sacramento* v. *State of California* (1990) 50 Cal.3d 51, 76; *Hayes* v. *Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1594; Government Code sections 17513, 17556.

January 1, 1999, or within 18 months of assignment to field duties. The plain language of section 13515 does not require local agencies to provide or pay for the training. In addition, there are no other state statutes or executive orders requiring local agencies to pay for the training.

Nevertheless, section 13515 specifically refers to "police officer" or "deputy sheriff." Penal Code section 830.1 defines "police officers" and "deputy sheriffs" as those persons who are "*employed*" by a public safety agency of a county, city, or special district. Since police officers and deputy sheriffs, by definition, are employed by local agencies, The Commission finds that the federal Fair Labor Standards Act (FLSA), which requires local agencies to compensate their employees for training under specified circumstances, is relevant to this claim.

Generally, the FLSA provides employee protection by establishing the minimum wage, maximum hours, and overtime pay under federal law. In 1985, the United States Supreme Court found that the FLSA applies to state and local governments.[3] The FLSA is codified in title 29 of the Code of Federal Regulations. The requirement to compensate employees for training time under the FLSA is described below.

Training Conducted During Regular Working Hours

If elder abuse training is required by the state, is not voluntary, and is conducted during regular working hours, training time needs to be counted as compensable working time under section 785.27 of the FLSA and treated as an obligation imposed on the local agency. Section 785.27 provides:

> Attendance at lectures, meetings, training programs and similar activities *need not be counted* as working time if the following four criteria are met:
>
> (a) Attendance is outside of the employee's regular working hours;
>
> (b) Attendance is in fact voluntary;
>
> (c) The course, lecture, or meeting is not directly related to the employee's job; and
>
> (d) The employee does not perform any productive work during such attendance. (Emphasis added.)

The Commission finds that local agencies are required under the FLSA to compensate their employees for mandatory training *if* the training occurs during the employee's regular working hours. The Commission finds section 785.27 is inapplicable to this test claim because elder abuse training can be offered during regular working hours, officers' attendance is not voluntary, the training is directly related to the officers' job, and officers engage in productive work while attending elder abuse training. Further support that section 785.27 is inapplicable to this test claim is that the obligation to pay for elder abuse training is an obligation imposed by state, not federal, law. The Commission finds that there is no federal statutory or regulatory scheme that requires cities to provide elder abuse training to its officers and sheriffs. Rather, what sets the provisions of the FLSA in motion, requiring local agencies to compensate officers for elder abuse training, is the test claim statute. If the state had not created this program, officers would not be required to receive elder abuse training and local agencies would not be obligated to compensate their officers for such training.

[3] *Garcia* v. *San Antonio Metropolitan Transit Authority et al.* (1985) 469 U.S. 528.

Accordingly, the Commission finds that local agencies are mandated by the state through section 13515 to provide elder abuse training to police officers and deputy sheriffs assigned to field or investigative duties *if* the training occurs during the employee's regular working hours.

Training Conducted Outside Regular Working Hours

The claimant asserts that the City of Newport Beach would need to provide training to its officers outside regular working hours. The Commission notes that an exception to the FLSA was enacted in 1987, which provides that time spent by employees of state and local governments in training required for certification by a higher level of government that occurs outside of the employee's regular working hours is noncompensable. In this regard, 29 CFR section 553.226 provides the following:

> (a) The general rules for determining the compensability of training time under the FLSA are set forth in §§ 785.27 through 785.32 of this title.
>
> (b) While time spent in attending training required by an employer is normally considered compensable hours of work, following are situations where time spent by employees of State and local governments in required training is considered to be *noncompensable*:
>
> "...
>
> "(2) *Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of government (e.g., where a State or county law imposes a training obligation on city employees), does* ***not*** *constitute compensable hours of work.* (Emphasis added.)

The Commission finds that 29 CFR section 553.226, subdivision (b)(2), applies when the elder abuse training is conducted outside the employee's regular working hours. In such cases, the local agency is not required to compensate the employee. Rather, the cost of elder abuse training becomes a term or condition of employment subject to the negotiation and collective bargaining between the local agency and the employee. However, the inquiry must continue to analyze how the inclusion of training in a memorandum of understanding (MOU) between local agencies and their employees relates to a determination of whether section 13515 is subject to article XIII B, section 6 of the California Constitution.

The Meyers-Milias-Brown Act governs collective bargaining between local agencies and their employees.[4] The Act requires the governing body of the local agency and its representatives to meet and confer in good faith regarding wages, hours, and other terms of employment with representatives of employee organizations. If an agreement is reached, the parties enter into a collective bargaining agreement, or MOU. The MOU becomes binding on the local agency and employees only upon the approval and adoption by the governing board of the local agency.[5]

[4] Government Code sections 3500 et al.

[5] Government Code sections 3500, 3505, and 3505.1. The Commission analyzed the Meyers-Milias-Brown Act in the *SIDS* test claim to determine if the fee authority established in the statute could realistically be imposed on firefighter employees. Based on evidence presented at the hearing, the Commission found that even though local agencies have the unilateral authority to impose changes regarding the terms of employment, the use of the unilateral authority is rare. Therefore, the Commission determined that the authority to impose fees upon firefighters in the SIDS case could not be realistically exercised by local agencies.

Although providing or paying for elder abuse training conducted outside the employee's regular working hours is an issue negotiated at the local level, the California Constitution prohibits the Legislature from impairing obligations or denying rights to the parties of a valid, binding contract absent an emergency.[6] Therefore, if a MOU requires a local agency to provide or pay for training, then section 13515 is subject to article XIII B, section 6 of the California Constitution.

The test claim statute became effective on September 24, 1997. Accordingly, the Commission finds that providing elder abuse training outside the employee's regular working hours is an obligation imposed on those local agencies that, as of September 24, 1997, were bound by a MOU that required the agency to provide or pay for continuing education training. However, when that MOU terminated training conducted outside the employee's regular working hours becomes a negotiable matter subject to the discretion of the local agency. Thus, under such circumstances, the Commission finds that the requirement to provide or pay for elder abuse training is not an obligation imposed by the state on a local agency.

Conclusion

Based on the foregoing, the Commission finds that Penal Code section 13515 is subject to article XIII B, section 6 of the California Constitution because it imposes an obligation on local agencies to provide elder abuse training under the following circumstances:

- When the elder abuse training occurs during the employee's regular working hours; or
- When the elder abuse training occurs outside the employee's regular working hours *and* there is an obligation imposed by an MOU existing on September 24, 1997 (the effective date of the statute) that requires the local agency to provide or pay for continuing education training.

However, the issue remains whether the test claim legislation imposes a new program or higher level of service upon local agencies that constitute costs mandated by the state. This issue is addressed below.

Issue 2

Does the test claim legislation impose a new program or higher level of service upon local agencies within the meaning of article XIII B, section 6 of the California Constitution and constitute costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

City police officers and deputy sheriffs were not required to receive elder abuse training before the enactment of Penal Code section 13515. Thus, the Commission finds that section 13515 constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution. However, the Commission must continue its inquiry to determine if there are any "costs mandated by the state."

Government Code section 17514 defines "costs mandated by the state" as any *increased* costs a local agency is required to incur as a result of any statute or executive order that mandates a new program or higher level of service.

The claimant contends that Penal Code section 13515 results in increased costs mandated by the state in the form of salaries and benefits for the time that city police officers and deputy sheriffs

[6] California Constitution, article 1, section 9.

spend in training and the costs incurred to present the course. The claimant submitted cost data to support its claim.

DOF contends that the test claim legislation has not imposed any costs on local agencies since the training may be available from other sources. DOF also contends that section 13515 does not impose costs on local agencies since the two-hour elder abuse training course was intended by the Legislature to be delivered as part of the continuing education requirement of 24 hours every two years.

In response to DOF's contentions, the claimant states that elder abuse training is unavailable from other sources. The claimant further contends that if the Legislature intended elder abuse training to be included in the 24-hour requirement, it would have expressly stated that intent. However, the express language of section 13515 provides that such training shall occur "by January 1, 1999 or within 18 months of assignment to field duties," not that elder abuse training must be included in the 24-hour requirement. Finally, the claimant contends that Government Code section 17556, subdivision (a), is inapplicable to the present test claim.

Scope of the Mandate

In order to determine if there are any costs mandated by the state, the Commission must first determine the scope of the mandate. Section 13515 expressly requires city police officers and deputy sheriffs to receive elder abuse training by January 1, 1999 or within 18 months of being assigned to field duties. The claimant alleges a reimbursable state-mandated program exists for the following activities: (1) the costs to develop the elder abuse training course; (2) trainer time associated with administering the elder abuse training course (including necessary materials provided to trainees); and (3) trainee time associated with attending the elder abuse training program. The Commission addresses each of these issues below.

1. *Costs to Develop the Elder Abuse Training Program*

In DOF's enrolled bill report for the test claim legislation, DOF notes that:

> [POST] indicates that this bill will have *no fiscal impact on [POST] because an elder abuse telecourse has already been developed and broadcasted to law enforcement agencies over closed-circuit television.* In addition, POST staff indicate[s] this bill would likely have no fiscal impact on local law enforcement agencies because, in most instances, law enforcement agencies record these broadcasts for future training purposes. *A law enforcement agency without this telecourse may request a video taped copy from POST free of charge.*[7] (Emphasis added.)

Section 13515 requires city police officers and deputy sheriffs to receive elder abuse training *by* January 1, 1999 or within 18 months of being assigned field duties. Based on the express completion date for training, by January 1, 1999 or within 18 months of being assigned field duties, the Commission finds that the Legislature intended to require elder abuse training on a one-time basis. Moreover, section 13515 requires that any elder abuse training course must be certified by POST. The elder abuse training course developed and certified by POST consists of two hours of training.

Based on the fact POST has already developed and provided the elder abuse training course to law enforcement agencies, the Commission finds that local agencies are *not* required by the state

[7] The Department of Finance Enrolled Bill Report for AB 870 is attached as Exhibit I to the Department of Finance's April 15, 1999 Opposition.

to incur costs to develop or design the training course and, thus, such costs are not reimbursable under article XIII B, section 6 of the California Constitution and Government Code section 17514. Thus, the Commission finds that any training on elder abuse beyond two hours is provided at the discretion of the city and is not reimbursable under article XIII B, section 6.

2. *Trainer Time Providing the Elder Abuse Training Course*

POST's regulations provide that elder abuse training shall include instruction in the law, elder abuse recognition, reporting requirements and procedures, neglect, fraud, and victim/witness issues.[8] As stated in the test claim legislation's enrolled bill report, POST has developed the two-hour elder abuse training video to be used by law enforcement agencies. Although POST has developed the two-hour elder abuse training course, the course must still be administered by staff that is knowledgeable of the course. The Commission finds that local agencies will incur increased costs to *present* the training in the form of trainer time associated with administering the course including necessary materials provided to trainees. Therefore, the Commission finds that such costs are reimbursable under article XIII B, section 6 of the California Constitution and Government Code section 17514.

3. *Trainee Time Associated with Attending the Elder Abuse Training Course*

In 1998, the Commission analyzed whether a statute requiring continuing education training for peace officers imposed "costs mandated by the state" in the *Domestic Violence Training and Incident Reporting* test claim.[9] That test claim statute included the following language:

> The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local government.

Thus, the Commission determined in the *Domestic Violence Training and Incident Reporting* test claim that if the domestic violence training course caused an increase in the total number of required continuing education hours, then the increased costs associated with the new training course were reimbursable as "costs mandated by the state." On the other hand, if there was no overall increase in the total number of continuing education hours, then there were no increased training costs associated with the course. Instead, the cost of the training course was absorbed by local law enforcement agencies within their existing resources available for training.

The Commission recognized POST regulations, which provide that local law enforcement officers must receive at least 24 hours of Advanced Officer continuing education training every two years. POST regulations provide:

> Continuing Professional Training (Required).
> (1) Every peace officer below the rank of a middle management position as defined in section 1001 and every designated Level 1 Reserve Officer as defined in Commission Procedure H-1-2 (a) *shall satisfactorily complete the Advanced Officer Course of 24* ***or more hours*** *at least once every two years after meeting the basic training requirement.*[10] (Emphasis added.)

The Commission found that no costs were mandated by the state in the *Domestic Violence Training and Incident Reporting* test claim denying the claim for the following reasons:

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[8] Title 11, California Code of Regulations, section 1081, subdivision (a)(26).

[9] CSM 96-362-01, *Domestic Violence Training and Incident Reporting.*

[10] Title 11, California Code of Regulations, section 1005, subdivision (d).

- *Immediately before and after* the effective date of the test claim legislation, POST's minimum required number of continuing education hours for the law enforcement officers in question *remained the same at 24 hours*. After the operative date of the test claim legislation these officers must still complete at least 24 hours of professional training every two years;
- The two hour domestic violence training update may be credited toward satisfying the officer's 24-hour minimum;
- The two hour training is neither separate and apart nor "on top of" the 24-hour minimum;
- POST does not mandate creation and maintenance of a separate schedule and tracking system for this two hour course;
- POST prepared and provides local agencies with the course materials and video tape to satisfy the training in question; and
- Of the 24-hour minimum, the two-hour domestic violence training update is the only course that is legislatively mandated to be continuously completed every two years by the officers in question. The officers may satisfy their remaining 22-hour requirement by choosing from *the many elective courses* certified by POST.

Like the *Domestic Violence Training and Incident Reporting* test claim, POST prepared and presented the elder abuse training course for city police officers and deputy sheriffs as a two-hour telecourse. In addition, the elder abuse training course is a one-time course. Every city police officer or deputy sheriff must complete the course by January 1, 1999 or within 18 months of being assigned field duties.

Moreover, the elder abuse training course did not cause the minimum number of required continuing education hours to increase. Rather, the minimum number of continuing education hours remained at 24 hours immediately before and after the effective date of the test claim legislation. The two-hour elder abuse training course may be credited toward satisfying an officer's 24-hour minimum.

Like the Commission's finding in the *Domestic Violence Training and Incident Reporting* test claim, it would appear that local law enforcement agencies do not incur increased training costs for the one-time, two-hour elder abuse training course because the cost of the course is absorbed by local agencies within their existing resources available for training.

However, the Commission finds that this test claim differs from the *Domestic Violence Training and Incident Reporting* test claim in one important respect. In the *Domestic Violence Training and Incident Reporting* test claim, the two-hour domestic violence training course must be completed every two years. While in the present test claim, the two-hour elder abuse training course need only be completed *once*, by January 1, 1999 or within 18 months of being assigned field duties. The Commission finds that there are two instances where the two-hour elder abuse training course would impose costs mandated by the state upon local agencies for the trainee time associated with attending the course.

The following table outlines the two instances where the Commission finds that the two-hour elder abuse training course would impose costs mandated by the state upon local agencies:

	24-Hour Continuing Education Requirement	**When Requirement Completed**	**When New 2-Year Cycle Begins**	**Reimbursable Activity**
OFFICER A	Completed 24	*Before* 9/24/97	Anytime *after*	Attending elder

(assigned field duties *before* the enactment of the TC legislation)	hours	(effective date of TC legislation)	1/1/99	abuse training course
OFFICER B (assigned field duties *after* enactment of TC legislation)	Completed 24 hours	Anytime	Anytime *after* 18 month requirement as outlined in section 13515	Attending elder abuse training course

Based on the example above, section 13515 requires OFFICER A to attend the elder abuse training course by January 1, 1999. If OFFICER A has already completed the 24-hour requirement, and their new cycle begins *after* January 1, 1999, then their attendance in the course is above and beyond the 24-hour requirement. In essence, OFFICER A would complete 26 hours of training, two more hours than required by state law, and therefore, under this example, those two hours of elder abuse training are reimbursable.

Based on the example above, section 13515 requires OFFICER B to attend the elder abuse training course within 18 months of being assigned field duties. If OFFICER B has already completed their 24-hour requirement *before* being assigned field duties, and their new cycle begins *later* than 18 months after being assigned field duties, then their attendance in the course is above and beyond the 24-hour requirement. In essence, OFFICER B would complete 26 hours of training, two more hours than required by state law, and therefore, under this example, those two hours of elder abuse training are reimbursable.

Therefore, the Commission finds that the test claim legislation has imposed costs mandated by the state upon local agencies for the following activities: (1) trainer time associated with administering the elder abuse training course (including necessary materials distributed to trainees); and (2) the trainee time associated with attending the elder abuse training course in those instances where the police officer or deputy sheriff has already completed their 24 hours of continuing education when the requirement of section 13515 applied to the particular officer. The Commission further finds that training city police officers or deputy sheriffs hired after September 24, 1997, the effective date of the test claim statue, *does not* impose costs mandated by the state upon local agencies because such officers can apply the two-hour elder abuse training course towards their 24-hour requirement.

Issue 3

Does Government Code section 17556, subdivision (a), apply to this test claim?

DOF contends that, even if costs had been imposed on local agencies, subvention would not lie because section 13515 was enacted at the request of local agencies. Therefore, DOF contends that Government Code section 17556, subdivision (a), applies to the present test claim.

Government Code section 17556, subdivision (a), provides:

> The commission shall not find costs mandated by the state . . . in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:
>
> (a) The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local

agency or school district requesting the legislation authority. *A resolution from the governing body or a letter from a delegated representative* of the governing body of a local agency or school district which requests authorization for that local agency or school district to implement a given program *shall constitute a request within the meaning of this paragraph.* (Emphasis added.)

DOF maintains that the sponsor of AB 870, the test claim's implementing legislation, was the San Francisco District Attorney's Office, a local agency, and that AB 870 was supported by the California District Attorneys Association (CDAA). DOF further contends that since the CDAA represents the elected district attorneys in all 58 counties, the CDAA is, in effect, the delegated representative for the City of Newport Beach.

The claimant contends that section 17556, subdivision (a), is inapplicable to the present test claim. The claimant states that the CDAA's support of AB 870 does not equate to the City of Newport Beach requesting the legislation. The claimant further contends that DOF fails to provide any evidence that the City of Newport Beach expressly requested the legislation either though board resolution or a letter from a delegated city representative.

Based on the plain language of section 17556, subdivision (a), there are only two instances where the Commission can find that a local agency or school district requested legislative authority to implement a particular program: (1) when the governing body for the local agency or school district, by resolution, makes such a request: or (2) when a delegated representative of a local agency or school district submits a letter making such a request. In both circumstances, the key fact is that the governing body of a local agency or school district must make the request. Based on the documentation provided by the parties, and the Commission's review of the legislative history of AB 870, there is no evidence that the claimant requested authority to implement elder abuse training for city police officers or deputy sheriffs. Therefore, the Commission finds that the CDAA's *support* of AB 870 does not meet the threshold specified in subdivision (a). Thus, the Commission finds that Government Code section 17556, subdivision (a), is inapplicable to this test claim.

CONCLUSION

The Commission finds that Penal Code section 13515 is subject to article XIII B, section 6 of the California Constitution because it imposes an obligation on local agencies to provide elder abuse training under the following circumstances:

- When the elder abuse training occurs during the employee's regular working hours; or
- When the elder abuse training occurs outside the employee's regular working hours **and** there is an obligation imposed by an MOU existing on September 24, 1997 (the effective date of the statute) that requires the local agency to provide or pay for continuing education training.

Further, the Commission finds that the test claim legislation has imposed costs mandated by the state upon local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities:

- Costs to present the one-time, two-hour course in the form of trainer time and necessary materials provided to trainees; and
- Salaries, benefits and incidental expenses for each city police officer or deputy sheriff to receive the one-time, two-hour course on elder abuse in those instances where the police officer or deputy sheriff has already completed their 24 hours of continuing education

when the requirement of section 13515 applied to the particular officer, and when a new two-year training cycle does not commence until after the deadline for that officer or deputy to complete elder abuse training.[11]

However, the Commission also finds that training city police officers or deputy sheriffs hired after September 24, 1997, the effective date of the test claim statue, **does not** impose costs mandated by the state because such officers can apply the two-hour elder abuse training course towards their 24-hour requirement.

In addition, the Commission finds that Government Code section 17556, subdivision (a), is inapplicable to the test claim, because there is no evidence that the claimant requested authority to implement elder abuse training for city police officers or deputy sheriffs.

[11] This paragraph was modified pursuant to Dan Stone's comments at the hearing.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

<table>
<tr>
<td>IN RE CONSOLIDATED TEST CLAIM ON:

Commission on Peace Officer Standards and Training (POST) Bulletin: 98-1;
POST Administrative Manual, Procedure D-13;

Filed on June 29, 2001;

By County of Los Angeles, Claimant;

Filed on September 13, 2002;

By Santa Monica Community College District, Claimant.</td>
<td>No. 00-TC-19/02-TC-06

Mandatory On-The-Job Training For Peace Officers Working Alone

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7

(Adopted on July 29, 2004)</td>
</tr>
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STATEMENT OF DECISION

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

______________________________ ______________

PAULA HIGASHI, Executive Director Date

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE CONSOLIDATED TEST CLAIM ON:	No. 00-TC-19/02-TC-06
Commission on Peace Officer Standards and Training (POST) Bulletin: 98-1; POST Administrative Manual, Procedure D-13;	*Mandatory On-The-Job Training For Peace Officers Working Alone*
Filed on June 29, 2001;	STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7
By County of Los Angeles, Claimant;	
Filed on September 13, 2002;	*(Adopted on July 29, 2004)*
By Santa Monica Community College District, Claimant.	

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on July 29, 2004. Leonard Kaye appeared on behalf of the County of Los Angeles. Leo Shaw appeared on behalf of the Santa Monica Community College District. Pamela Stone appeared on behalf of the California State Association of Counties. Georgia Johas appeared on behalf of the Department of Finance (DOF). Howell Snow and Bud Lewellen appeared on behalf of the Commission on Peace Officer Standards and Training.

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

The Commission adopted the staff analysis to deny this test claim by a vote of 5-0.

BACKGROUND

This test claim has been filed on documents issued by the Commission on Peace Officer Standards and Training (POST). POST Bulletin 98-1 and the POST Administrative Manual (PAM) procedure D-13, establish field training requirements for peace officers that work alone and are assigned to general law enforcement patrol duties. The claimants contend that the POST bulletin and manual constitute an executive order that requires reimbursement pursuant to article XIII B, section 6 of the California Constitution.

The POST bulletin, which was issued on January 9, 1998, states in pertinent part the following:

> Following a public hearing on November 6, 1997, the Commission on Peace Officer Standards and Training (POST) approved amendments to Commission Regulation 1005 and Procedure D-13 relating to establishing

a mandatory POST-approved Field Training Program for peace officers assigned to general law enforcement patrol duties. This Commission action implements one of the objectives in its strategic plan (to increase standards and competencies of officers by integrating a mandatory field training program as part of the basic training requirement). POST's regulations and procedures have incorporated most of the important elements of successful field training programs already in existence in California law enforcement agencies. Significant changes in regulation include:

- All regular officers, appointed after January 1, 1999 and after completing the Regular Basic Course are required to complete a POST-approved Field Training Program (described in PAM section D-13) prior to working alone in general law enforcement patrol assignments. Trainees in a Field Training Program shall be under the direct and immediate supervision (physical presence) of a qualified field training officer.
- The field training program, which shall be delivered over a minimum of 10 weeks, shall be based upon structured learning content as recommended in the *POST Field Training Program Guide* or upon a locally developed field training guide which includes the minimum POST specified topics.
- Officers are exempt from this requirement: 1) while the officer's assignment remains custodial, 2) if the employing agency does not provide general law enforcement patrol services, 3) if the officer is a lateral entry officer possessing a POST Regular Basic Certificate whose previous employment included general law enforcement patrol duties, or 4) if the employing authority has obtained a waiver as provided in PAM section D-13 as described below.
- A waiver provision has been established to accommodate any agency that may be unable to comply with the program's requirements due to either financial hardship or lack of availability of personnel who qualify as field training officers.
- Agencies are encouraged to apply for a POST-Approved Field Training Program prior to January 1, 1999, and as soon as all POST program requirements are in place (e.g., agency policies reviewed for conformance and sufficient numbers of qualified field training officers have been selected and trained) to ensure availability of a POST-approved program for new hires after that date.
- Requirements for the POST Regular Basic Certificate are not affected by the field training requirement.

Only those agencies affected by the new requirements (Police Departments, Sheriff's Departments, School/Campus Police Departments, and selected other agencies in the POST program) will receive additional documents attached to this bulletin as follows:

1. Description of the program approval process
2. Copies of the Commission Regulations which are effective January 1, 1999
3. Copy of the Application for POST-Approved Field Training Program (POST 2-229, Rev 12/97)
4. Copy of the POST Field Training Guide 1997

Effective January 1, 1999, section 1005 of the POST regulations was amended to provide for the field training program.[1] As amended, section 1005, subdivision (a)(2), stated in relevant part that "[e]very regular officer, following completion of the Regular Basic Course and before being assigned to perform general law enforcement patrol duties without direct and immediate supervision, shall complete a POST-approved Field Training Program as set forth in PAM [POST Administrative Manual] section D-13."

On July 1, 2004, further amendments to POST's regulations and administrative manual on the field training program went into effect. According to the regulatory notice issued by POST, section 1005 of the POST regulations was amended to "eliminate possible confusion with other courses in the POST Administrative Manual listed as 'Basic' courses." In addition, some of the required activities for the field training program that were originally listed in Procedure D-13 of the POST Administrative Manual were placed in section 1004 of the POST regulations.[2]

The field training activities provided in the POST Administrative Manual and in POST regulations include the following:

- Any department that employs peace officers and/or Level I Reserve peace officers shall have a POST-approved field training program. Requests for approval of the program shall be submitted on form 2-229, signed by the department head.
- The field training program shall be delivered over a minimum of 10 weeks and based upon the structured learning content specified in the POST Administrative Manual section D-13 and the POST Field Training Program Guide.[3]
- The trainee shall have successfully completed the Regular Basic Course before participating in the field training program.

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[1] California Code of Regulations, title 11, section 1005.

[2] See exhibit I, Bates pages 481 et seq., Item 5, July 29. 2004 Commission Hearing, for POST's notice of rulemaking. In addition, on July 1, 2004, the field training program content and course curricula was updated to include specific components of leadership, ethics, and community oriented policing.

[3] The POST Field Training Program Guide, Exhibit I, Bates pages 374 et seq., Item 5, July 29, 2004 Commission Hearing.

- The field training program shall have a training supervisor/administrator/coordinator that has been awarded or is eligible for the award of a POST Supervisory Certificate, and meets specified POST requirements, including completion of a POST-certified Field Training Supervisor/Administrator/Coordinator Course.
- The field training program shall have field training officers that meet specified POST requirements, including completion of a POST-certified Field Training Officer Course.
- A trainee assigned to general law enforcement patrol duties shall be under the direct and immediate supervision (physical presence) of a qualified field training officer. A trainee assigned to non-peace officer, specialized functions for the purpose of specialized training or orientation (i.e., complaint/dispatcher, records, jail, investigations) is not required to be in the immediate presence of a qualified field training officer.
- Each trainee shall be evaluated daily with written summaries of performance prepared and reviewed with the trainee by the field training officer. Each trainee's progress shall be monitored by a field training administrator/supervisor by review and signing of daily evaluations and/or completing weekly written summaries of performance that are reviewed by the trainee.
- Each field training officer shall be evaluated by the trainee and supervisor/administrator at the end of the program.[4]

Claimants' Positions

Both claimants contend that POST Bulletin 98-1 and Administrative Manual Procedure D-13 constitute a reimbursable state-mandated program. The County of Los Angeles is requesting reimbursement for the following activities:

- One-time cost to design and develop a ten-week on-the-job training program, including course content and evaluation procedures to comply with the subject law.[5]
- One-time cost to meet and confer with training experts on curriculum development.[6]
- One-time cost to design training materials including, but not limited to, training videos and audio visual aids.[7]

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[4] Exhibit A (Bates pp. 169-175) and Exhibit I (Bates p. 481), POST Administrative Manual, Procedure D-13, and section 1004 of the POST regulations, effective July 1, 2004. (Item 5, July 29, 2004 Commission Hearing.)

[5] Declaration of Lieutenant Bruce Fogarty, Los Angeles County Sheriff's Department, dated June 21, 2001. Staff notes that the County of Los Angeles' field training program is 28 weeks of training. (See Exhibit A, Bates p. 194, to Item 5, July 29, 2004 Commission Hearing, for the County of Los Angeles Field Training Program Manual.)

[6] *Ibid.*

- One-time cost to comply with POST application process for POST approval of county field training program.[8]
- Continuing cost for instructor time to prepare and teach ten-week training classes.[9]

  This includes the following instructor and administrator training:

  - 40-hour POST field training officer course in accordance with POST procedure, D-13-5;[10]
  - 24-hour POST field training administrator course, POST procedure D-13-6;[11] and
  - 24- hour field training officer's update, POST procedure D-13-7.[12]
- Continuing cost for trainee time to attend the ten-week training class.[13]
- Continuing cost to review and evaluate trainees to ensure that each phase is successfully completed.[14]

Santa Monica Community College District requests reimbursement for the following activities:

- Develop and implement policies and procedures, with periodic updates.
- Develop and implement tracking procedures to assure that every law enforcement officer employed by the district participates in the field training program.
- Pay the unreimbursed costs for travel, subsistence, meals, training fees and substitute salaries of field training officers and law enforcement officers attending the training.
- Plan, develop and implement a field training program and submit an application for approval of the field training program.
- Apply for a waiver of the field training requirements when unable to comply due to either financial hardship or lack of availability of personnel who qualify as field training officers.[15]

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[7] *Ibid.*

[8] Exhibit A, Bates pages 113-115, to Item 5, July 29, 2004 Commission Hearing.

[9] Declaration of Lt. Bruce Fogarty.

[10] Exhibit A, Bates pages 116 and 121, to Item 5, July 29, 2004 Commission Hearing.

[11] *Id.* at page 122.

[12] *Ibid.*

[13] Declaration of Lt. Bruce Fogarty.

[14] *Ibid.*

Position of the Department of Finance

The Department of Finance filed comments on both test claims arguing that the test claim should be denied for the following reasons:

- Local law enforcement agency participation in POST programs is optional. Local entities agree to participate in POST programs and comply with POST regulations by adopting a local ordinance or resolution pursuant to Penal Code sections 13522 and 13510. Therefore, any costs associated with participation in an optional program are not reimbursable state-mandated local costs.
- Local agency participation in the training is optional because local entities can request a waiver exempting them from the training.[16]

Position of POST

POST filed comments on the County of Los Angeles test claim as follows:

> The Commission on Peace Officer Standards and Training did enact new regulations, effective January 1, 1999, requiring that certain peace officers complete a minimum ten-week Field Training Program. This new requirement was enacted by the Commission on POST under its authority to set standards for employment and training of peace officers employed by participating agencies. There was no statutory enactment by the Legislature compelling adoption of Field Training program regulations.
>
> Local entities, such as the County of Los Angeles, participate in the POST program on a voluntary basis. The County has passed an ordinance under the terms of which it agrees to abide by current and future employment and training standards enacted by the POST Commission.
>
> The Commission's regulations include a waiver provision for participating agencies unable to comply due to significant financial constraints.[17]

POST also filed comments on the Santa Monica Community College test claim, which further alleges that agencies choosing to participate in the POST program should budget annually for anticipated costs. POST also states that participants in the POST program are reimbursed for travel, per diem, and tuition associated with attendance at field training officer courses.[18]

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[15] See declaration of Eileen Miller, Chief of Police of the Santa Monica Community College District, and declaration from Greg Bass, Director of Child Welfare and Attendance, Clovis Unified School District (Exhibit B to Item 5, July 29, 2004 Commission Hearing).

[16] Exhibit C to Item 5, July 29, 2004 Commission Hearing.

[17] Exhibit D to Item 5, July 29, 2004 Commission Hearing.

[18] *Ibid.*

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[19] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[20] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[21] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[22] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[23]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[24] To determine if the program is new or imposes a higher level of service, the

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[19] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[20] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

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

[22] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences.
(*Id*., at p. 754.)

[23] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836.

[24] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,*
44 Cal.3d 830, 835.

test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[25] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[26]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[27] 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."[28]

Issue I: Are the documents issued by POST, Bulletin 98-1 and POST Administrative Manual Procedure D-13, subject to article XIII B, section 6 of the California Constitution?

A. State law does not require school districts and community college districts to employ peace officers and, thus, the field training requirements do not impose a state mandate on school districts and community college districts.

Santa Monica Community College District contends that the documents issued by POST constitute executive orders that impose a mandate on school districts and community college districts to provide the required field training to their officers. The Commission disagrees. For the reasons described below, the Commission finds that the documents issued by POST are not subject to article XIII B, section 6 of the California Constitution because they do not impose a mandate on school districts and community college districts. School districts and community college districts are not required by state law to employ peace officers.

The California Constitution, article IX, Education, establishes and permits the formation of school districts, including community college districts, and county boards of education, all for the purpose of encouraging "the promotion of intellectual, scientific, moral and agricultural improvement."[29] Although the Legislature is permitted to authorize school districts "to act in any manner which is not in conflict with the laws and purposes for which school districts are established,"[30] the Constitution does not require school districts to operate police departments or employ school security officers as part of their essential educational function. Article I, section 28, subdivision (c), of the California Constitution does require K-12 school districts to maintain safe schools.

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[25] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

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

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

[28] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280.

[29] California Constitution, article IX, section 1.

[30] California Constitution, article IX, section 14.

However, there is no constitutional requirement to maintain safe schools through school security or a school district police department independent of the public safety services provided by the cities and counties a school district serves.[31]

In *Leger v. Stockton Unified School District*, the court interpreted the safe schools provision of the California Constitution as declaring only a general right *without* specifying any rules for its enforcement.[32] The claimant argues that the Commission should ignore the portion of the court's ruling that the safe schools provision does not specify any rules because the *Leger* case is a tort case where the plaintiff was seeking monetary damages for the alleged negligent actions of the school district. The claimant further argues that the Commission should follow the *Leger* court's statements that "all branches of government are required to comply with constitutional directives," such as providing a safe school through police services.[33]

But, the claimant is mischaracterizing the court's holding. When interpreting the safe schools provision of the Constitution, the court was applying rules of constitutional interpretation. The court stated the following:

> The following rule has been consistently applied in California to determine whether a constitutional provision is self-executing in the sense of providing a specific method for its enforcement: " 'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and *it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law*.'" [Citations omitted.] (Emphasis added.)[34]

The court further held that the safe schools provision of the Constitution is not self-executing because it does not lay down rules that are given the force of law.

> [H]owever, section 28(c) declares a general right without specifying *any* rules for its enforcement. It imposes no express duty on anyone to make schools safe. It is wholly devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred. Rather, "it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." [Citation omitted.][35]

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[31] Article I, section 28, subdivision (c) of the California Constitution provides "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are *safe*, secure and peaceful." (Emphasis added.)

[32] *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1455.

[33] Exhibit K, Bates pages 598-601, to Item 5, July 29, 2004 Commission Hearing.

[34] *Leger v. Stockton Unified School District, supra,* 202 Cal.App.3d at page 1455.

[35] *Ibid.*

Furthermore, the court reviewed the ballot materials for the safe schools provision and found that the provision was intended to be implemented through reforms in criminal laws.[36] For example, the court noted in footnote 3 of the decision that the Legislature implemented the safe schools provision by establishing procedures in the Penal Code by which non-students can gain access to school grounds and providing punishments for violations. The Legislature also enacted the "Interagency School Safety Demonstration Act of 1985" to encourage school districts, county offices of education, and law enforcement to develop and implement interagency strategies, programs, and activities to improve school attendance and reduce the rates of school crime and vandalism.[37] But, as shown below, the Legislature has not implemented the safe schools provision by requiring school districts to employ peace officers.

Accordingly, the California Constitution does not require or mandate school districts, through the safe schools provision, to employ peace officers.

Finally, although the Legislature authorizes school districts and community college districts to employ peace officers, the Legislature does not require school districts and community college districts to employ peace officers. Pursuant to Education Code section 38000:[38]

> [t]he governing board of any school district may establish a security department ... or a police department ...[and] may employ personnel to ensure the safety of school district personnel and pupils and the security of the real and personal property of the school district. In addition, a school district may assign a school police reserve officer who is deputized pursuant to Section 35021.5 to a schoolsite to supplement the duties of school police personnel pursuant to this section. It is the intention of the Legislature in enacting this section that a school district police or security department is supplementary to city and county law enforcement agencies and is not vested with general police powers.

Education Code section 72330, derived from the same 1959 Education Code section, provides the law for community colleges. "The governing board of a community college district may establish a community college police department ... [and] may employ personnel as necessary to enforce the law on or near the campus. ... This subdivision shall not be construed to require the employment by a community college district of any additional personnel."

In 2003, the California Supreme Court decided *Department of Finance v. Commission on State Mandates* and found that "if a school district elects to participate in or continue participation in any *underlying voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program

[36] *Id.* at page 1456.

[37] *Id.* at page 1456, footnote 3.

[38] Formerly numbered Education Code section 39670; derived from 1959 Education Code section 15831.

does not constitute a reimbursable state mandate."[39] The court further stated, on page 731 of the decision, that:

> *[W]e reject claimants' assertion that they have been legally compelled to incur* notice and agenda *costs,* and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related program in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.]

The decision of the California Supreme Court interpreting the state-mandate issue is relevant to this test claim. The Commission is not free to disregard clear statements of the California Supreme Court. Pursuant to state law, school districts and community college districts are not required by the state to have a police department and employ peace officers. That decision is a local decision.[40] Thus, the field training duties imposed by the POST documents that follow from the discretionary decision to employ peace officers do not impose a reimbursable state mandate.

In response to the draft staff analysis, Santa Monica Community College District contends that staff has misconstrued the *Department of Finance* case. The claimant alleges that the controlling authority on the subject of legal compulsion of a state statute is *City of Sacramento v. State of California.*[41, 42] The claimant, however, is mischaracterizing the Supreme Court's holding in *Department of Finance.*

In *Department of Finance*, the school districts argued that the definition of a state mandate should not be limited to circumstances of strict legal compulsion, but, instead, should be controlled by the court's broader definition of a federal mandate in the *City of Sacramento* case.[43] In *City of Sacramento*, the court analyzed the definition of a federal mandate and determined that because the financial consequences to the state and its residents for failing to participate in the federal plan were so onerous and punitive, and the consequences amounted to "certain and severe federal penalties" including "double

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[39] *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 743. (Emphasis added.)

[40] Santa Monica Community College District admits that the decision to have a police department and employ peace officers is a local decision. On page 25 of its comments to the draft staff analysis (Exhibit K, Bates p. 621, to Item 5, July 29, 2004 Commission Hearing), the claimant states the following:

> The people and the legislature has [sic] not directly specified how the constitutional duty to provide safe schools is to be accomplished. They left this decision to local agencies who [sic] have first hand knowledge of what is necessary for their respective communities. It is a local decision.

[41] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[42] Exhibit K, Bates pages 626-630, to Item 5, July 29, 2004 Commission Hearing.

[43] *Department of Finance, supra*, 30 Cal.4th at pp. 749-751.

taxation" and other "draconian" measures, the state was mandated by federal law to participate in the plan, even the federal legislation did not legally compel the participation.[44]

The Supreme Court in *Department of Finance*, however, found it "unnecessary to resolve whether [its] reasoning in *City of Sacramento* [citation omitted] applies with regard to the proper interpretation of the term 'state mandate' in section 6 of article XIII B."[45] Although the school districts argued that they had no true choice but to participate in the school site council programs, the court stated that, assuming for purposes of analysis only, the *City of Sacramento* case applies to the definition of a state mandate, the school districts did not face "certain and severe penalties" such as "double taxation" and other "draconian" consequences."[46]

Here, even assuming that the *City of Sacramento* case applies, there is no evidence in the law or in the record that school districts would face "certain and severe" penalties" such as "double taxation" or other "draconian" consequences if they don't employ peace officers.

Finally, the claimant argues that the staff analysis is arbitrary and unreasonable since it is not consistent with the Commission's prior decisions approving school district peace officer cases, such as the *Peace Officer Procedural Bill of Rights* (CSM 4499).[47] The claimant acknowledges the California Supreme Court's decision in *Weiss v. State Board of Education*, which held that the failure of a quasi-judicial agency to consider prior decisions is not a violation of due process as long as the action is not arbitrary or unreasonable.[48] But, the claimant states that "staff has offered no compelling reason … why mandated activities of district peace officers were reimbursable in previous rulings and now activities of district peace officers are not reimbursable, other than what appears to be a whim or current fancy."[49]

As explained above, the compelling reason is the California Supreme Court's decision in *Department of Finance*, which affirmed the 1984 decision of *City of Merced*, and requires the Commission to determine whether the claimant's participation in the underlying program is voluntary or compelled. All of the previous Commission decisions cited by the claimant were decided before the Supreme Court issued the *Department of Finance* decision.[50]

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[44] *City of Sacramento, supra,* 50 Cal.3d at pages 73-76.

[45] *Id.* at page 751.

[46] *Id.* at pages 751-752.

[47] Exhibit K, Bates pages 623-626, to Item 5, July 29, 2004 Commission Hearing.

[48] *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 777.

[49] Exhibit K, Bates page 626, to Item 5, July 29, 2004 Commission Hearing.

[50] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777 was a case brought by the city seeking reimbursement for eminent domain statutes under the former Senate Bill 90, Revenue and Taxation Code, provisions. The claim was not brought pursuant to article XIII B, section 6 of the California Constitution.

Therefore, the POST documents are not subject to article XIII B, section 6 of the California Constitution with respect to school districts because they do not impose a mandate on school districts and community college districts.

B. State law does not require local agencies and school districts to participate in the POST program and, thus, the field training requirements imposed by POST on their members are not mandated by the state.

Assuming for the sake of argument only that school districts are required to employ peace officers, the Commission finds that POST Bulletin 98-1 and the POST Administrative Manual Procedure D-13 do not impose a state-mandated program on either school districts or local agencies. Thus, the POST documents are not subject to article XIII B, section 6 of the California Constitution. As more fully described below, participation in POST and compliance with POST's field training program are voluntary, and not mandated by the state. Furthermore, POST's field training program is *not* part of the basic training requirement imposed by the state on all officers to obtain peace officer status, as suggested by the claimants.

Participation in POST is voluntary

As described by POST in their comments to the test claims, the ten-week field training program was enacted by POST under their authority to set standards for employment and training of peace officers employed by agencies that participate in the POST program.

POST was created in 1959 "[f]or the purpose of raising the level of competence of local law enforcement officers ..." (Pen. Code, § 13510.) To accomplish this purpose, POST has the authority, pursuant to Penal Code section 13510, to adopt rules establishing minimum standards relating to the physical, mental, and moral fitness of peace officers, and to the training of peace officers. But, these rules apply only to those cities, counties, and school districts that participate in the POST program and receive state aid. Penal Code section 13510, subdivision (a), expressly states that "[t]hese rules shall apply to those cities, counties, cities and counties, and districts receiving state aid pursuant to this chapter ..."[51]

The state aid is provided in Penal Code section 13520, which states the following: "There is hereby created in the State Treasury a Peace Officers' Training Fund, which is hereby appropriated, without regard to fiscal years, exclusively for costs of administration and for grants to local governments and districts pursuant to this chapter."

Penal Code section 13522 further provides that any local agency or school district may apply for the state aid by filing an application with POST, accompanied by an ordinance or resolution from the governing body stating that the agency will adhere to the standards for recruitment and training established by POST. Penal Code section 13522 states the following:

> Any city, city and county, or district which desires to receive state aid pursuant to this chapter shall make application to the commission for the aid. The initial application shall be accompanied by a certified copy of an

[51] Penal Code section 13507, subdivision (e) and (f), defines "district" to include school districts and community college districts.

> ordinance, or … a resolution, adopted by its governing body providing that while receiving any state aid pursuant to this chapter, the city, county, city and county, or district will adhere to the standards for recruitment and training established by the commission. The application shall contain any information the commission may request.

Penal Code section 13523 provides that "[i]n no event shall any allocation be made to any city, county, or district which is not adhering to the standards established by the commission as applicable to such city, county, or district."

In the *Department of Finance* case, the California Supreme Court held that the requirements imposed by a test claim statute are not state-mandated if the claimant's participation in the underlying program is voluntary.[52] As the court stated,

> [T]he core point … is that activities undertaken at the option or discretion of a local governmental entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds – even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice. [Citing *City of Merced v. State of California* (1984) 153 Cal.app.3d 777, 783.][53]

Here, participation in the underlying POST program is voluntary. The plain language of Penal Code section 13522 authorizes the governing body of local agencies and school districts to decide whether to apply for state aid through POST. If the local entity decides to file an application, the entity must adopt an ordinance or regulation agreeing to abide by POST rules and regulations as a condition of applying for state aid. Not all local agencies and school districts have applied for POST membership.[54]

In response to the draft staff analysis, the County of Los Angeles filed documents from the websites of cities that are listed by POST as non-participating agencies. These documents show that the nonparticipating cities contract their police services with agencies that do participate in the POST program.[55] But, the fact remains that there is no state statute, or other state law, that requires local agencies and school districts to participate in the POST program. The decision to participate is a local decision.

Thus, like the school districts in the *Department of Finance* case, local agencies and school districts here are free to decide whether to 1) continue to participate and receive POST funding, even though they must also incur program-related costs associated with the field training program, or 2) decline to participate in the POST program.[56] Therefore,

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[52] *Department of Finance, supra*, 30 Cal.4th at page 731.

[53] *Department of Finance, supra*, 30 Cal.4th at page 742.

[54] See Exhibit I, Bates pages 469-480, to Item 5, July 29, 2004 Commission Hearing, for POST's list of law enforcement agencies, with several agencies, as of March 11, 2004, noted as not a POST participating agency.

[55] Exhibit J to Item 5, July 29, 2004 Commission Hearing.

[56] *Department of Finance, supra*, 30 Cal.4th at page 753.

local agencies and school districts are not mandated by the state to provide field training to their officers.

Finally, the field training program at issue in this case is not like other legislatively-mandated training programs imposed on law enforcement agencies, as asserted by the County of Los Angeles. The County argues that the Commission's analysis of this claim should be the same as its analysis and findings of state-mandated programs in *Sexual Harassment Training in the Law Enforcement Workplace* (CSM 97-TC-07, adopted September 28, 2000) and *Domestic Violence Training* (CSM 96-362-01, adopted February 26, 1998).[57] But, the test claims on the Sexual Harassment and Domestic Violence Training involved Penal Code statutes (Pen. Code, §§ 13519.7 and 13519) that required POST to develop the training courses and required local law enforcement agencies to provide the POST-developed training courses to their officers.[58] Here, the Legislature has not enacted a statute compelling POST to develop a field training course and has not compelled local agencies and school districts to provide a field training program for their officers. Thus, the same rationale does not apply. Instead, local agencies and school districts are not mandated by the state, as described above, to provide field training to their officers.

Accordingly, the Commission finds that participation in POST and compliance with POST's field training program are voluntary, and not mandated by the state.

POST's field training program is *not* part of the basic training requirement imposed by the state on all officers to obtain peace officer status

The claimants allege that the field training program for officers working alone is part of the basic training requirement imposed by the state on all officers to obtain peace officer status. Thus, the claimants argue that field training is not voluntary. The Commission disagrees.

It is true, as argued by the claimants, that officers are required to complete a basic course of training prescribed by POST before they can exercise the powers of a peace officer, and must obtain the basic certificate issued by POST within 18 months of employment in order to continue to exercise the powers of a peace officer.[59] If the officer fails to complete the POST basic training or obtain the basic certificate, the officer may exercise only non-peace officer powers; for example, the officer may not exercise the powers of arrest, serve warrants, or carry a concealed weapon without a permit.[60] The basic training

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[57] Exhibit A, County of Los Angeles test claim, Bates pages 149-151, to Item 5, July 29, 2004 Commission Hearing.

[58] The Commission ultimately denied the test claim on Domestic Violence Training because there was no evidence that the state mandated local agencies to incur increased costs mandated by the state. The Second District Court of Appeal upheld the Commission's decision. (*County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1194.)

[59] Penal Code sections 832, 832.3, subdivision (a), and 832.4.

[60] 80 Opinions of the California Attorney General 293, 297 (1997).

and certificate is mandated by statute, and applies to all officers, whether or not their employers are POST members.[61]

But, based on the plain language of Bulletin 98-1, POST Regulations, the POST Administrative Manual, and the comments filed by POST on these test claims, the field training program is not part of the legislatively-mandated basic training requirement imposed on all officers. Field training is required only if the local agency or school district employer has elected to become a member of POST and, for those officers employed by a POST participating agency, only after the officer has completed the basic training course.

Page two of the POST Bulletin 98:1 expressly states that the "requirements for the POST regular Basic Certificate are *not* affected by the field training requirement." (Emphasis added.) Page two of the bulletin also describes those agencies affected by the new requirements as "Police Departments, Sheriff's Departments, School/Campus Police Departments, and selected other agencies *in the POST program*..." (Emphasis added.) Thus, agencies that decide not to participate in the POST program are not affected by the field training requirement.

In addition, section 1005, subdivision (a)(1), of the POST regulations, as amended in January 1999, provided that "[a]n officer as described in Penal Code section 832.2 (a) [a peace officer, first employed after January 1, 1975, that successfully completes the basic training course prescribed by POST] *is authorized to exercise peace officer powers while engaged in a field training program* ..." (Emphasis added.) Section 1005, subdivision (a)(2), further provided that "[e]very regular officer, *following completion of the Regular Basic Course* and before being assigned to perform general law enforcement patrol duties without direct and immediate supervision, shall complete a POST-approved Field Training Program as set forth in PAM section D-13." (Emphasis added.)[62] Thus, unlike the statutory requirement to successfully complete the basic training course before exercising the powers of a peace officer, an officer is not required to complete the field training program before he or she has the powers of a peace officer to make arrests, serve warrants, and carry a concealed weapon. Therefore, the field training program is not part of the basic training program.

Moreover, on July 1, 2004, further amendments to POST's regulations and the POST Administrative Manual on the field training program went into effect. According to the regulatory notice issued by POST, section 1005 of the POST regulations was amended to "eliminate possible confusion with other courses in the POST Administrative Manual listed as 'Basic' courses." The plain language of section 1005, as amended, indicates that the field training program is not part of the basic training program. Section 1005, as amended, provides as follows:

> (a) Minimum Entry-Level Training Standards (Required).
>
> > (1) Basic Course Requirement: Every peace officer, except Reserve Levels II and III, those peace officers listed in Regulation

[61] 55 Opinions of the California Attorney General 373, 375 (1972).

[62] See also, POST Administrative Manual Procedure D-13-3.

1005(a)(3) ..., and 1005(a)(4) ..., *shall complete the Regular Basic Course before being assigned duties which include the exercise of peace officer powers*. Requirements for the Regular Basic Course are set forth in PAM, section D-1-3.

(A) Field Training Program Requirement: Every peace officer, except Reserve Levels II and III and those officers described in sections (B)1-5(below), *following completion of the Regular Basic Course and before being assigned to perform general law enforcement uniformed patrol duties without direct and immediate supervision*, shall complete a POST-approved Field Training Program as set forth in PAM section D-13. (Emphasis added.)

The statutory authority and reference listed for section 1005 of the POST regulations includes Penal Code section 832 and 832.3, the statutes that require the successful completion of a basic course of training prescribed by POST before a person can exercise the powers of a peace officer. [63]

In addition, the activities required to be performed by POST participating agencies under the field training program that were originally listed in Procedure D-13 of the POST Administrative Manual was placed in section 1004 of the POST regulations on July 1, 2004. The statutory authority and reference for section 1004 of the POST regulations are Penal Code 13503, 13506, 13510, and 13510.5, the statutes that authorize POST to set standards for employment and training of peace officers employed by agencies that participate in POST.[64]

In addition to the plain language of the regulations and the POST Administrative Manual, the comments filed by POST on these test claims indicate that the field training program adopted by POST was meant only for POST participating agencies. POST states that the "new requirement was enacted by the Commission on POST under its authority to set standards for employment and training of peace officers *employed by participating agencies*."[65] POST's interpretation of their regulations and Administrative Manual, is entitled to great weight and the courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.[66, 67]

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[63] See exhibit I to Item 5, July 29, 2004 Commission Hearing, for POST's notice of rulemaking; California Code of Regulations, title 11, sections 1004 and 1005 (eff. 7/1/04).

[64] *Ibid.*

[65] Exhibit D to Item 5, July 29, 2004 Commission Hearing. (Emphasis added).

[66] *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 10-11.

[67] In response to the draft staff analysis, Santa Monica Community College District contends that the *Yamaha* case supports the conclusion that POST's interpretation of its own regulations and rules is not entitled to deference by the Commission because POST's interpretation is a quasi-judicial interpretation of a statute. (Exhibit K, Bates pp.

Accordingly, POST's field training program is *not* part of the basic training requirement imposed by the state on all officers to obtain peace officer status, as suggested by the claimants. Rather, the field training program is imposed only on POST participating agencies.

CONCLUSION

The Commission concludes that POST Bulletin 98-1 and the POST Administrative Manual Procedure D-13 do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the following reasons:

- State law does not require school districts and community college districts to employ peace officers and, thus, POST's field training requirements do not impose a state mandate on school districts and community college districts.
- State law does not require local agencies and school districts to participate in the POST program and, thus, the field training requirements imposed by POST on their members are not mandated by the state.

634-635 to Item 5, July 29, 2004 Commission Hearing.) The Commission disagrees. As indicated in the analysis, the state has *not* enacted a statute compelling POST to develop a field training course. Thus, POST was not exercising a quasi-judicial function to interpret a state statute. Rather, POST's field training course was adopted as a quasi-legislative action and, thus, under *Yamaha,* POST's interpretation of its own regulations and rules is entitled to great weight. (*Yamaha, supra*, 19 Cal.4th at pp. 10-11.)

CITY OF SAN CARLOS

EMPLOYMENT OPPORTUNITY
HUMAN RESOURCES DEPARTMENT,
CITY HALL, 600 ELM STREET, P.O. BOX 3009,SAN CARLOS, CA 94070-1309
(650) 802-4284

POLICE OFFICER
(LATERAL AND ACADEMY GRADUATE)

CLOSING DATE FOR FILING APPLICATIONS: WEDNESDAY, JANUARY 18, 2006

SALARY AND BENEFITS
The salary range is $5,487- $6,670 monthly. The comprehensive benefits package offered for this position includes:

• PERS Retirement (3% @ 50) • Paid employee & family medical insurance & dental reimbursement plan • Paid basic life insurance	• Employee Vision insurance coverage • Paid long term disability insurance • Employee Assistance Program	• 12 Vacation days/year to start • 12 Sick days/year • 10 paid holidays/year • 40 hours of float leave

JOB DEFINITION Police Officers work under general supervision, patrolling an assigned beat, protecting life and property, preventing crime, maintaining order, enforcing laws, ordinances and constitutional mandates, conducting criminal investigations and apprehending criminals. Police Officers assist the public when called upon to do so, and they work varying hours and shifts.

SUPERVISION RECEIVED Receives general supervision from an assigned Police Sergeant. Indirectly supervises Community Service Officers. A Police Officer directly supervises a recruit when designated as a Field Training Officer.

ESSENTIAL AND IMPORTANT DUTIES
- Patrols an assigned area in a vehicle or on foot. Stops drivers who are operating vehicles in violation of the law; issues warnings and citations.
- Answers calls for service and institutes necessary enforcement procedures in accordance with the law, departmental rules and regulations and policies.
- Enforces City, County and State laws, analyzes complex situations and arrives at the appropriate solution.
- Conducts criminal and vehicle accident investigations. Interviews victims, complainants and witnesses; questions suspects. Gathers evidence.
- Directs traffic.
- Prepares complete, accurate, legible and grammatically correct reports in a timely manner.
- Makes arrests. Searches, fingerprints and transports prisoners in accordance with standard procedures.
- Testifies in court.
- Serves warrants and subpoenas.
- Works cooperatively with other law enforcement agencies and City departments.
- Maintains contact with citizens regarding potential law enforcement problems and preserves good relationships with the general public. Answers inquiries from the general public.
- Administers first aid in emergency situations.
- Responds to calls for mutual aid as directed.
- Performs duties deemed necessary by the Chief of Police or his/her designate while maintaining a high professional standard of performance and conduct.
- Assists the Fire Department when called upon.
- Maintains a high professional standard of performance and conduct consistent with the Law Enforcement Code of Ethics.
- Carries and operates guns and other appropriate firearms.

JOB-RELATED AND ESSENTIAL QUALIFICATIONS
Ability to learn, retain and use standard broadcasting procedures and rules and public safety classification codes. Ability to carry and properly use firearms. Ability to learn, retain and use the geographic features and streets within the area served. Ability to make arrests while utilizing the minimal and proper amount of force in compliance with departmental policy and law; to read, comprehend, explain and apply complex issues of law; to safely operate a motor vehicle under normal and emergency conditions; qualify in the use of firearms and other defensive tools as prescribed by the Chief of Police; observe and accurately recall names, faces, numbers, incidents and places; to think and act quickly in emergencies and evaluate situations and people accurately; exercise discretion; write complete, concise and accurate crime and traffic reports. Ability to establish, maintain and foster cooperative working relations with diverse others contacted in the course of work.

EDUCATION AND TRAINING Graduation from high school and an Associate's Degree or Intermediate California P.O.S.T. Certificate or 60 semester college units completed at an accredited college or university and graduation from a California P.O.S.T. approved Basic Academy. Basic Academy requirement may include applicants currently enrolled in a P.O.S.T. approved academy with a pending completion date. A verification letter from the approved academy will be required. Academy certificate will be required prior to date of hire.

SPECIAL REQUIREMENTS
Must be able to perform the essential and important duties of this classification individually and unassisted by other persons. The ability to perform these tasks shall not be limited by the assistance of enhancing devices that are reasonably free from malfunction, loss or destruction during normal or foreseeable circumstances.

- Must be at least 21 years of age and a United States citizen at time of appointment.
- Height must be proportionate with weight.
- Must have no felony convictions.

Seeing:

- Vision must be correctable to 20/30 with soft contacts or no less than 20/80 uncorrected in both eyes if hard contacts or glasses are worn, with normal color vision.
- The ability to read or see objects under ambient, limited or artificial lighting and at a reasonable distance with sufficient clarity to permit their recording or accurate description, for example, persons, vehicles, license numbers, addresses, street signs, items of property, written messages and printed material.

Hearing:

- The ability to hear normal speech and other audible sounds, even in combination with other environmental noise. This necessarily includes hearing voices transmitted by radio and telephone, as well as hearing and distinguishing sounds associated with criminal activity, for example, gunshots, cries for help, glass breaking, alarm bells ringing and tires squealing. If a question arises on whether the ability to hear meets these requirements, candidates will be required to pass a hearing standards test as established by the P.O.S.T. Hearing Screening Guidelines.

Speaking:

- The ability to speak clearly in English and to be understood by others under normal and highly stressful circumstances, directly and through amplified, radio or telephonic transmission.

Moving, walking, standing, sitting, touching:

- The ability to demonstrate physical endurance, agility and strength in order to make physical arrests, at times under difficult and dangerous conditions.
- The ability to alternatively move from one place to another, to change from seated to standing positions, to securely grasp objects as required.
- The ability to operate a motor vehicle, including turning a steering wheel, operating acceleration and braking devices, opening and closing doors, operating seat belts or other equipment including switches, radios, and the like while speaking, seeing and hearing at the same time.
- The ability to traverse irregular surfaces, including under varying climactic conditions, climbing steps, scaling walls and fences, using ladders, crawling through unrestricted spaces and traversing graded surfaces, either at a normal or accelerated gait and when approaching, pursuing or retreating from persons, objects or locations.
- The ability to restrain violent or uncooperative persons, including the mobility and agility to apply appropriate restraining techniques against one or more persons under both passive and combative circumstances; to affix appropriate restraining devices upon others; to temporarily subdue others without resorting to excessive or unreasonable force.
- Ability to hold and operate furnished implements and equipment, including pens, pencils, typewriter or computer keyboard keys under varying lighting conditions and perhaps in concert with holding or operating other items of equipment, such as a flashlight; ability to hold, operate and accurately control an approved firearm.

- Ability to move and/or carry heavy objects, including lifting, carrying or assisting other persons unable/unwilling to move themselves.
- Ability to grasp and operate non-furnished devices, including door latches, light switches or other mechanical devices encountered at locations where police services are required.

ental/Cognitive Abilities:

- Ability to recall detail, including the ability to accurately re-create witnessed events, conversations or readings and to record those re-creations in written and/or oral form.
- Ability to interpret and apply oral or written material/instructions, including the ability to listen to or read abstract or directive instructional material and to apply that data correctly to practical circumstances.
- Ability to remain alert and coherent, including the ability to take action or to decide between alternative courses of action under routine, highly stressful, and environmentally difficult conditions; and ability to remain alert at varying hours after scheduled rest or to remain alert during extended periods of an emergency or unanticipated nature.

LICENSES, CERTIFICATES AND REGISTRATION Possession of an appropriate California driver's license issued by the State Department of Motor Vehicles.

SELECTION PROCEDURE All applications received will be thoroughly reviewed. Based on the job requirements, the most qualified candidates will be invited to participate in an oral board. Applicants selected from the oral board will interview with the Police Commanders. Applicants selected from the commander interviews will interview with the Police Chief. Those applicants who successfully complete the Chief's interview may receive a job offer conditional upon successful completion of a background investigation, which consists of a polygraph examination, a psychological examination, pre-placement physical to assess the candidate's functional abilities in relation to the job's demands, and drug screening examination. The costs of these exams are paid by the City. All employees are required to be fingerprinted at time of appointment.

PROBATION PERIOD The next step of the examination process is the probationary period. The probationary period for the position of Police Officer is eighteen (18) months. Those candidates who successfully complete the probation period will be appointed to regular status.

HOW TO APPLY

Submit applications and resumes online through CalOpps at www.calopps.org or call (650) 802-4284 for formation. Faxed applications are not accepted. Resumes will not be accepted in lieu of applications.

Briefs and Other Related Documents

Supreme Court of the United States
Joe G. GARCIA, Appellant
v.
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY et al.
Raymond J. DONOVAN, Secretary of Labor, Appellant
v.
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY et al.
Nos. 82-1913, 82-1951.

Argued March 19, 1984.
Reargued Oct. 1, 1984.
Decided Feb. 19, 1985.
Rehearing Denied April 15, 1985.
See 471 U.S. 1049, 105 S.Ct. 2041.
Metropolitan transit authority brought action seeking declaratory judgment that it was entitled to Tenth Amendment immunity from minimum wage and overtime pay provisions of the Fair Labor Standards Act. On remand from the Supreme Court, 457 U.S. 1102, 102 S.Ct. 2897, 73 L.Ed.2d 1309, the United States District Court for the Western District of Texas, Fred Shannon, J., entered summary judgment for transit authority, 557 F.Supp. 445, and the Secretary of Labor and intervening transit authority employee appealed. The Supreme Court, Justice Blackmun, held that transit authority was not immune from minimum wage and overtime requirements of the Act.

Reversed and remanded.

Justice Powell filed dissenting opinion in which Chief Justice Burger and Justice Rehnquist and Justice O'Connor joined.

Justice Rehnquist filed dissenting opinion.

Justice O'Connor filed dissenting opinion in which Justice Powell and Justice Rehnquist joined.

West Headnotes

[1] States 360 18.37

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.37 k. Governmental Immunity. Most Cited Cases
(Formerly 232Ak1083 Labor Relations, 360k4.16)
Determination of state immunity from federal regulation does not turn on judicial appraisal of whether a particular governmental function is "integral" or "traditional"; overruling *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[2] Labor and Employment 231H 2213

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)1 In General
231Hk2211 Power to Regulate
231Hk2213 k. Public Works or Employment. Most Cited Cases
(Formerly 232Ak1083 Labor Relations)

States 360 18.46

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.45 Labor and Employment
360k18.46 k. In General. Most Cited Cases
(Formerly 360k18.45, 360k4.18)
Local public transit authority was not immune from minimum wage and overtime requirements of the Fair Labor Standards Act because there was nothing in those requirements that was destructive of state sovereignty or violative of any constitutional provision. U.S.C.A. Const. Art. 1, § 8, cl. 3; Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.
*****1006 *528 Syllabus*** FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United*

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States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Appellee San Antonio Metropolitan Transit Authority (SAMTA) is a public mass-transit authority that is the major provider of transportation in the San Antonio, Tex., metropolitan area. It has received substantial federal financial assistance under the Urban Mass Transportation Act of 1964. In 1979, the Wage and Hour Administration of the Department of Labor issued an opinion that SAMTA's operations are not immune from the minimum-wage and overtime requirements of the Fair Labor Standards Act (FLSA) under National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245, in which it was held that the Commerce Clause does not empower Congress to enforce such requirements against the States "in areas of traditional governmental functions." Id., at 852, 96 S.Ct., at 2474. SAMTA then filed an action in Federal District Court, seeking declaratory relief. Entering judgment for SAMTA, the District Court held that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under *National League of Cities*, is exempt from the obligations imposed by the FLSA.

Held: In affording SAMTA employees the protection of the wage and hour provisions of the FLSA, Congress contravened no affirmative limit on its power under the Commerce Clause. Pp. 1010-1021.

(a) The attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental functions" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled. Pp. 1010-1016.

(b) There is nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. The States' continued role in the federal system is primarily guaranteed not by any externally*529 imposed limits on the commerce power, but by the structure of the Federal Government itself. In these cases, the political process effectively protected that role. Pp. 1016-1020.

557 F.Supp. 445, reversed and remanded.

Solicitor General Lee reargued the cause and filed briefs on reargument for appellant in No. 82-1951. *Assistant Attorney General Olson* argued the cause for appellants in both cases on the original argument. With him on the briefs on the original argument were Mr. Lee, *Assistant Attorney General McGrath, Deputy Solicitor General Geller, Joshua I. Schwartz, Michael F. Hertz,* and *Douglas Letter. Laurence Gold* reargued the cause for appellant in No. 82-1913. With him on the briefs were *Earle Putnam, Linda R. Hirshman, Robert Chanin,* and *George Kaufmann.*
William T. Coleman, Jr., reargued the cause for appellees in both cases. With him on the briefs for appellee American Public Transit Association were *Donald T. Bliss* and *Zoë E. Baird. George P. Parker, Jr.,* filed briefs for appellee San Antonio Metropolitan Transit Authority.†
† Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by the Attorneys General of their respective States as follows: *Francis X. Bellotti* of Massachusetts, *John K. Van de Kamp* of California, *Joseph I. Lieberman* of Connecticut, *Michael A. Lilly* of Hawaii, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Robert T. Stephen* of Kansas, *David L. Armstrong* of Kentucky, *William J. Guste, Jr.,* of Louisiana, *Stephen H. Sachs* of Maryland, *Hubert H. Humphrey III* of Minnesota, *John Ashcroft* of Missouri, *Michael P. Greely* of Montana, *Paul L. Douglas* of Nebraska, *Gregory H. Smith* of New Hampshire, *Irwin I. Kimmelman* of New Jersey, *LeRoy Zimmerman* of Pennsylvania, *T. Travis Medlock* of South Carolina, *David Wilkinson* of Utah, *John J. Easton, Jr.,* of Vermont, *Gerald L. Baliles* of Virginia, *Chauncey H. Browning* of West Virginia, *Bronson C. La Follette* of Wisconsin, and *A.G. McClintock* of Wyoming; for the Colorado Public Employees' Retirement Association by *Endicott Peabody* and *Jeffrey N. Martin;* for the Legal Foundation of America by *David Crump;* for the National Institute of Municipal Law Officers by *John W. Witt, Roger F. Cutler, Benjamin L. Brown, J. Lamar Shelley, William H. Taube, William I. Thornton, Jr., Henry W. Underhill, Jr., Charles S. Rhyne, Roy D. Bates, George Agnost, Robert J. Alfton, James K. Baker,* and *Clifford D. Pierce, Jr.;* for the National League of Cities et al. by *Lawrence R. Velvel* and *Elaine Kaplan;* and for the National Public Employer Labor Relations Association et al. by *R. Theodore Clark, Jr.*
*530 Justice BLACKMUN delivered the opinion of the Court.

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We revisit in these cases an issue raised in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). In that litigation, this Court, by a sharply divided vote, ruled that the Commerce**1007 Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA) against the States "in areas of traditional governmental functions." *Id.*, at 852, 96 S.Ct., at 2474. Although *National League of Cities* supplied some examples of "traditional governmental functions," it did not offer a general explanation of how a "traditional" function is to be distinguished from a "nontraditional" one. Since then, federal and state courts have struggled with the task, thus imposed, of identifying a traditional function for purposes of state immunity under the Commerce Clause.

In the present cases, a Federal District Court concluded that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under *National League of Cities*, is exempt from the obligations imposed by the FLSA. Faced with the identical question, three Federal Courts of Appeals and one state appellate court have reached the opposite conclusion.FN1

FN1. See *Dove v. Chattanooga Area Regional Transportation Authority*, 701 F.2d 50 (CA6 1983) cert. pending *sub nom. City of Macon v. Joiner*, No. 82-1974; *Alewine v. City Council of Augusta, Ga.*, 699 F.2d 1060 (CA11 1983), cert. pending, No. 83-257; *Kramer v. New Castle Area Transit Authority*, 677 F.2d 308 (CA3 1982), cert. denied, 459 U.S. 1146, 103 S.Ct. 786, 74 L.Ed.2d 993 (1983); *Francis v. City of Tallahassee*, 424 So.2d 61 (Fla.App.1982).

*531 Our examination of this "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled.

I

The history of public transportation in San Antonio, Tex., is characteristic of the history of local mass transit in the United States generally. Passenger transportation for hire within San Antonio originally was provided on a private basis by a local transportation company. In 1913, the Texas Legislature authorized the State's municipalities to regulate vehicles providing carriage for hire. 1913 Tex.Gen.Laws, ch. 147, § 4, ¶ 12, now codified, as amended, as Tex.Rev.Civ.Stat.Ann., Art. 1175, § § 20 and 21 (Vernon 1963). Two years later, San Antonio enacted an ordinance setting forth franchising, insurance, and safety requirements for passenger vehicles operated for hire. The city continued to rely on such publicly regulated private mass transit until 1959, when it purchased the privately owned San Antonio Transit Company and replaced it with a public authority known as the San Antonio Transit System (SATS). SATS operated until 1978, when the city transferred its facilities and equipment to appellee San Antonio Metropolitan Transit Authority (SAMTA), a public mass-transit authority organized on a countywide basis. See generally Tex.Rev.Civ.Stat.Ann., Art. 1118x (Vernon Supp.1984). SAMTA currently is the major provider of transportation in the San Antonio metropolitan area; between 1978 and 1980 alone, its vehicles traveled over 26 million route miles and carried over 63 million passengers.

*532 As did other localities, San Antonio reached the point where it came to look to the Federal Government for financial assistance in maintaining its public mass transit. SATS managed to meet its operating expenses and bond obligations for the first decade of its existence without federal or local financial aid. By 1970, however, its financial position had deteriorated to the point where federal subsidies were vital for its continued operation. SATS' general manager that year testified before Congress that "if we do not receive substantial help from the Federal Government, San Antonio may ... join the growing ranks of cities that have inferior [public] transportation**1008 or may end up with no [public] transportation at all." FN2

FN2. Urban Mass Transportation: Hearings on H.R. 6663 et al. before the Subcommittee on Housing of the House Committee on Banking and Currency, 91st Cong., 2d Sess., 419 (1970) (statement of F. Norman Hill).

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The principal federal program to which SATS and other mass-transit systems looked for relief was the Urban Mass Transportation Act of 1964 (UMTA), Pub.L. 88-365, 78 Stat. 302, as amended, 49 U.S.C.App. § 1601 *et seq.*, which provides substantial federal assistance to urban mass-transit programs. See generally *Jackson Transit Authority v. Transit Union,* 457 U.S. 15, 102 S.Ct. 2202, 72 L.Ed.2d 639 (1982). UMTA now authorizes the Department of Transportation to fund 75 percent of the capital outlays and up to 50 percent of the operating expenses of qualifying mass-transit programs. § § 4(a), 5(d) and (e), 49 U.S.C.App. § § 1603(a), 1604(d) and (e). SATS received its first UMTA subsidy, a $4.1 million capital grant, in December 1970. From then until February 1980, SATS and SAMTA received over $51 million in UMTA grants-more than $31 million in capital grants, over $20 million in operating assistance, and a minor amount in technical assistance. During SAMTA's first two fiscal years, it received $12.5 million in UMTA operating grants, $26.8 million from sales taxes, and only $10.1 million from fares. Federal subsidies ***533** and local sales taxes currently account for about 75 percent of SAMTA's operating expenses.

The present controversy concerns the extent to which SAMTA may be subjected to the minimum-wage and overtime requirements of the FLSA. When the FLSA was enacted in 1938, its wage and overtime provisions did not apply to local mass-transit employees or, indeed, to employees of state and local governments. § § 3(d), 13(a)(9), 52 Stat. 1060, 1067. In 1961, Congress extended minimum-wage coverage to employees of any private mass-transit carrier whose annual gross revenue was not less than $1 million. Fair Labor Standards Amendments of 1961, § § 2(c), 9, 75 Stat. 65, 71. Five years later, Congress extended FLSA coverage to state and local-government employees for the first time by withdrawing the minimum-wage and overtime exemptions from public hospitals, schools, and mass-transit carriers whose rates and services were subject to state regulation. Fair Labor Standards Amendments of 1966, § § 102(a) and (b), 80 Stat. 831. At the same time, Congress eliminated the overtime exemption for all mass-transit employees other than drivers, operators, and conductors. § 206(c), 80 Stat. 836. The application of the FLSA to public schools and hospitals was ruled to be within Congress' power under the Commerce Clause. *Maryland v. Wirtz,* 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968).

The FLSA obligations of public mass-transit systems like SATS were expanded in 1974 when Congress provided for the progressive repeal of the surviving overtime exemption for mass-transit employees. Fair Labor Standards Amendments of 1974, § 21(b), 88 Stat. 68. Congress simultaneously brought the States and their subdivisions further within the ambit of the FLSA by extending FLSA coverage to virtually all state and local-government employees. § § 6(a)(1) and (6), 88 Stat. 58, 60, 29 U.S.C. § § 203(d) and (x). SATS complied with the FLSA's overtime requirements until 1976, when this Court, in *National League of Cities,* overruled *Maryland v. Wirtz,* and held that the FLSA could not be ***534** applied constitutionally to the "traditional governmental functions" of state and local governments. Four months after *National League of Cities* was handed down, SATS informed its employees that the decision relieved SATS of its overtime obligations under the FLSA.[FN3]

FN3. Neither SATS nor SAMTA appears to have attempted to avoid the FLSA's minimum-wage provisions. We are informed that basic wage levels in the mass-transit industry traditionally have been well in excess of the minimum wages prescribed by the FLSA. See Brief for National League of Cities et al. as *Amici Curiae* 7-8.

****1009** Matters rested there until September 17, 1979, when the Wage and Hour Administration of the Department of Labor issued an opinion that SAMTA's operations "are not constitutionally immune from the application of the Fair Labor Standards Act" under *National League of Cities.* Opinion WH-499, 6 LRR 91:1138. On November 21 of that year, SAMTA filed this action against the Secretary of Labor in the United States District Court for the Western District of Texas. It sought a declaratory judgment that, contrary to the Wage and Hour Administration's determination, *National League of Cities* precluded the application of the FLSA's overtime requirements to SAMTA's operations. The Secretary counterclaimed under 29 U.S.C. § 217 for enforcement of the overtime and recordkeeping requirements of the FLSA. On the same day that SAMTA filed its action, appellant Garcia and several other SAMTA employees brought suit against SAMTA in the same District Court for overtime pay under the FLSA. *Garcia v. SAMTA,*

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Civil Action No. SA 79 CA 458. The District Court has stayed that action pending the outcome of these cases, but it allowed Garcia to intervene in the present litigation as a defendant in support of the Secretary. One month after SAMTA brought suit, the Department of Labor formally amended its FLSA interpretive regulations to provide that publicly owned local mass-transit systems are not entitled to immunity under *535 iNational League of Cities. *44 Fed.Reg. 75630 (1979), codified as 29 CFR § 775.3(b)(3) (1984).*

On November 17, 1981, the District Court granted SAMTA's motion for summary judgment and denied the Secretary's and Garcia's cross-motion for partial summary judgment. Without further explanation, the District Court ruled that "local public mass transit systems (including [SAMTA]) constitute integral operations in areas of traditional governmental functions" under *National League of Cities.* App. D to Juris. Statement in No. 82-1913, p. 24a. The Secretary and Garcia both appealed directly to this Court pursuant to 28 U.S.C. § 1252. During the pendency of those appeals, *Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982), was decided. In that case, the Court ruled that commuter rail service provided by the state-owned Long Island Rail Road did not constitute a "traditional governmental function" and hence did not enjoy constitutional immunity, under *National League of Cities,* from the requirements of the Railway Labor Act. Thereafter, it vacated the District Court's judgment in the present cases and remanded them for further consideration in the light of *Long Island.* 457 U.S. 1102, 102 S.Ct. 2897, 73 L.Ed.2d 1309 (1982).

On remand, the District Court adhered to its original view and again entered judgment for SAMTA. 557 F.Supp. 445 (1983). The court looked first to what it regarded as the "historical reality" of state involvement in mass transit. It recognized that States not always had owned and operated mass-transit systems, but concluded that they had engaged in a longstanding pattern of public regulation, and that this regulatory tradition gave rise to an "inference of sovereignty." *Id.*, at 447-448. The court next looked to the record of federal involvement in the field and concluded that constitutional immunity would not result in an erosion of federal authority with respect to state-owned mass-transit systems, because many federal statutes themselves contain exemptions for States and thus make the withdrawal of federalregulatory *536 power over public mass-transit systems a supervening federal policy. *Id.*, at 448-450. Although the Federal Government's authority over employee wages under the FLSA obviously would be eroded, Congress had not asserted any interest in the wages of public mass-transit employees until 1966 and hence had not established a longstanding federal interest in the field, in contrast to the century-old federal regulatory presence in the railroad industry found significant for the decision in *Long Island.* Finally, the court compared mass transit to the list of functions identified as constitutionally **1010 immune in *National League of Cities* and concluded that it did not differ from those functions in any material respect. The court stated: "If transit is to be distinguished from the exempt [*National League of Cities*] functions it will have to be by identifying a traditional state function in the same way pornography is sometimes identified: someone knows it when they see it, but they can't describe it." 557 F.Supp., at 453.[FN4]

FN4. The District Court also analyzed the status of mass transit under the four-part test devised by the Sixth Circuit in *Amersbach v. City of Cleveland*, 598 F.2d 1033 (1979). In that case, the Court of Appeals looked to (1) whether the function benefits the community as a whole and is made available at little or no expense; (2) whether it is undertaken for public service or pecuniary gain; (3) whether government is its principal provider; and (4) whether government is particularly suited to perform it because of a community-wide need. *Id.*, at 1037.

The Secretary and Garcia again took direct appeals from the District Court's judgment. We noted probable jurisdiction. 464 U.S. 812, 104 S.Ct. 64, 78 L.Ed.2d 79 (1983). After initial argument, the cases were restored to our calendar for reargument, and the parties were requested to brief and argue the following additional question:
"Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, 426 U.S. 833 [96 S.Ct. 2465, 49 L.Ed.2d 245] (1976), should be reconsidered?" 468 U.S. 1213, 104 S.Ct. 3582, 82 L.Ed.2d 880 (1984). Reargument followed in due course.

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*537 II

Appellees have not argued that SAMTA is immune from regulation under the FLSA on the ground that it is a local transit system engaged in intrastate commercial activity. In a practical sense, SAMTA's operations might well be characterized as "local." Nonetheless, it long has been settled that Congress' authority under the Commerce Clause extends to intrastate economic activities that affect interstate commerce. See, *e.g.*, *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 276-277, 101 S.Ct. 2352, 2360-2361, 69 L.Ed.2d 1 (1981); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258, 85 S.Ct. 348, 358, 13 L.Ed.2d 258 (1964); *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S.Ct. 82, 89, 87 L.Ed. 122 (1942); *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941). Were SAMTA a privately owned and operated enterprise, it could not credibly argue that Congress exceeded the bounds of its Commerce Clause powers in prescribing minimum wages and overtime rates for SAMTA's employees. Any constitutional exemption from the requirements of the FLSA therefore must rest on SAMTA's status as a governmental entity rather than on the "local" nature of its operations.

The prerequisites for governmental immunity under *National League of Cities* were summarized by this Court in *Hodel, supra.* Under that summary, four conditions must be satisfied before a state activity may be deemed immune from a particular federal regulation under the Commerce Clause. First, it is said that the federal statute at issue must regulate "the 'States as States.' " Second, the statute must "address matters that are indisputably 'attribute[s] of state sovereignty.' " Third, state compliance with the federal obligation must "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.' " Finally, the relation of state and federal interests must not be such that "the nature of the federal interest ... justifies state submission." 452 U.S., at 287-288, and n. 29, 101 S.Ct., at 2365-2366, and n. 29, quoting *National League of Cities*, 426 U.S., at 845, 852, 854, 96 S.Ct., at 2471, 2474, 2475.

*538 The controversy in the present cases has focused on the third *Hodel* requirement-that the challenged federal statute trench on "traditional governmental functions." The District Court voiced a common concern: "Despite the abundance of adjectives, identifying which particular state functions are immune remains difficult."**1011 557 F.Supp., at 447. Just how troublesome the task has been is revealed by the results reached in other federal cases. Thus, courts have held that regulating ambulance services, *Gold Cross Ambulance v. City of Kansas City*, 538 F.Supp. 956, 967-969 (WD Mo.1982), aff'd on other grounds, 705 F.2d 1005 (CA8 1983), cert. pending, No. 83-138; licensing automobile drivers, *United States v. Best*, 573 F.2d 1095, 1102-1103 (CA9 1978); operating a municipal airport, *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037-1038 (CA6 1979); performing solid waste disposal, *Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187, 1196 (CA6 1981); and operating a highway authority, *Molina-Estrada v. Puerto Rico Highway Authority*, 680 F.2d 841, 845-846 (CA1 1982), are functions *protected* under *National League of Cities*. At the same time, courts have held that issuance of industrial development bonds, *Woods v. Homes and Structures of Pittsburg, Kansas, Inc.*, 489 F.Supp. 1270, 1296-1297 (Kan.1980); regulation of intrastate natural gas sales, *Oklahoma ex rel. Derryberry v. FERC*, 494 F.Supp. 636, 657 (WD Okla.1980), aff'd, 661 F.2d 832 (CA10 1981), cert. denied *sub nom. Texas v. FERC*, 457 U.S. 1105, 102 S.Ct. 2902, 73 L.Ed.2d 1313 (1982); regulation of traffic on public roads, *Friends of the Earth v. Carey*, 552 F.2d 25, 38 (CA2), cert. denied, 434 U.S. 902, 98 S.Ct. 296, 54 L.Ed.2d 188 (1977); regulation of air transportation, *Hughes Air Corp. v. Public Utilities Comm'n of Cal.*, 644 F.2d 1334, 1340-1341 (CA9 1981); operation of a telephone system, *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694, 700-701 (CA1 1977); leasing and sale of natural gas, *Public Service Co. of N.C. v. FERC*, 587 F.2d 716, 721 (CA5), cert. denied *sub nom. Louisiana v. FERC*, 444 U.S. 879, 100 S.Ct. 166, 62 L.Ed.2d 108 (1979); operation of a mental health facility, ***539***Williams v. Eastside Mental Health Center, Inc.*, 669 F.2d 671, 680-681 (CA11), cert. denied, 459 U.S. 976, 103 S.Ct. 318, 74 L.Ed.2d 294 (1982); and provision of in-house domestic services for the aged and handicapped, *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1472 (CA9 1983), are *not* entitled to immunity. We find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side. The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best.

Thus far, this Court itself has made little headway in

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defining the scope of the governmental functions deemed protected under *National League of Cities.* In that case the Court set forth examples of protected and unprotected functions, see 426 U.S., at 851, 854, n. 18, 96 S.Ct., at 2474, 2475 n. 18, but provided no explanation of how those examples were identified. The only other case in which the Court has had occasion to address the problem is *Long Island.*[FN5] We there observed: "The determination of whether a federal law impairs a state's authority with respect to 'areas of traditional [state] functions' may at times be a difficult one." 455 U.S., at 684, 102 S.Ct., at 1354, quoting *National League of Cities,* 426 U.S., at 852, 96 S.Ct., at 2474. The accuracy of that statement is demonstrated by this Court's own difficulties in *Long Island* in developing a workable standard for "traditional governmental functions." We relied in large part there on "the *historical reality* that the operation of railroads is not among the functions *traditionally* performed by state and local governments," but we ***540** simultaneously disavowed "a static historical view of state functions generally immune from federal ****1012** regulation." 455 U.S., at 686, 102 S.Ct., at 1355 (first emphasis added; second emphasis in original). We held that the inquiry into a particular function's "traditional" nature was merely a means of determining whether the federal statute at issue unduly handicaps "basic state prerogatives," *id.,* at 686-687, 102 S.Ct., at 1354-1355, but we did not offer an explanation of what makes one state function a "basic prerogative" and another function not basic. Finally, having disclaimed a rigid reliance on the historical pedigree of state involvement in a particular area, we nonetheless found it appropriate to emphasize the extended historical record of *federal* involvement in the field of rail transportation. *Id.,* at 687-689, 102 S.Ct., at 1355-1356.

FN5. See also, however, *Jefferson County Pharmaceutical Assn. v. Abbott Laboratories,* 460 U.S. 150, 154, n. 6, 103 S.Ct. 1011, 1014, n. 6, 74 L.Ed.2d 882 (1983); *FERC v. Mississippi,* 456 U.S. 742, 781, and n. 7, 102 S.Ct. 2126, 2148, and n. 7, 72 L.Ed.2d 532 (1982) (opinion concurring in the judgment in part and dissenting in part); *Fry v. United States,* 421 U.S. 542, 558, and n. 2, 95 S.Ct. 1792, 1800, and n. 2, 44 L.Ed.2d 363 (1975) (dissenting opinion).

Many constitutional standards involve "undoubte[d] ... gray areas," *Fry v. United States,* 421 U.S. 542, 558, 95 S.Ct. 1792, 1801, 44 L.Ed.2d 363 (1975) (dissenting opinion), and, despite the difficulties that this Court and other courts have encountered so far, it normally might be fair to venture the assumption that case-by-case development would lead to a workable standard for determining whether a particular governmental function should be immune from federal regulation under the Commerce Clause. A further cautionary note is sounded, however, by the Court's experience in the related field of state immunity from federal taxation. In *South Carolina v. United States,* 199 U.S. 437, 26 S.Ct. 110, 50 L.Ed. 261 (1905), the Court held for the first time that the state tax immunity recognized in *Collector v. Day,* 11 Wall. 113, 20 L.Ed. 122 (1871), extended only to the "ordinary" and "strictly governmental" instrumentalities of state governments and not to instrumentalities "used by the State in the carrying on of an ordinary private business." 199 U.S., at 451, 461, 26 S.Ct., at 112, 116. While the Court applied the distinction outlined in *South Carolina* for the following 40 years, at no time during that period did the Court develop a consistent formulation of the kinds of governmental functions that were entitled to immunity. The Court identified the protected functions at various times as "essential," "usual," "traditional," or "strictly governmental." ***541** [FN6] While "these differences in phraseology ... must not be too literally contradistinguished," *Brush v. Commissioner,* 300 U.S. 352, 362, 57 S.Ct. 495, 496, 81 L.Ed. 691 (1937), they reflect an inability to specify precisely what aspects of a governmental function made it necessary to the "unimpaired existence" of the States. *Collector v. Day,* 11 Wall., at 127. Indeed, the Court ultimately chose "not, by an attempt to formulate any general test, [to] risk embarrassing the decision of cases [concerning] activities of a different kind which may arise in the future." *Brush v. Commissioner,* 300 U.S., at 365, 57 S.Ct., at 498.

FN6. See *Flint v. Stone Tracy Co.,* 220 U.S. 107, 172, 31 S.Ct. 342, 357, 55 L.Ed. 389 (1911) ("essential"); *Helvering v. Therrell,* 303 U.S. 218, 225, 58 S.Ct. 539, 543, 82 L.Ed. 758 (1938) (same); *Helvering v. Powers,* 293 U.S. 214, 225, 55 S.Ct. 171, 173, 79 L.Ed. 291 (1934) ("usual"); *United States v. California,* 297 U.S. 175, 185, 56 S.Ct. 421, 424, 80 L.Ed. 567 (1936) ("activities in which the states have traditionally engaged"); *South Carolina v.*

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United States, 199 U.S. 437, 461, 26 S.Ct. 110, 116, 50 L.Ed. 261 (1905) ("strictly governmental").

If these tax-immunity cases had any common thread, it was in the attempt to distinguish between "governmental" and "proprietary" functions.FN7 To say that the distinction**1013 between*542 "governmental" and "proprietary" proved to be stable, however, would be something of an overstatement. In 1911, for example, the Court declared that the provision of a municipal water supply "is no part of the essential governmental functions of a State." *Flint v. Stone Tracy Co.,* 220 U.S. 107, 172, 31 S.Ct. 342, 357, 55 L.Ed. 389. Twenty-six years later, without any intervening change in the applicable legal standards, the Court simply rejected its earlier position and decided that the provision of a municipal water supply *was* immune from federal taxation as an essential governmental function, even though municipal water-works long had been operated for profit by private industry. *Brush v. Commissioner,* 300 U.S., at 370-373, 57 S.Ct., at 500-502. At the same time that the Court was holding a municipal water supply to be immune from federal taxes, it had held that a state-run commuter rail system was *not* immune. *Helvering v. Powers,* 293 U.S. 214, 55 S.Ct. 171, 79 L.Ed. 291 (1934). Justice Black, in *Helvering v. Gerhardt,* 304 U.S. 405, 427, 58 S.Ct. 969, 978, 82 L.Ed. 1427 (1938), was moved to observe: "An implied constitutional distinction which taxes income of an officer of a state-operated transportation system and exempts income of the manager of a municipal water works system manifests the uncertainty created by the 'essential' and 'non-essential' test" (concurring opinion). It was this uncertainty and instability that led the Court shortly thereafter, in *New York v. United States,* 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326 (1946), unanimously to conclude that the distinction between "governmental" and "proprietary" functions was "untenable" and must be abandoned. See *id.,* at 583, 66 S.Ct., at 314 (opinion of Frankfurter, J., joined by Rutledge, J.); *id.,* at 586, 66 S.Ct., at 316 (Stone, C.J., concurring, joined by Reed, Murphy, and Burton, JJ.); *id.,* at 590-596, 66 S.Ct., at 318-321 (Douglas, J., dissenting, joined by Black, J.). See also *Massachusetts v. United States,* 435 U.S. 444, 457, and n. 14, 98 S.Ct. 1153, 1162, and n. 14, 55 L.Ed.2d 403 (1978) (plurality opinion); *Case v. Bowles,* 327 U.S. 92, 101, 66 S.Ct. 438, 442, 90 L.Ed. 552 (1946).

FN7. In *South Carolina,* the Court relied on the concept of "strictly governmental" functions to uphold the application of a federal liquor license tax to a state-owned liquor-distribution monopoly. In *Flint,* the Court stated: "The true distinction is between ... those operations of the States essential to the execution of its [*sic*] governmental functions, and which the State can only do itself, and those activities which are of a private character"; under this standard, "[i]t is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like." 220 U.S., at 172, 31 S.Ct., at 357. In *Ohio v. Helvering,* 292 U.S. 360, 54 S.Ct. 725, 78 L.Ed. 1307 (1934), another case involving a state liquor-distribution monopoly, the Court stated that "the business of buying and selling commodities ... is not the performance of a governmental function," and that "[w]hen a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto,* and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned." *Id.,* at 369, 54 S.Ct., at 727. In *Powers,* the Court upheld the application of the federal income tax to the income of trustees of a state-operated commuter railroad; the Court reiterated that "the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend," regardless of the fact that the proprietary enterprises "are undertaken for what the State conceives to be the public benefit." 293 U.S., at 225, 55 S.Ct., at 173. Accord, *Allen v. Regents,* 304 U.S. 439, 451-453, 58 S.Ct. 980, 985-986, 82 L.Ed. 1448 (1938).

*543 Even during the heyday of the governmental/proprietary distinction in intergovernmental tax-immunity doctrine the Court never explained the constitutional basis for that distinction. In *South Carolina,* it expressed its concern that unlimited state immunity from federal taxation would allow the States to undermine the Federal Government's tax base by expanding into previously private sectors of the economy. See 199

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U.S., at 454-455, 26 S.Ct., at 113-114.[FN8] Although the need to reconcile state and federal interests obviously demanded that state immunity have some limiting principle, the Court did not try to justify the particular result it reached; it simply concluded that a "line [must] be drawn," *id.*, at 456, 26 S.Ct., at 114, and proceeded to draw that line. The Court's elaborations in later cases, such as the assertion in *Ohio v. Helvering*, 292 U.S. 360, 369, 54 S.Ct. 725, 727, 78 L.Ed. 1307 (1934), that "[w]hen a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*," sound more of *ipse dixit* than reasoned **1014 explanation. This inability to give principled content to the distinction between "governmental" and "proprietary," no less significantly than its unworkability, led the Court to abandon the distinction in *New York v. United States*.

FN8. That concern was especially weighty in *South Carolina* because liquor taxes, the object of the dispute in that case, then accounted for over one-fourth of the Federal Government's revenues. See *New York v. United States*, 326 U.S. 572, 598, n. 4, 66 S.Ct. 310, 321, n. 4, 90 L.Ed. 326 (1946) (dissenting opinion).

The distinction the Court discarded as unworkable in the field of tax immunity has proved no more fruitful in the field of regulatory immunity under the Commerce Clause. Neither do any of the alternative standards that might be employed to distinguish between protected and unprotected governmental functions appear manageable. We rejected the possibility of making immunity turn on a purely historical standard of "tradition" in *Long Island*, and properly so. The most obvious defect of a historical approach to state immunity is that it prevents a court from accommodating changes in the historical functions of States, changes that have resulted*544 in a number of once-private functions like education being assumed by the States and their subdivisions.[FN9] At the same time, the only apparent virtue of a rigorous historical standard, namely, its promise of a reasonably objective measure for state immunity, is illusory. Reliance on history as an organizing principle results in line-drawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated.[FN10]

FN9. Indeed, the "traditional" nature of a particular governmental function can be a matter of historical nearsightedness; today's self-evidently "traditional" function is often yesterday's suspect innovation. Thus, *National League of Cities* offered the provision of public parks and recreation as an example of a traditional governmental function. 426 U.S., at 851, 96 S.Ct., at 2474. A scant 80 years earlier, however, in *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893), the Court pointed out that city commons originally had been provided not for recreation but for grazing domestic animals "in common," and that "[i]n the memory of men now living, a proposition to take private property [by eminent domain] for a public park ... would have been regarded as a novel exercise of legislative power." *Id.*, at 297, 13 S.Ct., at 389.

FN10. For much the same reasons, the existence *vel non* of a tradition of *federal* involvement in a particular area does not provide an adequate standard for state immunity. Most of the Federal Government's current regulatory activity originated less than 50 years ago with the New Deal, and a good portion of it has developed within the past two decades. The recent vintage of this regulatory activity does not diminish the strength of the federal interest in applying regulatory standards to state activities, nor does it affect the strength of the States' interest in being free from federal supervision. Although the Court's intergovernmental tax-immunity decisions ostensibly have subjected particular state activities to federal taxation because those activities "ha[ve] been traditionally within [federal taxing] power from the beginning," *New York v. United States*, 326 U.S., at 588, 66 S.Ct., at 317 (Stone, C.J., concurring, joined by Reed, Murphy, and Burton, JJ.), the Court has not in fact required federal taxes to have long historical records in order to be effective. The income tax at issue in *Powers*, *supra*, took effect less than a decade before the tax years for which it was challenged, while the federal tax whose application was upheld in *New York v.*

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United States took effect in 1932 and was rescinded less than two years later. See Helvering v. Powers, 293 U.S., at 222, 55 S.Ct., at 172; Rakestraw, The Reciprocal Rule of Governmental Tax Immunity-A Legal Myth, 11 Fed.Bar J. 3, 34, n. 116 (1950).

*545 A nonhistorical standard for selecting immune governmental functions is likely to be just as unworkable as is a historical standard. The goal of identifying "uniquely" governmental functions, for example, has been rejected by the Court in the field of governmental tort liability in part because the notion of a "uniquely" governmental function is unmanageable. See *Indian Towing Co. v. United States*, 350 U.S. 61, 64-68, 76 S.Ct. 122, 124-126, 100 L.Ed. 48 (1955); see also *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 433, 98 S.Ct. 1123, 1147, 55 L.Ed.2d 364 (1978) (dissenting opinion). Another possibility would be to confine immunity to "necessary" governmental services, that is, services that would be provided inadequately or not at all unless the government provided them. Cf. **1015*Flint v. Stone Tracy Co.*, 220 U.S., at 172, 31 S.Ct., at 357. The set of services that fits into this category, however, may well be negligible. The fact that an unregulated market produces less of some service than a State deems desirable does not mean that the State itself must provide the service; in most if not all cases, the State can "contract out" by hiring private firms to provide the service or simply by providing subsidies to existing suppliers. It also is open to question how well equipped courts are to make this kind of determination about the workings of economic markets.

We believe, however, that there is a more fundamental problem at work here, a problem that explains why the Court was never able to provide a basis for the governmental/proprietary distinction in the intergovernmental tax-immunity cases and why an attempt to draw similar distinctions with respect to federal regulatory authority under *National League of Cities* is unlikely to succeed regardless of how the distinctions are phrased. The problem is that neither the governmental/proprietary distinction nor any *546 other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else-including the judiciary-deems state involvement to be. Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. "The science of government ... is the science of experiment," *Anderson v. Dunn*, 6 Wheat. 204, 226, 5 L.Ed. 242 (1821), and the States cannot serve as laboratories for social and economic experiment, see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting), if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands. In the words of Justice Black:

"There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people-acting not through the courts but through their elected legislative representatives-have the power to determine as conditions demand, what services and functions the public welfare requires." *Helvering v. Gerhardt*, 304 U.S., at 427, 58 S.Ct., at 978 (concurring opinion).

[1] We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a *547 particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles. If there are to be limits on the Federal Government's power to interfere with state functions-as undoubtedly there are-we must look elsewhere to find them. We accordingly return to the underlying issue that confronted this Court in *National League of Cities* -the manner in which the Constitution insulates States from the reach of Congress' power under the Commerce Clause.

III

The central theme of *National League of Cities* was that the States occupy a special position in our

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constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect **1016 that position. Of course, the Commerce Clause by its specific language does not provide any special limitation on Congress' actions with respect to the States. See EEOC v. Wyoming, 460 U.S. 226, 248, 103 S.Ct. 1054, 1067, 75 L.Ed.2d 18 (1983) (concurring opinion). It is equally true, however, that the text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for "[b]ehind the words of the constitutional provisions are postulates which limit and control." Monaco v. Mississippi, 292 U.S. 313, 322, 54 S.Ct. 745, 748, 78 L.Ed. 1282 (1934). *National League of Cities* reflected the general conviction that the Constitution precludes "the National Government [from] devour[ing] the essentials of state sovereignty." Maryland v. Wirtz, 392 U.S., at 205, 88 S.Ct., at 2028 (dissenting opinion). In order to be faithful to the underlying federal premises of the Constitution, courts must look for the "postulates which limit and control."

What has proved problematic is not the perception that the Constitution's federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations. One approach to defining the limits on Congress' *548 authority to regulate the States under the Commerce Clause is to identify certain underlying elements of political sovereignty that are deemed essential to the States' "separate and independent existence." Lane County v. Oregon, 7 Wall. 71, 76, 19 L.Ed. 101 (1869). This approach obviously underlay the Court's use of the "traditional governmental function" concept in *National League of Cities*. It also has led to the separate requirement that the challenged federal statute "address matters that are indisputably 'attribute[s] of state sovereignty.' " Hodel, 452 U.S., at 288, 101 S.Ct., at 2366, quoting National League of Cities, 426 U.S., at 845, 96 S.Ct., at 2471. In *National League of Cities* itself, for example, the Court concluded that decisions by a State concerning the wages and hours of its employees are an "undoubted attribute of state sovereignty." 426 U.S., at 845, 96 S.Ct., at 2471. The opinion did not explain what aspects of such decisions made them such an "undoubted attribute," and the Court since then has remarked on the uncertain scope of the concept. See EEOC v. Wyoming, 460 U.S., at 238, n. 11, 103 S.Ct., at 1061, n. 11. The point of the inquiry, however, has remained to single out particular features of a State's internal governance that are deemed to be intrinsic parts of state sovereignty.

We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty. In part, this is because of the elusiveness of objective criteria for "fundamental" elements of state sovereignty, a problem we have witnessed in the search for "traditional governmental functions." There is, however, a more fundamental reason: the sovereignty of the States is limited by the Constitution itself. A variety of sovereign powers, for example, are withdrawn from the States by Article I, § 10. Section 8 of the same Article works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation. See *549 Hodel, 452 U.S., at 290 - 292, 101 S.Ct., at 2367-2368. By providing for final review of questions of federal law in this Court, Article III curtails the sovereign power of the States' judiciaries to make authoritative determinations of law. See Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L.Ed. 97 (1816). Finally, the developed application, through the Fourteenth Amendment, of the greater part of the Bill of Rights to the States limits the sovereign authority that States otherwise would possess to legislate with respect to their citizens and to conduct their own affairs.

The States unquestionably do "retai[n] a significant measure of sovereign authority." **1017 EEOC v. Wyoming, 460 U.S., at 269, 103 S.Ct., at 1077 (POWELL, J., dissenting). They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government. In the words of James Madison to the Members of the First Congress: "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States." 2 Annals of Cong. 1897 (1791). Justice Field made the same point in the course of his defense of state autonomy in his dissenting opinion in Baltimore & Ohio R. Co. v. Baugh, 149 U.S. 368, 401, 13 S.Ct. 914, 927, 37 L.Ed. 772 (1893), a defense quoted with approval in Erie R. Co. v. Tompkins, 304 U.S. 64, 78-79, 58 S.Ct. 817, 822-823, 82 L.Ed. 1188 (1938):
"[T]he Constitution of the United States ... recognizes

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and preserves the autonomy and independence of the States-independence in their legislative and independence in their judicial departments. [Federal] [s]upervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of *550 the authority of the State and, to that extent, a denial of its independence."

As a result, to say that the Constitution assumes the continued role of the States is to say little about the nature of that role. Only recently, this Court recognized that the purpose of the constitutional immunity recognized in *National League of Cities* is not to preserve "a sacred province of state autonomy." *EEOC v. Wyoming*, 460 U.S., at 236, 103 S.Ct., at 1060. With rare exceptions, like the guarantee, in Article IV, § 3, of state territorial integrity, the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace. James Wilson reminded the Pennsylvania ratifying convention in 1787: "It is true, indeed, sir, although it presupposes the existence of state governments, yet this Constitution does not suppose them to be the sole power to be respected." 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 439 (J. Elliot 2d ed. 1876) (Elliot). The power of the Federal Government is a "power to be respected" as well, and the fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies. In short, we have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.

When we look for the States' "residuary and inviolable sovereignty," The Federalist No. 39, p. 285 (B. Wright ed. 1961) (J. Madison), in the shape of the constitutional scheme rather than in predetermined notions of sovereign power, a different measure of state sovereignty emerges. Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal*551 Government was designed in large part to protect the States from overreaching by Congress.[FN11] The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives**1018 and the Presidency by their control of electoral qualifications and their role in Presidential elections. U.S. Const., Art. I, § 2, and Art. II, § 1. They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. Art. I, § 3. The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent. Art. V.

FN11. See, *e.g.*, J. Choper, Judicial Review and the National Political Process 175-184 (1980); Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum.L.Rev. 543 (1954); La Pierre, The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation, 60 Wash.U.L.Q. 779 (1982).

The extent to which the structure of the Federal Government itself was relied on to insulate the interests of the States is evident in the views of the Framers. James Madison explained that the Federal Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist No. 46, p. 332 (B. Wright ed. 1961). Similarly, James Wilson observed that "it was a favorite object in the Convention" to provide for the security of the States against federal encroachment and that the structure of the Federal Government itself served that end. 2 Elliot, at 438-439. Madison placed particular reliance on the equal representation of the States in the Senate, which he saw as "at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty." The Federalist No. 62, p. 408 (B. Wright ed. 1961). He further noted that "the residuary sovereignty of the States [is] implied *and secured* by that principle of representation in one branch of the [federal] legislature" (emphasis added). The Federalist No. 43, p. 315 (B. Wright ed. 1961).

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See also *McCulloch v. Maryland,* 4 Wheat. 316, 435 (1819). In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

The effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation. On the one hand, the States have been able to direct a substantial proportion of federal revenues into their own treasuries in the form of general and program-specific grants in aid. The federal role in assisting state and local governments is a longstanding one; Congress provided federal land grants to finance state governments from the beginning of the Republic, and direct cash grants were awarded as early as 1887 under the Hatch Act.[FN12] In the past quarter-century alone, federal grants to States and localities have grown from $7 billion to $96 billion.[FN13] As a result, federal *553 grants now account for about one-fifth of state and local government expenditures. [FN14] The States have obtained federal funding for such services as police and fire protection, education, public health and hospitals, parks and recreation, and sanitation.[FN15] **1019 Moreover, at the same time that the States have exercised their influence to obtain federal support, they have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause. For example, the Federal Power Act, the National Labor Relations Act, the Labor-Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, and the Sherman Act all contain express or implied exemptions for States and their subdivisions.[FN16] The fact that some federal statutes such as the FLSA extend general obligations to the States cannot obscure the extent to which the political position of *554 the States in the federal system has served to minimize the burdens that the States bear under the Commerce Clause.[FN17]

FN12. See, *e.g.*, A. Howitt, Managing Federalism: Studies in Intergovernmental Relations 3-18 (1984); Break, Fiscal Federalism in the United States: The First 200 Years, Evolution and Outlook, in Advisory Commission on Intergovernmental Relations, The Future of Federalism in the 1980s, pp. 39-54 (July 1981).

FN13. A. Howitt, *supra,* at 8; Bureau of the Census, U.S. Dept. of Commerce, Bureau of the Census, Federal Expenditures by State for Fiscal Year 1983, p. 2 (1984) (Census, Federal Expenditures); Division of Government Accounts and Reports, Fiscal Service-Bureau of Government Financial Operations, Dept. of the Treasury, Federal Aid to States: Fiscal Year 1982, p. 1 (1983 rev. ed.).

FN14. Advisory Commission on Intergovernmental Relations, Significant Features of Fiscal Federalism 120, 122 (1984).

FN15. See, *e.g.*, the Federal Fire Prevention and Control Act of 1974, 88 Stat. 1535, as amended, 15 U.S.C. § 2201 *et seq.;* the Urban Park and Recreation Recovery Act of 1978, 92 Stat. 3538, 16 U.S.C. § 2501 *et seq.;* the Elementary and Secondary Education Act of 1965, 79 Stat. 27, as amended, 20 U.S.C. § 2701 *et seq.;* the Water Pollution Control Act, 62 Stat. 1155, as amended, 33 U.S.C. § 1251 *et seq.;* the Public Health Service Act, 58 Stat. 682, as amended, 42 U.S.C. § 201 *et seq.;* the Safe Drinking Water Act, 88 Stat. 1660, as amended, 42 U.S.C. § 300f *et seq.;* the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, as amended, 42 U.S.C. § 3701 *et seq.;* the Housing and Community Development Act of 1974, 88 Stat. 633, as amended, 42 U.S.C. § 5301 *et seq.;* and the Juvenile Justice and Delinquency Prevention Act of 1974, 88 Stat. 1109, as amended, 42 U.S.C. § 5601 *et seq.* See also Census, Federal Expenditures 2-15.

FN16. See 16 U.S.C. § 824(f); 29 U.S.C. § 152(2); 29 U.S.C. § 402(e); 29 U.S.C. § 652(5); 29 U.S.C. § § 1003(b)(1), 1002(32); and *Parker v. Brown,* 317 U.S. 341 (1943).

FN17. Even as regards the FLSA, Congress incorporated special provisions concerning overtime pay for law enforcement and

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firefighting personnel when it amended the FLSA in 1974 in order to take account of the special concerns of States and localities with respect to these positions. See 29 U.S.C. § 207(k). Congress also declined to impose any obligations on state and local governments with respect to policymaking personnel who are not subject to civil service laws. See 29 U.S.C. § § 203(e)(2)(C)(i) and (ii).

We realize that changes in the structure of the Federal Government have taken place since 1789, not the least of which has been the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913, and that these changes may work to alter the influence of the States in the federal political process.FN18 Nonetheless, against this background, we are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy." *EEOC v. Wyoming,* 460 U.S., at 236, 103 S.Ct., at 1060.

FN18. See, *e.g.*, Choper, *supra,* at 177-178; Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum.L.Rev. 847, 860-868 (1979).

Insofar as the present cases are concerned, then, we need go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.

*555 In these cases, the status of public mass transit simply underscores the extent to which the structural protections of the Constitution insulate the States from federally imposed burdens. When Congress first subjected state mass-transit systems to FLSA obligations in 1966, and when it expanded those obligations in 1974, it simultaneously provided extensive funding for state and local mass transit through UMTA. In the two decades since its enactment, UMTA has provided over $22 billion **1020 in mass-transit aid to States and localities.FN19 In 1983 alone, UMTA funding amounted to $3.7 billion. FN20 As noted above, SAMTA and its immediate predecessor have received a substantial amount of UMTA funding, including over $12 million during SAMTA's first two fiscal years alone. In short, Congress has not simply placed a financial burden on the shoulders of States and localities that operate mass-transit systems, but has provided substantial countervailing financial assistance as well, assistance that may leave individual mass-transit systems better off than they would have been had Congress never intervened at all in the area. Congress' treatment of public mass transit reinforces our conviction that the national political process systematically protects States from the risk of having their functions in that area handicapped by Commerce Clause regulation.FN21

FN19. See Department of Transportation and Related Agencies Appropriations for 1983: Hearings before a Subcommittee of the House Committee on Appropriations, 97th Cong., 2d Sess., pt. 4, p. 808 (1982) (fiscal years 1965-1982); Census, Federal Expenditures 15 (fiscal year 1983).

FN20. *Ibid.*

FN21. Our references to UMTA are not meant to imply that regulation under the Commerce Clause must be accompanied by countervailing financial benefits under the Spending Clause. The application of the FLSA to SAMTA would be constitutional even had Congress not provided federal funding under UMTA.

IV

[2] This analysis makes clear that Congress' action in affording SAMTA employees the protections of the wage and hour *556 provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause. The judgment of the District Court therefore must be reversed.

Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect

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that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action-the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended.

These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause. See *Coyle v. Oklahoma*, 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853 (1911). We note and accept Justice Frankfurter's observation in *New York v. United States*, 326 U.S. 572, 583, 66 S.Ct. 310, 314, 90 L.Ed. 326 (1946):
"The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court."

Though the separate concurrence providing the fifth vote in *National League of Cities* was "not untroubled by certain possible implications" of the decision, 426 U.S., at 856, 96 S.Ct., at 2476, the Court in that case attempted to articulate affirmative limits on the Commerce Clause power in terms of core governmental functions and fundamental attributes of state sovereignty. But the model of democratic decisionmaking the *557 Court there identified underestimated, in our view, the solicitude of the national political process for the continued vitality of the States. Attempts by other courts since then to draw guidance from this model have proved it both impracticable and doctrinally barren. In sum, in *National League of Cities* the Court tried to repair what did not need repair.

**1021 We do not lightly overrule recent precedent.[FN22] We have not hesitated, however, when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause. See *United States v. Darby*, 312 U.S. 100, 116-117, 61 S.Ct. 451, 458-459, 85 L.Ed. 609 (1941). Due respect for the reach of congressional power within the federal system mandates that we do so now.

FN22. But see *United States v. Scott*, 437 U.S. 82, 86-87, 98 S.Ct. 2189, 2191-2192, 57 L.Ed.2d 65 (1978).

National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), is overruled. The judgment of the District Court is reversed, and these cases are remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

Justice POWELL, with whom THE CHIEF JUSTICE, Justice REHNQUIST, and Justice O'CONNOR join, dissenting.
The Court today, in its 5-4 decision, overrules *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), a case in which we held that Congress lacked authority to impose the requirements of the Fair Labor Standards Act on state and local governments. Because I believe this decision substantially alters the federal system embodied in the Constitution, I dissent.

I

There are, of course, numerous examples over the history of this Court in which prior decisions have been reconsidered and overruled. There have been few cases, however, in which the principle of *stare decisis* and the rationale of recent *558 decisions were ignored as abruptly as we now witness. [FN1] The reasoning of the Court in *National League of Cities*, and the principle applied there, have been reiterated consistently over the past eight years. Since its decision in 1976, *National League of Cities* has been cited and quoted in opinions joined by every Member of the present Court. *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 287-293, 101 S.Ct. 2352, 2365-2369, 69 L.Ed.2d 1 (1981); *Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 684-686, 102 S.Ct. 1349, 1353-1354, 71 L.Ed.2d 547 (1982); *FERC v. Mississippi*, 456 U.S. 742, 764-767, 102 S.Ct. 2126, 2140-2142, 72 L.Ed.2d 532 (1982). Less than three years ago, in *Long Island R. Co., supra*, a unanimous Court reaffirmed the principles of *National League of Cities* but found them inapplicable to the regulation of a railroad heavily engaged in interstate commerce. The Court stated:

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FN1. *National League of Cities,* following some changes in the composition of the Court, had overruled *Maryland v. Wirtz,* 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968). Unlike *National League of Cities,* the rationale of *Wirtz* had not been repeatedly accepted by our subsequent decisions.

"The key prong of the *National League of Cities* test applicable to this case is the third one [repeated and reformulated in *Hodel*], which examines whether 'the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." ' " 455 U.S., at 684, 102 S.Ct., at 1353.

The Court in that case recognized that the test "may at times be a difficult one," *ibid.,* but it was considered in that unanimous decision as settled constitutional doctrine.

As recently as June 1, 1982, the five Justices who constitute the majority in this case also were the majority in *FERC v. Mississippi.* In these cases the Court said:

"In *National League of Cities v. Usery, supra,* for example, the Court made clear that the State's regulation of its relationship with its employees is an 'undoubted attribute of state sovereignty.' 426 U.S., at 845 [96 S.Ct., at 2471]. Yet, ***559** by holding 'unimpaired' *California v. Taylor,* 353 U.S. 553 [77 S.Ct. 1037, 1 L.Ed.2d 1034] (1957), which upheld a federal****1022** labor regulation as applied to state railroad employees, 426 U.S., at 854, n. 18 [96 S.Ct., at 2475, n. 18], *National League of Cities* acknowledged that not all aspects of a State's sovereign authority are immune from federal control." 456 U.S., at 764, n. 28, 102 S.Ct., at 2153, n. 28.

The Court went on to say that even where the requirements of the *National League of Cities* standard are met, " '[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission.' " *Ibid.,* quoting *Hodel, supra,* 452 U.S., at 288, n. 29, 101 S.Ct., at 2366 n. 29. The joint federal/state system of regulation in *FERC* was such a "situation," but there was no hint in the Court's opinion that *National League of Cities* -or its basic standard-was subject to the infirmities discovered today.

Although the doctrine is not rigidly applied to constitutional questions, "any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). See also *Oregon v. Kennedy,* 456 U.S. 667, 691-692, n. 34, 102 S.Ct. 2083, 2097-2098, n. 34, 72 L.Ed.2d 416 (1982) (STEVENS, J., concurring in judgment). In the present cases, the five Justices who compose the majority today participated in *National League of Cities* and the cases reaffirming it.[FN2] The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitate overruling of multiple precedents that we witness in these cases.[FN3]

FN2. Justice O'CONNOR, the only new member of the Court since our decision in *National League of Cities,* has joined the Court in reaffirming its principles. See *Transportation Union v. Long Island R. Co.,* 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982), and *FERC v. Mississippi,* 456 U.S. 742, 775, 102 S.Ct. 2126, 2145, 72 L.Ed.2d 532 (1982) (O'CONNOR, J., dissenting in part).

FN3. As one commentator noted, *stare decisis* represents "a natural evolution from the very nature of our institutions." Lile, Some Views on the Rule of *Stare Decisis,* 4 Va.L.Rev. 95, 97 (1916).

Whatever effect the Court's decision may have in weakening the application of *stare decisis,* it is likely to be less ***560** important than what the Court has done to the Constitution itself. A unique feature of the United States is the *federal* system of government guaranteed by the Constitution and implicit in the very name of our country. Despite some genuflecting in the Court's opinion to the concept of federalism, today's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause. The Court holds that the Fair Labor Standards Act (FLSA) "contravened no affirmative limit on Congress' power under the Commerce Clause" to determine the wage rates and hours of employment of all state and local employees. *Ante,* at 1020. In rejecting the traditional view of our federal system, the Court states:

"Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I

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powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the *structure* of the Federal Government itself." *Ante,* at 1018 (emphasis added).

To leave no doubt about its intention, the Court renounces its decision in *National League of Cities* because it "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Ante,* at 1015. In other words, the extent to which the States may exercise their authority, when Congress purports to act under the Commerce Clause, henceforth is to be determined from time to time by political decisions made by members of the Federal Government, decisions the Court says will not be subject to judicial review. I note that it does not seem to have occurred to the Court that *it* -an unelected majority of five Justices-today rejects almost 200 years of the understanding of the constitutional status of federalism. In doing so, there is only a single passing reference to **1023 the Tenth Amendment. Nor is so much as a dictum of any court cited in support of the view that the role of the States in the federal system may depend upon *561 the grace of elected federal officials, rather than on the Constitution as interpreted by this Court.

In my opinion that follows, Part II addresses the Court's criticisms of *National League of Cities*. Part III reviews briefly the understanding of federalism that ensured the ratification of the Constitution and the extent to which this Court, until today, has recognized that the States retain a significant measure of sovereignty in our federal system. Part IV considers the applicability of the FLSA to the indisputably local service provided by an urban transit system.

II

The Court finds that the test of state immunity approved in *National League of Cities* and its progeny is unworkable and unsound in principle. In finding the test to be unworkable, the Court begins by mischaracterizing *National League of Cities* and subsequent cases. In concluding that efforts to define state immunity are unsound in principle, the Court radically departs from long-settled constitutional values and ignores the role of judicial review in our system of government.

A

Much of the Court's opinion is devoted to arguing that it is difficult to define *a priori* "traditional governmental functions." *National League of Cities* neither engaged in, nor required, such a task.[FN4] The Court discusses and condemns *562 as standards "traditional governmental functions," "purely historical" functions, " 'uniquely' governmental functions," and " 'necessary' governmental services." *Ante,* at 1011 - 1012, 1014, 1015. But nowhere does it mention that *National League of Cities* adopted a familiar type of balancing test for determining whether Commerce Clause enactments transgress constitutional limitations imposed by the federal nature of our system of government. This omission is noteworthy, since the author of today's opinion joined *National League of Cities* and concurred separately to point out that the Court's opinion in that case "adopt[s] a balancing approach [that] does not outlaw federal power in areas ... where the federal interest is demonstrably greater and where state ... compliance with imposed federal standards would be essential." 426 U.S., at 856, 96 S.Ct., at 2476 (BLACKMUN, J., concurring).

FN4. In *National League of Cities,* we referred to the sphere of state sovereignty as including "traditional governmental functions," a realm which is, of course, difficult to define with precision. But the luxury of precise definitions is one rarely enjoyed in interpreting and applying the general provisions of our Constitution. Not surprisingly, therefore, the Court's attempt to demonstrate the impossibility of definition is unhelpful. A number of the cases it cites simply do not involve the problem of defining governmental functions. *E.g., Williams v. Eastside Mental Health Center, Inc.,* 669 F.2d 671 (CA11), cert. denied, 459 U.S. 976, 103 S.Ct. 318, 74 L.Ed.2d 294 (1982); *Friends of the Earth v. Carey,* 552 F.2d 25 (CA2), cert. denied, 434 U.S. 902, 98 S.Ct. 296, 54 L.Ed.2d 188 (1977). A number of others are not properly analyzed under the principles of *National League of Cities,* notwithstanding some of the language of the lower courts. *E.g., United States v. Best,* 573 F.2d 1095 (CA9 1978), and *Hybud Equipment Corp. v. City of Akron,* 654 F.2d 1187 (CA6 1981).

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Moreover, rather than carefully analyzing the case law, the Court simply lists various functions thought to be protected or unprotected by courts interpreting *National League of Cities*. *Ante*, at 1011. In the cited cases, however, the courts considered the issue of state immunity on the specific facts at issue; they did not make blanket pronouncements that particular things inherently qualified as traditional governmental functions or did not. Having thus considered the cases out of context, it was not difficult for the Court to conclude that there is no "organizing principle" among them. See *ante*, at 1011.

In reading *National League of Cities* to embrace a balancing approach, Justice BLACKMUN quite correctly cited the part of the opinion that reaffirmed *Fry v. United States*, 421 U.S. 542, 95 S.Ct. 1792, 44 L.Ed.2d 363 (1975). The Court's analysis reaffirming *Fry* explicitly weighed the seriousness of the problem addressed by the federal legislation at issue in that case, ****1024** against the effects of compliance on state sovereignty. 426 U.S., at 852-853, 96 S.Ct., at 2474-2475. Our subsequent decisions also adopted this approach of weighing the respective interests of the States and Federal ***563** Government.FN5 In *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), for example, the Court stated that "[t]he principle of immunity articulated in *National League of Cities* is a functional doctrine ... whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system ... not be lost through undue federal interference in certain core state functions." *Id.*, at 236, 103 S.Ct., at 1060. See also *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981). In overruling *National League of Cities*, the Court incorrectly characterizes the mode of analysis established therein and developed in subsequent cases. FN6

FN5. In undertaking such balancing, we have considered, on the one hand, the strength of the federal interest in the challenged legislation and the impact of exempting the States from its reach. Central to our inquiry into the federal interest is how closely the challenged action implicates the central concerns of the Commerce Clause, viz., the promotion of a national economy and free trade among the States. See *EEOC v. Wyoming*, 460 U.S. 226, 244, 103 S.Ct. 1054, 1064, 75 L.Ed.2d 18 (1983) (STEVENS, J., concurring). See also, for example, *Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 688, 102 S.Ct. 1349, 1355, 71 L.Ed.2d 547 (1982) ("Congress long ago concluded that federal regulation of railroad labor services is necessary to prevent disruptions in vital rail service essential to the national economy"); *FERC v. Mississippi*, 456 U.S. 742, 757, 102 S.Ct. 2126, 2136, 72 L.Ed.2d 532 (1982) ("[I]t is difficult to conceive of a more basic element of interstate commerce than electric energy ..."). Similarly, we have considered whether exempting States from federal regulation would undermine the goals of the federal program. See *Fry v. United States*, 421 U.S. 542, 95 S.Ct. 1792, 44 L.Ed.2d 363 (1975). See also *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S., at 282, 101 S.Ct., at 2363 (national surface mining standards necessary to insure competition among States does not undermine States' efforts to maintain adequate intrastate standards). On the other hand, we have also assessed the injury done to the States if forced to comply with federal Commerce Clause enactments. See *National League of Cities*, 426 U.S., at 846-851, 96 S.Ct., at 2471-2474.

FN6. In addition, reliance on the Court's difficulties in the tax immunity field is misplaced. Although the Court has abandoned the "governmental/proprietary" distinction in this field, see *New York v. United States*, 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326 (1946), it has not taken the drastic approach of relying solely on the structure of the Federal Government to protect the States' immunity from taxation. See *Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978). Thus, faced with an equally difficult problem of defining constitutional boundaries of federal action directly affecting the States, we did not adopt the view many would think naive, that the Federal Government *itself* will protect whatever rights the States may have.

***564** Moreover, the statute at issue in this case, the

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FLSA, is the identical statute that was at issue in *National League of Cities.* Although Justice BLACKMUN's concurrence noted that he was "not untroubled by certain possible implications of the Court's opinion" in *National League of Cities,* it also stated that "the result with respect to the statute under challenge here [the FLSA] is *necessarily correct.*" 426 U.S., at 856, 96 S.Ct., at 2476 (emphasis added). His opinion for the Court today does not discuss the statute, nor identify any changed circumstances that warrant the conclusion today that *National League of Cities* is *necessarily wrong.*

B

Today's opinion does not explain how the States' role in the electoral process guarantees that particular exercises of the Commerce Clause power will not infringe on residual state sovereignty.FN7 Members of **1025 Congress are elected from the various States, but once in office they are Members of the *565 Federal Government.FN8 Although the States participate in the Electoral College, this is hardly a reason to view the President as a representative of the States' interest against federal encroachment. We noted recently "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power...." *INS v. Chadha,* 462 U.S. 919, 951, 103 S.Ct. 2764, 2784, 77 L.Ed.2d 317 (1983). The Court offers no reason to think that this pressure will not operate when Congress seeks to invoke its powers under the Commerce Clause, notwithstanding the electoral role of the States.FN9

FN7. Late in its opinion, the Court suggests that after all there may be some "affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Ante,* at 1020. The Court asserts that "[i]n the factual setting of these cases the internal safeguards of the political process have performed as intended." *Ibid.* The Court does not explain the basis for this judgment. Nor does it identify the circumstances in which the "political process" may fail and "affirmative limits" are to be imposed. Presumably, such limits are to be determined by the Judicial Branch even though it is "unelected." Today's opinion, however, has rejected the balancing standard and suggests no other standard that would enable a court to determine when there has been a malfunction of the "political process." The Court's failure to specify the "affirmative limits" on federal power, or when and how these limits are to be determined, may well be explained by the transparent fact that any such attempt would be subject to precisely the same objections on which it relies to overrule *National League of Cities.*

FN8. One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet, the position adopted today is indistinguishable in principle. The Tenth Amendment also is an essential part of the Bill of Rights. See *infra,* at 1027-1028.

FN9. At one time in our history, the view that the structure of the Federal Government sufficed to protect the States might have had a somewhat more practical, although not a more logical, basis. Professor Wechsler, whose seminal article in 1954 proposed the view adopted by the Court today, predicated his argument on assumptions that simply do not accord with current reality. Professor Wechsler wrote: "National action has ... always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case." Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum.L.Rev. 543, 544 (1954). Not only is the premise of this view clearly at odds with the proliferation of national legislation over the past 30 years, but "a variety of structural and political changes occurring in this century have combined to make Congress particularly *insensitive* to state and local values." Advisory Commission on Intergovernmental Relations (ACIR), Regulatory Federalism: Policy, Process, Impact and Reform 50 (1984). The adoption of the Seventeenth Amendment (providing for direct election of Senators), the weakening of political parties on the local level, and the rise of national media, among other things, have made Congress

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increasingly less representative of state and local interests, and more likely to be responsive to the demands of various national constituencies. *Id.*, at 50-51. As one observer explained: "As Senators and members of the House develop independent constituencies among groups such as farmers, businessmen, laborers, environmentalists, and the poor, each of which generally supports certain national initiatives, their tendency to identify with state interests and the positions of state officials is reduced." Kaden, Federalism in the Courts: Agenda for the 1980s, in ACIR, The Future of Federalism in the 1980s, p. 97 (July 1981).

See also Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum.L.Rev. 847, 849 (1979) (changes in political practices and the breadth of national initiatives mean that the political branches "may no longer be as well suited as they once were to the task of safeguarding the role of the states in the federal system and protecting the fundamental values of federalism"), and ACIR, Regulatory Federalism, *supra*, at 1-24 (detailing the "dramatic shift" in kind of federal regulation applicable to the States over the past two decades). Thus, even if one were to ignore the numerous problems with the Court's position in terms of constitutional theory, there would remain serious questions as to its factual premises.

*566 The Court apparently thinks that the State's success at obtaining federal funds for various projects and exemptions from the obligations of some federal statutes is indicative of the "effectiveness of the federal political process in preserving the States' interests...." *Ante*, at 1018.[FN10] **1026 But such political success is not relevant to the question whether the political *processes* are the proper means of enforcing constitutional limitations.[FN11] The fact that Congress generally *567 does not transgress constitutional limits on its power to reach state activities does not make judicial review any less necessary to rectify the cases in which it does do so.[FN12] The States' role in our system of government is a matter of constitutional law, not of legislative grace. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." U.S. Const., Amdt. 10.

FN10. The Court believes that the significant financial assistance afforded the States and localities by the Federal Government is relevant to the constitutionality of extending Commerce Clause enactments to the States. See *ante*, at 1018-1019, 1020. This Court has never held, however, that the mere disbursement of funds by the Federal Government establishes a right to control activities that benefit from such funds. See *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17-18, 101 S.Ct. 1531, 1539-1540, 67 L.Ed.2d 694 (1981). Regardless of the willingness of the Federal Government to provide federal aid, the constitutional question remains the same: whether the federal statute violates the sovereign powers reserved to the States by the Tenth Amendment.

FN11. Apparently in an effort to reassure the States, the Court identifies several major statutes that thus far have not been made applicable to state governments: the Federal Power Act, 16 U.S.C. § 824(f); the Labor Management Relations Act, 29 U.S.C. § 152(2); the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 402(e); the Occupational Safety and Health Act, 29 U.S.C. § 652(5); the Employee Retirement Income Security Act, 29 U.S.C. § § 1002(32), 1003(b)(1); and the Sherman Act, 15 U.S.C. § 1 *et seq.*; see *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). *Ante*, at 1019. The Court does not suggest that this restraint will continue after its decision here. Indeed, it is unlikely that special interest groups will fail to accept the Court's open invitation to urge Congress to extend these and other statutes to apply to the States and their local subdivisions.

FN12. This Court has never before abdicated responsibility for assessing the constitutionality of challenged action on the ground that affected parties theoretically are able to look out for their own interests through the electoral process. As the Court noted in *National League of Cities*, a much stronger argument as to inherent structural protections could have been made in either

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Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), or Myers v. United States, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926), than can be made here. In these cases, the President signed legislation that limited his authority with respect to certain appointments and thus arguably "it was ... no concern of this Court that the law violated the Constitution." 426 U.S., at 841-842, n. 12, 96 S.Ct., at 2469-2470, n. 12. The Court nevertheless held the laws unconstitutional because they infringed on Presidential authority, the President's consent notwithstanding. The Court does not address this point; nor does it cite any authority for its contrary view.

More troubling than the logical infirmities in the Court's reasoning is the result of its holding, *i.e.*, that federal political officials, invoking the Commerce Clause, are the sole judges of the limits of their own power. This result is inconsistent with the fundamental principles of our constitutional system. See, *e.g.*, The Federalist No. 78 (Hamilton). At least since *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803), it has been the settled province of the federal judiciary "to say what the law is" with respect to the constitutionality of Acts of Congress. In rejecting the role of the judiciary in protecting the States from federal overreaching, the Court's opinion offers no explanation for ignoring the teaching of the most famous case in our history.[FN13]

FN13. The Court states that the decision in *National League of Cities* "invites an unelected federal judiciary to make decisions about which state policies it favors and which ones its dislikes." Curiously, the Court then suggests that under the application of the "traditional" governmental function analysis, "the States cannot serve as laboratories for social and economic experiment." *Ante*, at 1015, citing Justice Brandeis' famous observation in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting). Apparently the Court believes that when "an unelected federal judiciary" makes decisions as to whether a particular function is one for the Federal or State Governments, the States no longer may engage in "social and economic experiment." *Ante*, at 1015. The Court does not explain how leaving the States virtually at the mercy of the Federal Government, without recourse to judicial review, will enhance their opportunities to experiment and serve as "laboratories."

*568 III

A

In our federal system, the States have a major role that cannot be pre-empted by the National Government. As contemporaneous writings and the debates at the ratifying conventions make clear, the States' **1027 ratification of the Constitution was predicated on this understanding of federalism. Indeed, the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized.

Much of the initial opposition to the Constitution was rooted in the fear that the National Government would be too powerful and eventually would eliminate the States as viable political entities. This concern was voiced repeatedly until proponents of the Constitution made assurances that a Bill of Rights, including a provision explicitly reserving powers in the States, would be among the first business of the new Congress. Samuel Adams argued, for example, that if the several States were to be joined in "one entire Nation, under one Legislature, the Powers of which shall extend to every Subject of Legislation, and its Laws be supreme & controul the whole, the Idea of Sovereignty in these States must be lost." Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1787), reprinted in Anti-Federalists versus Federalists*569 159 (J. Lewis ed. 1967). Likewise, George Mason feared that "the general government being paramount to, and in every respect more powerful than the state governments, the latter must give way to the former." Address in the Ratifying Convention of Virginia (June 4-12, 1788), reprinted in Anti-Federalists versus Federalists, *supra*, at 208-209.

Antifederalists raised these concerns in almost every state ratifying convention.[FN14] See generally 1-4 Debates in the Several State Conventions on the Adoption of the Federal Constitution (J. Elliot 2d. ed. 1876). As a result, eight States voted for the Constitution only after proposing amendments to be

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adopted after ratification.[FN15] All eight of these included among their recommendations some version of what later became the Tenth Amendment. *Ibid.* So strong was the concern that the proposed Constitution was seriously defective without a specific bill of rights, including a provision reserving powers to the States, that in order to secure the votes for ratification, the Federalists eventually conceded that such provisions were necessary. See 1 B. Schwartz, The Bill of Rights: A Documentary History 505 and *passim* (1971). It was thus generally agreed that consideration of a bill of rights would be among the first business of the new Congress. See generally 1 Annals of Cong. 432-437 (1789) (remarks of James Madison). Accordingly, the 10 Amendments that we know as the Bill of Rights were proposed and adopted early in the first session of the First Congress. 2 Schwartz, The Bill of Rights, *supra,* at 983-1167.

FN14. Opponents of the Constitution were particularly dubious of the Federalists' claim that the States retained powers not delegated to the United States in the absence of an express provision so providing. For example, James Winthrop wrote that "[i]t is a mere fallacy ... that what rights are not given are reserved." Letters of Agrippa, reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 510, 511 (1971).

FN15. Indeed, the Virginia Legislature came very close to withholding ratification of the Constitution until the adoption of a Bill of Rights that included, among other things, the substance of the Tenth Amendment. See 2 Schwartz, The Bill of Rights, *supra,* at 762-766 and *passim.*

*570 This history, which the Court simply ignores, documents the integral role of the Tenth Amendment in our constitutional theory. It exposes as well, I believe, the fundamental character of the Court's error today. Far from being "unsound in principle," *ante,* at 1016, judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution.

B

The Framers had definite ideas about the nature of the Constitution's division of authority between the Federal and State Governments. In The Federalist No. 39, for example, Madison explained this division by drawing a series of contrasts between the attributes of a "national" **1028 government and those of the government to be established by the Constitution. While a national form of government would possess an "indefinite supremacy over all persons and things," the form of government contemplated by the Constitution instead consisted of "local or municipal authorities [which] form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them, within its own sphere." *Id.,* at 256 (J. Cooke ed. 1961). Under the Constitution, the sphere of the proposed government extended to jurisdiction of "certain enumerated objects only, ... leav[ing] to the several States a residuary and inviolable sovereignty over all other objects." *Ibid.*

Madison elaborated on the content of these separate spheres of sovereignty in The Federalist No. 45:
"The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce .... The powers *571 reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." *Id.,* at 313 (J. Cooke ed.1961).

Madison considered that the operations of the Federal Government would be "most extensive and important in times of war and danger; those of the State Governments in times of peace and security." *Ibid.* As a result of this division of powers, the state governments generally would be more important than the Federal Government. *Ibid.*

The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective "counterpoise" to the power of the Federal Government. The States would serve this essential role because they would attract and retain the loyalty of their citizens. The roots of such loyalty, the Founders thought, were found in the objects peculiar to state government.

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For example, Hamilton argued that the States "regulat[e] all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake...." The Federalist No. 17, p. 107 (J. Cooke ed. 1961). Thus, he maintained that the people would perceive the States as "the immediate and visible guardian of life and property," a fact which "contributes more than any other circumstance to impressing upon the minds of the people affection, esteem and reverence towards the government." *Ibid.* Madison took the same position, explaining that "the people will be more familiarly and minutely conversant" with the business of state governments, and "with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments...." The Federalist No. 46, p. 316 (J. Cooke ed. 1961). Like Hamilton, Madison saw the States' involvement in the everyday concerns of the people as the source of *572 their citizens' loyalty. *Ibid.* See also Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 S.Ct.Rev. 81.

Thus, the harm to the States that results from federal overreaching under the Commerce Clause is not simply a matter of dollars and cents. *National League of Cities,* 426 U.S., at 846-851, 96 S.Ct., at 2471-2474. Nor is it a matter of the wisdom or folly of certain policy choices. Cf. *ante,* at 1015. Rather, by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.

**1029 C

The emasculation of the powers of the States that can result from the Court's decision is predicated on the Commerce Clause as a power "delegated to the United States" by the Constitution. The relevant language states: "Congress shall have power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. Section eight identifies a score of powers, listing the authority to lay taxes, borrow money on the credit of the United States, pay its debts, and provide for the common defense and the general welfare *before* its brief reference to "Commerce." It is clear from the debates leading up to the adoption of the Constitution that the commerce to be regulated was that which the States themselves lacked the practical capability to regulate. See, *e.g.,* 1 M. Farrand, The Records of the Federal Convention of 1787 (rev. ed. 1937); The Federalist Nos. 7, 11, 22, 42, 45. See also *EEOC v. Wyoming,* 460 U.S. 226, 265, 103 S.Ct. 1054, 1075, 75 L.Ed.2d 18 (1983) (POWELL, J., dissenting). Indeed, the language of the Clause itself focuses on activities that only a National Government could regulate: commerce with foreign nations and Indian tribes and *"among"* the several States.

*573 To be sure, this Court has construed the Commerce Clause to accommodate unanticipated changes over the past two centuries. As these changes have occurred, the Court has had to decide whether the Federal Government has exceeded its authority by regulating activities beyond the capability of a single State to regulate or beyond legitimate federal interests that outweighed the authority and interests of the States. In so doing, however, the Court properly has been mindful of the essential role of the States in our federal system.

The opinion for the Court in *National League of Cities* was faithful to history in its understanding of federalism. The Court observed that "our federal system of government imposes definite limits upon the authority of Congress to regulate the activities of States as States by means of the commerce power." 426 U.S., at 842, 96 S.Ct., at 2470. The Tenth Amendment was invoked to prevent Congress from exercising its " 'power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.' " *Id.,* at 842-843, 96 S.Ct., at 2470-2471 (quoting *Fry v. United States,* 421 U.S., at 547, n. 7, 95 S.Ct., at 1795, n. 7.

This Court has recognized repeatedly that state sovereignty is a fundamental component of our system of government. More than a century ago, in *Lane County v. Oregon,* 7 Wall. 71, 19 L.Ed. 101 (1869), the Court stated that the Constitution recognized "the necessary existence of the States, and, within their proper spheres, the independent authority of the States." It concluded, as Madison did, that this authority extended to "nearly the whole charge of interior regulation ...; to [the States] and to the people all powers not expressly delegated to the national government are reserved." *Id.,* at 76. Recently, in *Community Communications Co. v. Boulder,* 455 U.S. 40, 53, 102 S.Ct. 835, 841, 70 L.Ed.2d 810 (1982), the Court recognized that the state action exemption from the antitrust laws was

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based on state sovereignty. Similarly, in *Transportation Union v. Long Island R. Co.*, 455 U.S., at 683, 102 S.Ct., at 1353, although finding the Railway Labor Act applicable to a state-owned railroad, the ***574** unanimous Court was careful to say that the States possess constitutionally preserved sovereign powers.

Again, in *FERC v. Mississippi*, 456 U.S. 742, 752, 102 S.Ct. 2126, 2133, 72 L.Ed.2d 532 (1982), in determining the constitutionality of the Public Utility Regulatory Policies Act, the Court explicitly considered whether the Act impinged on state sovereignty in violation of the Tenth Amendment. These represent only a few of the many cases in which the Court has recognized not only the role, but also the importance, of state sovereignty. See also, *e.g., Fry v. United States, supra*; ****1030***Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 46 S.Ct. 172, 70 L.Ed. 384 (1926); *Coyle v. Oklahoma*, 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853 (1911). As Justice Frankfurter noted, the States are not merely a factor in the "shifting economic arrangements" of our country, *Kovacs v. Cooper*, 336 U.S. 77, 95, 69 S.Ct. 448, 458, 93 L.Ed. 513 (1949) (concurring), but also constitute a "coordinate element in the system established by the Framers for governing our Federal Union." *National League of Cities, supra*, 426 U.S., at 849, 96 S.Ct., at 2473.

D

In contrast, the Court today propounds a view of federalism that pays only lipservice to the role of the States. Although it says that the States "unquestionably do 'retai[n] a significant measure of sovereign authority,' " *ante*, at 1017 (quoting *EEOC v. Wyoming, supra*, 460 U.S., at 269, 103 S.Ct., at 1077 (POWELL, J., dissenting)), it fails to recognize the broad, yet specific areas of sovereignty that the Framers intended the States to retain. Indeed, the Court barely acknowledges that the Tenth Amendment exists. [FN16] That Amendment states explicitly that "[t]he powers not delegated to the United States ... are reserved to the States." The Court recasts this language to say that the States retain their sovereign powers "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal ***575** Government." *Ante*, at 1017. This rephrasing is not a distinction without a difference; rather, it reflects the Court's unprecedented view that Congress is free under the Commerce Clause to assume a State's traditional sovereign power, and to do so without judicial review of its action. Indeed, the Court's view of federalism appears to relegate the States to precisely the trivial role that opponents of the Constitution feared they would occupy.[FN17]

FN16. The Court's opinion mentions the Tenth Amendment only once, when it restates the question put to the parties for reargument in these cases. See *ante*, at 1010.

FN17. As the *amici* argue, "the ability of the states to fulfill their role in the constitutional scheme is dependent solely upon their effectiveness as instruments of self-government." Brief for State of California et al. as *Amici Curiae* 50. See also Brief for National League of Cities et al as *Amici Curiae* (a brief on behalf of every major organization representing the concerns of State and local governments).

In *National League of Cities*, we spoke of fire prevention, police protection, sanitation, and public health as "typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S., at 851, 96 S.Ct., at 2474. Not only are these activities remote from any normal concept of interstate commerce, they are also activities that epitomize the concerns of local, democratic self-government. See n. 5, *supra*. In emphasizing the need to protect traditional governmental functions, we identified the kinds of activities engaged in by state and local governments that affect the everyday lives of citizens. These are services that people are in a position to understand and evaluate, and in a democracy, have the right to oversee.[FN18] ****1031** We recognized that "it is ***576** functions such as these which governments are created to provide ..." and that the States and local governments are better able than the National Government to perform them. 426 U.S., at 851, 96 S.Ct., at 2474.

FN18. The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them. *E.g.*, The Federalist

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> No. 17, p. 107 (J. Cooke ed. 1961); The Federalist No. 46, p. 316 (J. Cooke ed. 1961). This is as true today as it was when the Constitution was adopted. "Participation is likely to be more frequent, and exercised at more different stages of a governmental activity at the local level, or in regional organizations, than at the state and federal levels. [Additionally,] the proportion of people actually involved from the total population tends to be greater, the lower the level of government, and this, of course, better approximates the citizen participation ideal." ACIR, Citizen Participation in the American Federal System 95 (1980).
> Moreover, we have witnessed in recent years the rise of numerous special interest groups that engage in sophisticated lobbying, and make substantial campaign contributions to some Members of Congress. These groups are thought to have significant influence in the shaping and enactment of certain types of legislation. Contrary to the Court's view, a "political process" that functions in this way is unlikely to safeguard the sovereign rights of States and localities. See n. 9, *supra*.

The Court maintains that the standard approved in *National League of Cities* "disserves principles of democratic self-goverance." *Ante*, at 1016. In reaching this conclusion, the Court looks myopically only to persons elected to positions in the Federal Government. It disregards entirely the far more effective role of democratic self-government at the state and local levels. One must compare realistically the operation of the state and local governments with that of the Federal Government. Federal legislation is drafted primarily by the staffs of the congressional committees. In view of the hundreds of bills introduced at each session of Congress and the complexity of many of them, it is virtually impossible for even the most conscientious legislators to be truly familiar with many of the statutes enacted. Federal departments and agencies customarily are authorized to write regulations. Often these are more important than the text of the statutes. As is true of the original legislation, these are drafted largely by staff personnel. The administration and enforcement of federal laws and regulations necessarily are largely in the hands of staff and civil service employees. These employees may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible. In any case, they hardly are as accessible and responsive ***577** as those who occupy analogous positions in state and local governments.

In drawing this contrast, I imply no criticism of these federal employees or the officials who are ultimately in charge. The great majority are conscientious and faithful to their duties. My point is simply that members of the immense federal bureaucracy are not elected, know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are state legislatures, city councils, boards of supervisors, and state and local commissions, boards, and agencies. It is at these state and local levels-not in Washington as the Court so mistakenly thinks-that "democratic self-government" is best exemplified.

IV

The question presented in these cases is whether the extension of the FLSA to the wages and hours of employees of a city-owned transit system unconstitutionally impinges on fundamental state sovereignty. The Court's sweeping holding does far more than simply answer this question in the negative. In overruling *National League of Cities*, today's opinion apparently authorizes federal control, under the auspices of the Commerce Clause, over the terms and conditions of employment of all state and local employees. Thus, for purposes of federal regulation, the Court rejects the distinction between public and private employers that had been drawn carefully in *National League of Cities*. The Court's action reflects a serious misunderstanding, if not an outright rejection, of the history of our country and the intention of the Framers of the Constitution.[FN19]

> FN19. The opinion of the Court in *National League of Cities* makes clear that the very essence of a federal system of government is to impose "definite limits upon the authority of Congress to regulate the activities of the States as States by means of the commerce power." 426 U.S., at 842, 96 S.Ct., at 2470. See also the Court's opinion in *Fry v. United States*, 421 U.S. 542, 547, n. 7, 95 S.Ct. 1792, 1795, n. 7, 44 L.Ed.2d 363 (1975).

***578** I return now to the balancing test approved in *National League of Cities* and accepted in *Hodel*,

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Long Island R. Co., and *FERC v. Mississippi*. See n. 5, *supra*. The Court does not find in these cases that the "federal interest is demonstrably greater."**1032 426 U.S., at 856, 96 S.Ct., at 2476 (BLACKMUN, J., concurring). No such finding could have been made, for the state interest is compelling. The financial impact on States and localities of displacing their control over wages, hours, overtime regulations, pensions, and labor relations with their employees could have serious, as well as unanticipated, effects on state and local planning, budgeting, and the levying of taxes.[FN20] As we said in *National League of Cities*, federal control of the terms and conditions of employment of state employees also inevitably "displaces state policies regarding the manner in which [States] will structure delivery of those governmental services that citizens require." *Id.*, at 847, 96 S.Ct., at 2472.

FN20. As Justice Douglas observed in his dissent in *Maryland v. Wirtz*, 392 U.S., at 203, 88 S.Ct., at 2027, extension of the FLSA to the States could "disrupt the fiscal policy of the States and threaten their autonomy in the regulation of health and education."

The Court emphasizes that municipal operation of an intracity mass transit system is relatively new in the life of our country. It nevertheless is a classic example of the type of service traditionally provided by local government. It is *local* by definition. It is indistinguishable in principle from the traditional services of providing and maintaining streets, public lighting, traffic control, water, and sewerage systems.[FN21] Services of this kind are precisely those with which citizens are more "familiarly and minutely conversant." The Federalist No. 46, p. 316 (J. Cooke ed. 1961). State and local officials of course must be intimately familiar with these services and sensitive to their quality as well as cost. Such *579 officials also know that their constituents and the press respond to the adequacy, fair distribution, and cost of these services. It is this kind of state and local control and accountability that the Framers understood would insure the vitality and preservation of the federal system that the Constitution explicitly requires. See *National League of Cities*, 426 U.S. at 847-852, 96 S.Ct., at 2472-2474.

FN21. In *Long Island R. Co.* the unanimous Court recognized that "[t]his Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation." 455 U.S., at 686, 102 S.Ct., at 1354.

V

Although the Court's opinion purports to recognize that the States retain some sovereign power, it does not identify even a single aspect of state authority that would remain when the Commerce Clause is invoked to justify federal regulation. In *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968), overruled by *National League of Cities* and today reaffirmed, the Court sustained an extension of the FLSA to certain hospitals, institutions, and schools. Although the Court's opinion in *Wirtz* was comparatively narrow, Justice Douglas, in dissent, wrote presciently that the Court's reading of the Commerce Clause would enable "the National Government [to] devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment." 392 U.S. at 205, 88 S.Ct., at 2028. Today's decision makes Justice Douglas' fear once again a realistic one.

As I view the Court's decision today as rejecting the basic precepts of our federal system and limiting the constitutional role of judicial review, I dissent.

Justice REHNQUIST, dissenting.

I join both Justice POWELL's and Justice O'CONNOR's thoughtful dissents. Justice POWELL's reference to the "balancing test" approved in *National League of Cities* is not identical with the language in that case, which recognized that Congress could not act under its commerce power to infringe on certain fundamental aspects of state sovereignty that are essential to "the States' separate and independent existence." Nor is either test, or Justice *580 O'CONNOR's suggested approach, **1033 precisely congruent with Justice BLACKMUN's views in 1976, when he spoke of a balancing approach which did not outlaw federal power in areas "where the federal interest is demonstrably greater." But under any one of these approaches the judgment in these cases should be affirmed, and I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.

Justice O'CONNOR, with whom Justice POWELL and Justice REHNQUIST join, dissenting.

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The Court today surveys the battle scene of federalism and sounds a retreat. Like Justice POWELL, I would prefer to hold the field and, at the very least, render a little aid to the wounded. I join Justice POWELL's opinion. I also write separately to note my fundamental disagreement with the majority's views of federalism and the duty of this Court.

The Court overrules *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), on the grounds that it is not "faithful to the role of federalism in a democratic society." *Ante,* at 1029. "The essence of our federal system," the Court concludes, "is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal...." *Ibid. National League of Cities* is held to be inconsistent with this narrow view of federalism because it attempts to protect only those fundamental aspects of state sovereignty that are essential to the States' separate and independent existence, rather than protecting all state activities "equally."

In my view, federalism cannot be reduced to the weak "essence" distilled by the majority today. There is more to federalism than the nature of the constraints that can be imposed on the States in "the realm of authority left open to them by the Constitution." The central issue of federalism, ***581** of course, is whether any realm *is* left open to the States by the Constitution-whether any area remains in which a State may act free of federal interference. "The issue ... is whether the federal system has any *legal* substance, any core of constitutional right that courts will enforce." C. Black, Perspectives in Constitutional Law 30 (1963). The true "essence" of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme. *Younger v. Harris,* 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971). If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States.

Due to the emergence of an integrated and industrialized national economy, this Court has been required to examine and review a breathtaking expansion of the powers of Congress. In doing so the Court correctly perceived that the Framers of our Constitution intended Congress to have sufficient power to address national problems. But the Framers were not single-minded. The Constitution is animated by an array of intentions. *EEOC v. Wyoming,* 460 U.S. 226, 265-266, 103 S.Ct. 1054, 1075-1076, 75 L.Ed.2d 18 (1983) (POWELL, J., dissenting). Just as surely as the Framers envisioned a National Government capable of solving national problems, they also envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States. *FERC v. Mississippi,* 456 U.S. 742, 790, 102 S.Ct. 2126, 2153, 72 L.Ed.2d 532 (1982) (O'CONNOR, J., dissenting). In the 18th century these intentions did not conflict because technology had not yet converted every local problem into a national one. A conflict has now emerged, and the Court ****1034** today retreats rather than reconcile the Constitution's dual concerns for federalism and an effective commerce power.

***582** We would do well to recall the constitutional basis for federalism and the development of the commerce power which has come to displace it. The text of the Constitution does not define the precise scope of state authority other than to specify, in the Tenth Amendment, that the powers not delegated to the United States by the Constitution are reserved to the States. In the view of the Framers, however, this did not leave state authority weak or defenseless; the powers delegated to the United States, after all, were "few and defined." The Federalist No. 45, p. 313 (J. Cooke ed. 1961). The Framers' comments indicate that the sphere of state activity was to be a significant one, as Justice POWELL's opinion clearly demonstrates, *ante* at 1028 - 1029. The States were to retain authority over those local concerns of greatest relevance and importance to the people. The Federalist No. 17, pp. 106-108 (J. Cooke ed. 1961). This division of authority, according to Madison, would produce efficient government and protect the rights of the people:

"In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The

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different governments will controul each other; at the same time that each will be controuled by itself." The Federalist No. 51, pp. 350-351 (J. Cooke ed. 1961).

See Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 S.Ct.Rev. 81, 88.

Of course, one of the "few and defined" powers delegated to the National Congress was the power "To regulate Commerce*583 with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. The Framers perceived the interstate commerce power to be important but limited, and expected that it would be used primarily if not exclusively to remove interstate tariffs and to regulate maritime affairs and large-scale mercantile enterprise. See Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn.L.Rev. 432 (1941). This perception of a narrow commerce power is important not because it suggests that the commerce power should be as narrowly construed today. Rather, it explains why the Framers could believe the Constitution assured significant state authority even as it bestowed a range of powers, including the commerce power, on the Congress. In an era when interstate commerce represented a tiny fraction of economic activity and most goods and services were produced and consumed close to home, the interstate commerce power left a broad range of activities beyond the reach of Congress.

In the decades since ratification of the Constitution, interstate economic activity has steadily expanded. Industrialization, coupled with advances in transportation and communications, has created a national economy in which virtually every activity occurring within the borders of a State plays a part. The expansion and integration of the national economy brought with it a coordinate expansion in the scope of national problems. This Court has been increasingly generous in its interpretation of the commerce power of Congress, primarily to assure that the National Government would be able to deal with national economic problems. Most significantly, the Court in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937), and *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941), rejected its previous interpretations of the commerce power which had stymied **1035 New Deal legislation. *Jones & Laughlin* and *Darby* embraced the notion that Congress can regulate intrastate activities that affect *584 interstate commerce as surely as it can regulate interstate commerce directly. Subsequent decisions indicate that Congress, in order to regulate an activity, needs only a rational basis for a finding that the activity affects interstate commerce. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258, 85 S.Ct. 348, 358, 13 L.Ed.2d 258 (1964). Even if a particular individual's activity has no perceptible interstate effect, it can be reached by Congress through regulation of that class of activity in general as long as that *class*, considered as a whole, affects interstate commerce. *Fry v. United States*, 421 U.S. 542, 95 S.Ct. 1792, 44 L.Ed.2d 363 (1975); *Perez v. United States*, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971).

Incidental to this expansion of the commerce power, Congress has been given an ability it lacked prior to the emergence of an integrated national economy. Because virtually every *state* activity, like virtually every activity of a private individual, arguably "affects" interstate commerce, Congress can now supplant the States from the significant sphere of activities envisioned for them by the Framers. It is in this context that recent changes in the workings of Congress, such as the direct election of Senators and the expanded influence of national interest groups, see *ante*, at 1025, n. 9 (POWELL, J., dissenting), become relevant. These changes may well have lessened the weight Congress gives to the legitimate interests of States as States. As a result, there is now a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic.

It would be erroneous, however, to conclude that the Supreme Court was blind to the threat to federalism when it expanded the commerce power. The Court based the expansion on the authority of Congress, through the Necessary and Proper Clause, "to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *United States v. Darby, supra*, 312 U.S., at 124, 61 S.Ct., at 462. It is through this reasoning that an intrastate activity "affecting" interstate commerce can be reached through the *585 commerce power. Thus, in *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726 (1942), the Court stated:
"The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect

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interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. See *McCulloch v. Maryland,* 4 Wheat. 316, 421 [4 L.Ed. 579 (1819)]...."

United States v. Wrightwood Dairy Co. was heavily relied upon by *Wickard v. Filburn,* 317 U.S. 111, 124, 63 S.Ct. 82, 88, 87 L.Ed. 122 (1942), and the reasoning of these cases underlies every recent decision concerning the reach of Congress to activities affecting interstate commerce. See, *e.g., Fry v. United States, supra,* 421 U.S., at 547, 95 S.Ct., at 1795; *Perez v. United States, supra,* 402 U.S., at 151-152, 91 S.Ct., at 1360; *Heart of Atlanta Motel, Inc. v. United States, supra,* 379 U.S., at 258-259, 85 S.Ct., at 358-359.

It is worth recalling the cited passage in *McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579 (1819), that lies at the source of the recent expansion of the commerce power. "Let the end be legitimate, let it be within the scope of the constitution," Chief Justice Marshall said, "and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter *and spirit* of the constitution, are constitutional" (emphasis added). The *spirit* of the Tenth Amendment, of course, is that the ****1036** States will retain their integrity in a system in which the laws of the United States are nevertheless supreme. *Fry v. United States, supra,* 421 U.S., at 547, n. 7, 95 S.Ct., at 1795, n. 7.

It is not enough that the "end be legitimate"; the means to that end chosen by Congress must not contravene the spirit of the Constitution. Thus many of this Court's decisions acknowledge that the means by which national power is exercised must take into account concerns for state autonomy. See, *e.g., Fry v. United States, supra,* at 547, n. 7, 95 S.Ct., at 1795, n. 7; *New* ***586** *York v. United States,* 326 U.S. 572, 586-587, 66 S.Ct. 310, 316-317, 90 L.Ed. 326 (1946) (Stone, C.J., concurring); *NLRB v. Jones & Laughlin Steel Corp., supra,* 301 U.S., at 37, 57 S.Ct., at 624 ("Undoubtedly, the scope of this [commerce] power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government"); *Santa Cruz Fruit Packing Co. v. NLRB,* 303 U.S. 453, 466-467, 58 S.Ct. 656, 660-661, 82 L.Ed. 954 (1938). See also Sandalow, Constitutional Interpretation, 79 Mich.L.Rev. 1033, 1055 (1981) ("The question, always, is whether the exercise of power is consistent with the entire Constitution, a question that can be answered only by taking into account, so far as they are relevant, all of the values to which the Constitution-as interpreted over time-gives expression"). For example, Congress might rationally conclude that the location a State chooses for its capital may affect interstate commerce, but the Court has suggested that Congress would nevertheless be barred from dictating that location because such an exercise of a delegated power would undermine the state sovereignty inherent in the Tenth Amendment. *Coyle v. Oklahoma,* 221 U.S. 559, 565, 31 S.Ct. 688, 689, 55 L.Ed. 853 (1911). Similarly, Congress in the exercise of its taxing and spending powers can protect federal savings and loan associations, but if it chooses to do so by the means of converting quasi-public state savings and loan associations into federal associations, the Court has held that it contravenes the reserved powers of the States because the conversion is not a reasonably necessary exercise of power to reach the desired end. *Hopkins Federal Savings & Loan Assn. v. Cleary,* 296 U.S. 315, 56 S.Ct. 235, 80 L.Ed. 251 (1935). The operative language of these cases varies, but the underlying principle is consistent: state autonomy is a relevant factor in assessing the means by which Congress exercises its powers.

***587** This principle requires the Court to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power. *National League of Cities v. Usery* represented an attempt to define such limits. The Court today rejects *National League of Cities* and washes its hands of all efforts to protect the States. In the process, the Court opines that unwarranted federal encroachments on state authority are and will remain " 'horrible possibilities that never happen in the real world.' " *Ante,* at 1021, quoting *New York v. United States, supra,* 326 U.S., at 583, 66 S.Ct., at 314 (opinion of Frankfurter, J.). There is ample reason to believe to the contrary.

The last two decades have seen an unprecedented growth of federal regulatory activity, as the majority itself acknowledges. *Ante,* at 1014, n. 10. In 1954, one could still speak of a "burden of persuasion on those favoring national intervention" in asserting that "National action has ... always been regarded as

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exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case." Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum.L.Rev. 543, 544-545 (1954). Today, as federal legislation**1037 and coercive grant programs have expanded to embrace innumerable activities that were once viewed as local, the burden of persuasion has surely shifted, and the extraordinary has become ordinary. See Engdahl, Sense and Nonsense About State Immunity, 2 Constitutional Commentary 93 (1985). For example, recently the Federal Government has, with this Court's blessing, undertaken to tell the States the age at which they can retire their law enforcement officers, and the regulatory standards, procedures, and even the agenda which their utilities commissions must consider and follow. See *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983); *FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982). The political process ***588** has not protected against these encroachments on state activities, even though they directly impinge on a State's ability to make and enforce its laws. With the abandonment of *National League of Cities*, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint.

The problems of federalism in an integrated national economy are capable of more responsible resolution than holding that the States as States retain no status apart from that which Congress chooses to let them retain. The proper resolution, I suggest, lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States. It is insufficient, in assessing the validity of congressional regulation of a State pursuant to the commerce power, to ask only whether the same regulation would be valid if enforced against a private party. That reasoning, embodied in the majority opinion, is inconsistent with the spirit of our Constitution. It remains relevant that a *State* is being regulated, as *National League of Cities* and every recent case have recognized. See *EEOC v. Wyoming, supra; Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 684, 102 S.Ct. 1349, 1353, 71 L.Ed.2d 547 (1982); *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 287-288, 101 S.Ct. 2352, 2365-2366, 69 L.Ed.2d 1 (1981); *National League of Cities*, 426 U.S., at 841-846, 96 S.Ct., at 2469-2472. As far as the Constitution is concerned, a State should not be equated with any private litigant. Cf. *Nevada v. Hall*, 440 U.S. 410, 428, 99 S.Ct. 1182, 1192, 59 L.Ed.2d 416 (1979) (BLACKMUN, J., dissenting) (criticizing the ability of a state court to treat a sister State no differently than a private litigant). Instead, the autonomy of a State is an essential component of federalism. If state autonomy is ignored in assessing the means by which Congress regulates matters affecting commerce, then federalism becomes irrelevant simply because the set of activities remaining beyond the reach of such a commerce power "may well be negligible." *Ante*, at 1015.

It has been difficult for this Court to craft bright lines defining the scope of the state autonomy protected by *National* ***589** *League of Cities*. Such difficulty is to be expected whenever constitutional concerns as important as federalism and the effectiveness of the commerce power come into conflict. Regardless of the difficulty, it is and will remain the duty of this Court to reconcile these concerns in the final instance. That the Court shuns the task today by appealing to the "essence of federalism" can provide scant comfort to those who believe our federal system requires something more than a unitary, centralized government. I would not shirk the duty acknowledged by *National League of Cities* and its progeny, and I share Justice REHNQUIST's belief that this Court will in time again assume its constitutional responsibility.

I respectfully dissent.

U.S.S.C., 1985.
Garcia v. San Antonio Metropolitan Transit Authority
469 U.S. 528, 105 S.Ct. 1005, 36 Empl. Prac. Dec. P 34,995, 53 USLW 4135, 27 Wage & Hour Cas. (BNA) 65, 83 L.Ed.2d 1016, 102 Lab.Cas. P 34,633

Briefs and Other Related Documents (Back to top)

- 1984 WL 564024 (Appellate Brief) Reply Brief for the Secretary of Labor on Reargument (Sep. 24, 1984)
- 1984 WL 564025 (Appellate Brief) Reply Brief of Appellant Joe G. Garcia on Reargument (Sep. 24, 1984)
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HOECHST CELANESE CORPORATION, Plaintiff and Appellant,
v.
FRANCHISE TAX BOARD, Defendant and Respondent.
No. S085091.

Supreme Court of California

May 14, 2001.

SUMMARY

The trial court entered judgment for the Franchise Tax Board in a corporation's action for a refund of franchise taxes, finding that the apportioned share of a $388 million reversion of surplus pension plan assets was taxable as business income under the Uniform Division of Income for Tax Purposes Act (Rev. & Tax. Code, § 25120 et seq.). (Superior Court of Sacramento County, No. 96AS01954, William M. Gallagher, Judge. [FN*]) The Court of Appeal, Third Dist., No. C030702, reversed.

FN* Retired judge of the Sacramento Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The Supreme Court reversed the judgment of the Court of Appeal and remanded for further proceedings. The court held that pursuant to the unitary business principle, a state may tax a corporation on an apportionable share of the multistate business carried on in part in the taxing state, and that Rev. & Tax. Code, § 25120, subd. (a), establishes both a transactional test and a separate functional test. If the income meets the requirement of either test, it is taxable by the state as apportionable business income. The court held that although the income from the reversion was not taxable under the transactional test, it was taxable under the functional test, under which corporate income is business income if the acquisition, management, and disposition of the income-producing property constitute integral parts of the taxpayer's regular trade or business operations. Under this test, the reversion of surplus pension plan assets to the taxpayer was business income apportionable to California. The taxpayer created the income-producing property-the pension plan and trust-in order to retain its current employees and to attract new employees. The taxpayer had broad authority to amend the plan and retained an interest in any surplus pension plan assets. It funded the plan with its business income and used these contributions to reduce its tax liability, and it exercised control over the plan and its assets through various committees composed of its officers and employees. The court also held that subjecting an apportionable share of the reverted pension plan assets to *509 taxation in California did not violate the federal due process clause or commerce clause. (Opinion by Brown, J., with George, C. J., Mosk, Kennard, Baxter, and Chin, JJ., concurring. Dissenting opinion by Werdegar, J. (see p. 540).)

HEADNOTES

Classified to California Digest of Official Reports

(1) Corporations § 59--Taxation--Apportionment of Unitary Business.
Pursuant to the unitary business principle, a state may tax a corporation on an apportionable share of the multistate business carried on in part in the taxing state. California employs this unitary business principle and formula apportionment in applying its franchise tax to corporations doing business both inside and outside the state. Under the unitary business/formula apportionment method, a state calculates the local tax base by first defining the scope of the unitary business of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that unitary business between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account objective measures of the corporation's activities within and outside the jurisdiction.

(2) Statutes § 42--Construction--Aids--Uniform Acts.
In construing a statute, courts begin with the words of the statute and give these words their ordinary meaning. If the statutory language is clear and unambiguous, then courts need go no further. If, however, the language is susceptible to more than one reasonable interpretation, then courts look to extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative

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history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. Where the Legislature adopts a uniform act, the history surrounding the creation and adoption of that act is also relevant.

(3a, 3b) Corporations § 60--Taxation--Apportionment of Unitary Business--Allocation of Income--Tests.
Rev. & Tax. Code, § 25120, subd. (a), states that "business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations. The first clause of the provision establishes a transactional *510 test for business income in the first clause, while the second clause establishes a separate functional test. Although the statute is ambiguous, its legislative history, administrative decisions interpreting the definition of business income, and the purpose of the uniform act (Uniform Division of Income for Tax Purposes Act, Rev. & Tax. Code, § § 25120-25141) of which it is a part-to promote uniformity in taxing multistate businesses-support this interpretation. If the income meets the requirement of either test, it is taxable by the state as apportionable business income; nonbusiness income is taxable only to the taxpayer's commercial domicile.

(4) Statutes § 31--Construction--Language--Words and Phrases--Last Antecedent Doctrine.
Under the last antecedent doctrine, qualifying words, phrases, and clauses in a statute are to be applied to the words or phrases immediately preceding and are not to be construed as extending to others more remote.

(5) Statutes § 44--Construction--Aids--Administrative Construction.
Although courts are not bound by administrative decisions construing a controlling statute, courts accord great weight and respect to the administrative construction. The amount of deference given to the administrative construction depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all other factors that give it persuasive power.

(6) Corporations § 60--Taxation--Apportionment of Unitary Business-- Allocation of Income--Transactional Test--Reversion of Pension Surplus.
A reversion of surplus pension plan assets to a taxpaying corporation was not business income under the transactional test for identifying business income that is taxable in the state where the taxpayer is doing business (Rev. & Tax. Code, § 25120, subd. (a)). In this test, the controlling factor is the nature of the particular transaction that generates the income. To create business income, these transactions and activity must occur in the regular course of the taxpayer's trade or business. Relevant considerations include the frequency and regularity of similar transactions, the former practices of the business, and the taxpayer's subsequent use of the income. Unprecedented, once-in-a-corporate-lifetime occurrences do not meet the transactional test, because they do not occur in the regular course of any business. Thus, income arising from extraordinary events such as a complete liquidation and cessation of business cannot satisfy the *511 transactional test. The reversion of surplus assets and the activities necessary to execute it were extraordinary occurrences and were not normal trade or business activities of the taxpayer, which manufactured and sold a diversified line of chemicals, fibers, and specialty products. Indeed, the reversion of surplus pension plan assets was the first and only such transaction in its corporate history. Because the reversion was a once-in-a-lifetime corporate occurrence, it did not meet the transactional test.

(7a, 7b) Corporations § 60--Taxation--Apportionment of Unitary Business--Allocation of Income--Functional Test--Reversion of Pension Surplus.
Under the functional test for identifying business income that is taxable in the state where the taxpayer is doing business (Rev. & Tax. Code, § 25120, subd. (a)), corporate income is business income if the acquisition, management, and disposition of the income-producing property constitute integral parts of the taxpayer's regular trade or business operations. In contrast to the transactional test, which focuses on the income-producing transactions and activity, the functional test focuses on the income-producing property. This property may be tangible or intangible, and the nature of the relationship between this property and the taxpayer's business operations is the critical inquiry. The statutory term "property" does not mean that the taxpayer must own or hold legal title to the property. The phrase "acquisition, management, and disposition" encompasses the myriad of ways that corporations may control and use the rights and privileges commonly associated with property ownership. The word "integral" refers to an

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organic unity between the income-producing property and the taxpayer's business activities. Thus income is business income under the functional test if the taxpayer's acquisition, control, and use of the property contribute materially to the taxpayer's production of business income. In so contributing, the income-producing property becomes interwoven into and inseparable from the taxpayer's business operations.

(8a, 8b, 8c) Corporations § 60--Taxation--Apportionment of Unitary Business--Allocation of Income--Functional Test--Reversion of Pension Surplus.
Under the functional test for identifying business income that is taxable in the state where the taxpayer is doing business (Rev. & Tax. Code, § 25120, subd. (a)), whereby corporate income is business income if the acquisition, management, and disposition of the income-producing property constitute integral parts of the taxpayer's regular trade or business operations, a reversion of surplus pension plan *512 assets to a taxpaying corporation was business income apportionable to California. The corporation created the income-producing property-the pension plan and trust-in order to retain its current employees and to attract new employees. The corporation had broad authority to amend the plan and retained an interest in any surplus pension plan assets. It funded the plan with its business income and used these contributions to reduce its tax liability. It exercised control over the plan and its assets through various committees composed of its officers and employees. The absence of any reference to these pension plan assets in the corporation's financial statements was irrelevant. Subjecting an apportionable share of the reverted pension plan assets to taxation in California did not violate the federal due process clause or commerce clause.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 291.]

(9) Commerce § 3--State Regulation and Taxation of Interstate Commerce-- Apportionment of Unitary Business.
Under the federal due process and commerce clauses, a state may not tax value earned outside its borders. The taxpayer bears the burden of showing by clear and cogent evidence that the state tax results in extraterritorial values being taxed. The state's power to tax an individual's or corporation's activities is justified by the protection, opportunities and benefits the state confers on those activities. Corporate income earned from activities unrelated to corporate activities in the taxing state is not includible in any apportionment formula. Only income from assets that serve an operational rather than an investment function are apportionable to a state for tax purposes. The mere fact that a transaction has a business purpose is not enough. An asset serves an operational function if it helps the taxpayer make better use of its existing business-related resources.

COUNSEL

Morrison & Foerster, Eric J. Coffill, Carley A. Roberts and Lisa R. Brenner for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Lawrence K. Keethe and George C. Spanos, Deputy Attorneys General, for Defendant and Respondent.

Paull Mines and Anne E. Miller for Multistate Tax Commission as Amicus Curiae on behalf of Defendant and Respondent. *513

BROWN, J.

States have long struggled to devise an equitable and constitutional method for taxing corporations that do business in multiple states and countries. Like many other states, California has adopted the Uniform Division of Income for Tax Purposes Act (7A pt. 1 West's U. Laws Ann. (1999) U. Div. of Income for Tax Purposes Act, § 1 et seq., p. 361) (UDITPA) in an attempt to resolve this dilemma (see Rev. & Tax. Code, § § 25120-25141). [FN1] Under this scheme of taxation, all taxpayer income is divided into business or nonbusiness income. Business income is apportionable to each state using a three-factor formula. Nonbusiness income is allocable only to the taxpayer's commercial domicile. In this case, we consider whether a reversion of surplus pension plan assets is taxable by California as apportionable business income. We conclude that it is.

FN1 All further statutory references are to the Revenue and Taxation Code unless otherwise indicated.

Factual Background

Hoechst Celanese Corporation (Hoechst), formerly Celanese Corporation, is a Delaware corporation with its principal place of business in New Jersey and its commercial domicile in New York. It manufactures and sells a diversified line of chemicals, fibers and specialty products. Since the late 1960's, Hoechst has conducted business operations in California and filed

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California franchise tax returns.

In 1947, Hoechst created its first pension plan. Since then, Hoechst's pension plans have undergone numerous changes. For example, the original pension plan required contributions from both Hoechst and its participating employees. In 1969, however, the plan became noncontributory, and only Hoechst had to make contributions. Despite the constant evolution of these plans, their purpose has remained the same. Hoechst has created and maintained these plans "for the general benefit of its employees" in an effort to "retain its current employees and to attract other qualified employees."

The version of the pension plan at issue here was known as the Celanese Retirement Income Plan (CRIP I), and was subject to the terms of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.) (ERISA). CRIP I dated back to the original 1947 plan and resulted from the merger in 1982 of several pension plans created and maintained by Hoechst and its controlled subsidiaries. It was a qualified plan under Internal Revenue Code section 401(a) (26 U.S.C. § 401(a)) and covered both active *514 and retired employees. Under the terms of CRIP I, each plan member only had a "nonforfeitable right" to a predefined level of benefits. (*Hughes Aircraft* Co. *v. Jacobson* (1999) 525 U.S. 432, 440 [119 S.Ct. 755, 761-762, 142 L.Ed.2d 881] (*Hughes Aircraft*).)

In conjunction with CRIP I, Hoechst created and maintained a trust known as the Celanese Retirement Income Plan Trust (CRIP Trust I). The trust was tax exempt, and Chase Manhattan Bank acted as the trustee. To fund CRIP I, Hoechst made periodic contributions to the CRIP Trust I, and the trust invested these contributions in order to ensure adequate funding for the pension plan. These contributions discharged Hoechst's financial obligations and liabilities to CRIP I subject to any limitations imposed by ERISA. As permitted by law, Hoechst claimed tax deductions for these contributions on its federal and California tax returns. Any surplus assets in excess of those necessary to meet any obligations and liabilities owed under ERISA and CRIP I (surplus pension plan assets) were used to reduce future contributions by Hoechst to the CRIP Trust I and were not used to increase any benefits provided under the plan.

Because the CRIP Trust I held the pension plan assets, Hoechst did not own or hold legal title to these assets and could not use these assets to fund any of its corporate activities. Hoechst, however, retained an interest in any surplus pension plan assets. These surplus assets would revert to Hoechst *only* upon termination of the plan and satisfaction of all benefits and liabilities owed under CRIP I and ERISA. Until such a reversion, none of the pension plan assets, including any contributions or capital gains, were taxable as Hoechst's income.

Even though Hoechst did not hold legal title to the pension plan assets, it did have some control over them through its power over CRIP I and the CRIP Trust I and their predecessors. For example, Hoechst had the power to amend or discontinue the pension plans at any time, subject to ERISA limitations. The board of directors of Hoechst also had the power to appoint and replace the trustees of the pension plan assets at any time-a power that it exercised on numerous occasions.

Hoechst also retained the power to administer its pension plans, including the power to prescribe procedures to follow in obtaining evidence necessary to establish the right of any person to payments under the plans, to interpret the terms of the plans, to prescribe procedures for determining and recording the periods for calculating benefits, and to determine the right of any person to benefits under the plans. To exercise these powers, Hoechst created an *515 administrative committee composed of Hoechst employees, including corporate officers. Known as the Employee Benefits Administration Committee, the committee handled all paperwork for the plans, determined eligibility for benefits and considered requests for increases in benefits. The committee met in either New York or North Carolina three to six times a year on an irregular basis, depending on the rate that applications accumulated.

Hoechst also created a separate committee responsible for the supervision and review of the financial operation of its pension plans and trusts. The Celanese Pension Plan Investment Committee was comprised of Hoechst's chief financial officer, some of its vice-presidents, its controller and an individual from its human resources department. The committee established, supervised and reviewed the funding and investment policies of the plans and trusts and appointed the investment fund managers who determined the actual investments made by the plans and trusts. Although the committee did not control the specific investments chosen by the fund managers, it had the power to change fund managers and guide their overall investment strategy. On many occasions, Hoechst exercised this power and replaced

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these fund managers for various reasons, including inadequate performance. For example, in 1978, the committee "drastically revised" the investment strategy of its pension plan and "introduced new managers with a different perspective on their mission."

Due to years of wise investments, the CRIP Trust I accumulated more assets than necessary to fund the defined benefits owed to plan members under CRIP I and ERISA. In 1983, Hoechst decided to recapture these surplus assets in order to preclude their use in a takeover bid. To recapture the surplus assets, Hoechst divided CRIP I into two separate plans with essentially the same provisions as CRIP I. The newly created Celanese Retirement Income Plan (CRIP II) covered active employees, and the Celanese Retirement Security Plan (CRSP) covered retired employees. Like their predecessor, both plans were qualified benefit plans under Internal Revenue Code section 401(a).

Concurrent with its division of CRIP I, Hoechst divided the CRIP Trust I into two separate trusts. The Celanese Retirement Income Plan Trust (CRIP Trust II) funded the newly created CRIP II, while the Celanese Retirement Security Plan Trust (CRSP Trust) funded the newly created CRSP. As part of the split-up, Hoechst allocated all assets of the CRIP Trust I between the CRIP Trust II and the CRSP Trust. In making this allocation, Hoechst made sure that all benefits owed to CRIP II and CRSP members were fully funded as required under the terms of CRIP I and ERISA. *516

Using the funds allocated to the CRSP Trust, Hoechst purchased annuities to provide the benefits owed to its retirees. Hoechst then terminated both CRSP and the CRSP Trust in 1985. Upon termination, all surplus assets of that plan and trust reverted to Hoechst. This surplus totaled approximately $388.8 million. After the reversion, Hoechst placed these surplus pension plan assets in its general fund to be used for general corporate purposes.

As part of its 1985 federal tax returns, Hoechst reported the income from the reversion as "miscellaneous income." Hoechst also reported the income from the reversion as "taxable income of the business" in its 1985 New York tax return, and paid New York state income tax on a small percentage of this income. [FN2] In its 1985 California tax return, however, Hoechst did not apportion any part of the reverted income to California. Consequently, the state Franchise Tax Board (Board) issued a "Notice of Additional Tax Proposed to Be Assessed for 1985" and proposed to impose an additional franchise tax of $292,142 plus interest based on the income from the reversion.

FN2 New York has not adopted the UDITPA.

Hoechst filed a timely protest. The Board denied the protest and affirmed the proposed assessment in its entirety. Hoechst then appealed to the State Board of Equalization (SBE). Citing *Appeal of Borden, Inc.* (Feb. 3, 1977) (1971-1978 Transfer Binder) Cal.Tax Rptr. (CCH) paragraph 205-515, page 14,897-57 (*Borden*), and *Appeal of Kroehler Manufacturing Co.* (Apr. 6, 1977) (1971-1978 Transfer Binder) Cal.Tax Rptr. (CCH) paragraph 205-646, page 14,897-122 (*Kroehler*), the SBE held that: (1) the definition of "business income" in subdivision (a) of section 25120 created both a transactional and a functional test; and (2) income from the reversion was business income under the functional test. Thus, the reverted income was apportionable and subject to taxation in California. The SBE also found the tax assessment constitutional under the operational purpose test enunciated in *Allied-Signal, Inc. v. Director, Div. of Taxation* (1992) 504 U.S. 768, 778 [112 S.Ct. 2251, 2258, 119 L.Ed.2d 533] (*Allied-Signal*).

Hoechst then filed a timely claim for refund with the Board. As part of the claim, Hoechst attached a check for $715,791.35-which covered the original assessment plus interest. In the claim, Hoechst asked for a full refund, alleging that the income from the reversion did not constitute business income under section 25120. Hoechst further argued that apportionment of the income from the reversion to California violated the due process and commerce clauses of the United States Constitution.

After the Board denied the claim, Hoechst filed a complaint for refund of taxes with the superior court. After a hearing, the court ruled in favor of the *517 Board. Specifically, the court found that: (1) the statutory definition of "business income" established both a transactional and a functional test; (2) the income from the reversion was apportionable business income subject to taxation in California under the functional test; and (3) taxation of the income from the reversion by California did not violate the due process and commerce clauses of the United States Constitution.

Hoechst appealed, and the Court of Appeal reversed.

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Although the court applied both a transactional and functional test, it concluded that the reversion did not satisfy either test. First, the court found that the reversion did not meet the transactional test because the reversion was an extraordinary event that did not occur in the regular course of Hoechst's trade or business. Second, the court found that the reversion failed the functional test because Hoechst did not own or hold title to the pension plan assets that generated the income. Thus, the income from the reversion was nonbusiness income-and not business income-and was only subject to taxation in Hoechst's commercial domicile, New York.

We granted review to determine whether: (1) income from a reversion of surplus pension plan assets constitutes business income apportionable to California; and (2) subjecting income from a reversion to taxation in California violates the federal due process and commerce clauses.

Discussion

I

(1) Pursuant to "the unitary business principle," a state may "tax a corporation on an apportionable share of the multistate business carried on in part in the taxing State." (*Allied-Signal, supra,* 504 U.S. at p. 778 [112 S.Ct. at p. 2258].) California employs this " 'unitary business' principle and formula apportionment in applying [its franchise] tax to corporations doing business both inside and outside the State." (*Container Corp. v. Franchise Tax Bd.* (1983) 463 U.S. 159, 162-163 [103 S.Ct. 2933, 2939, 77 L.Ed.2d 545] (*Container Corp.*).) Under the "unitary business/formula apportionment method," a state "calculates the local tax base by first defining the scope of the ' unitary business' of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that ' unitary business' between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account objective measures of the corporation's activities within and without the jurisdiction." (*Id.* at p. 165 [103 S.Ct. at p. 2940].) Like many other states that use this method of taxation, California has adopted the UDITPA almost verbatim. (*Container Corp.*, at p. 165 [103 S.Ct. at p. 2940]; § 25120 et seq.) ***518**

Originally promulgated by the National Conference of Commissioners on Uniform State Laws (Commissioners) in 1957, the UDITPA has two main objectives: "(1) to promote uniformity in allocation practices among the 38 states which impose taxes on or measured by the income of corporations, and (2) to relieve the pressure for congressional legislation in this field." (Keesling & Warren, *California's Uniform Division of Income for Tax Purposes Act* (1967) 15 UCLA L.Rev. 156, 156 (Keesling & Warren).) Initially, the UDITPA received a tepid response as few states adopted it. In 1965, however, Congress proposed comprehensive legislation regulating state taxation of interstate commerce. Spurred by the specter of congressional intervention, many states, including California, adopted the UDITPA. (See Peters, *The Distinction Between Business Income and Nonbusiness Income* (1973) 25 So.Cal. Tax Inst. 251, 279 (Peters).) Currently, 22 states plus the District of Columbia have adopted the UDITPA. [FN3] In addition, some states have modeled their corporate tax scheme after the UDITPA. (See, e.g., *Polaroid Corp. v. Offerman* (1998) 349 N.C. 290 [507 S.E.2d 284, 294] (*Polaroid*) [North Carolina's "Corporate Income Tax Act is modeled after [the] UDITPA"]; *Kroger Co. v. Dept. of Revenue* (1996) 284 Ill.App.3d 473 [220 Ill.Dec. 566, 673 N.E.2d 710, 714] (*Kroger*) [the Illinois Income Tax Act "was modeled after the UDITPA"].)

FN3 These states are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Kentucky, Maine, Michigan, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. (7A pt. 1 West's U. Laws Ann. (2000 supp.) UDITPA, note, p. 13.)

California's Uniform Division of Income for Tax Purposes Act (California UDITPA) mirrors the UDITPA. (Compare § § 25120-25141 with 7A pt. 1 West's U. Laws Ann., *supra*, UDIPTA, § § 1-22, pp. 361-403.) Like the UDITPA, the California UDITPA divides all corporate income into two categories-business income and nonbusiness income-and uses the UDITPA definition of these categories. (§ 25120.) " 'Business income' means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." (§ 25120, subd. (a).) " 'Nonbusiness income' means all income other than business income." (§ 25120, subd. (d).) All business income is "apportioned to this state" through a formula based on the property, sales and payroll of the taxpayer. (§ 25128.) [FN4] In contrast, nonbusiness income is generally "allocated in full to the state in which the taxpayer is domiciled."

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(*519*Robert Half Internat., Inc. v. Franchise Tax Bd.* (1998) 66 Cal.App.4th 1020, 1023 [78 Cal.Rptr.2d 453] (*Robert Half*).) The tax treatment of corporate income therefore depends on its classification as business or nonbusiness income.

FN4 Since 1993, the Legislature has amended the original apportionment formula-which used to be identical to the formula used in the UDITPA. (Compare § 25128 with Stats. 1966, ch. 2, § 7, p. 179.) The present formula, however, is still based on the property, sales and payroll of the taxpayer. (See § 25128.)

Because section 25120 defines "nonbusiness income" in relation to business income, the definition of "business income" is the key to determining whether corporate income is apportionable or allocable. (2) To construe this definition, we apply the well-established rules of statutory construction and seek to " 'ascertain the intent of the Legislature so as to effectuate the purpose of the law.' " (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977 [90 Cal.Rptr.2d 260, 987 P.2d 727] (*Wilcox*), quoting *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [20 Cal.Rptr.2d 523, 853 P.2d 978].) As always, we begin with the words of a statute and give these words their ordinary meaning. (*Wilcox*, at p. 977.) If the statutory language is clear and unambiguous, then we need go no further. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].) If, however, the language is susceptible to more than one reasonable interpretation, then we look to "extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1008 [239 Cal.Rptr. 656, 741 P.2d 154].) Where the Legislature adopts a uniform act, the history surrounding the creation and adoption of that act is also relevant. [FN5] (See *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 16- 19 [99 Cal.Rptr.2d 252, 5 P.3d 815] (*Bonds*).)

FN5 In three separate requests for judicial notice, the Board asked the court to take judicial notice of: (1) a bill analysis and fiscal impact report submitted by the New Mexico Taxation and Revenue Department in connection with New Mexico House Bill No. 349 (1999 Reg. Sess.); (2) a transcript of the January 12, 1996, hearing of the California Assembly Committee on Taxation; (3) the 1966 reprinting of the model UDITPA issued by the National Conference of Commissioners on Uniform State Laws; (4) the legislative history of Assembly Bill No. 11 (1966 Reg. Sess.), which became the California UDITPA; (5) a January 7, 1966 memorandum from Allison Dunham, the Executive Director of the National Conference of Commissioners on Uniform State Laws, to the Special Committee on UDITPA; and (6) a January 21, 1966 memorandum from William J. Pierce, a commissioner of the National Conference of Commissioners on Uniform State Laws, to the Special Committee on UDITPA. In addition, Hoechst asked the court to take judicial notice of a January 14, 1966 memorandum from Donald H. Burnett to R.R. Bullivant, Chairman of the Special Subcommittee on UDITPA. We hereby grant these requests. (Evid. Code, § 452, subd. (h).)

In the instant case, Hoechst contends the statutory definition of "business income" creates a single transactional test, and the 1985 reversion of surplus pension plan assets does not satisfy this test or any other test. Thus, the ***520** income from the reversion is nonbusiness income that is only taxable by Hoechst's commercial domicile, New York. The Board counters that the definition establishes both a transactional and functional test, and the reversion meets both tests. Thus, the reverted assets are apportionable to California. As explained below, we conclude that the statutory definition establishes separate transactional and functional tests for business income and that the reversion satisfies *only* the functional test. Therefore, the income from the reversion is apportionable business income.

A. *The Business Income Tests*

(3a) Subdivision (a) of section 25120 states: " 'Business income' means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." Thus, the statutory definition of "business income" consists of two clauses joined together by the conjunction and predicate, "and includes." (*Ibid.*) In interpreting this language, all courts agree that the first clause establishes a transactional test. Some courts have,

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however, construed the second clause as a separate functional test for business income. (*Uniroyal Tire Co. v. Dept. of Finance* (Ala. 2000) 779 So.2d 227, 230 (*Uniroyal Tire*).) Under this construction, corporate income is business income if it satisfies either the transactional or functional test. (*Ibid.*) Other courts have rejected this approach and construed the two clauses as a single transactional test. Under this construction, the second clause modifies the first clause and merely exemplifies "what fits within the definition." (*Polaroid, supra,* 507 S.E.2d at p. 290.) Not surprisingly, Hoechst contends the statutory definition of business income establishes only a transactional test, while the Board contends the definition establishes both a transactional and functional test. We agree with the Board.

We initially note that the statutory language is ambiguous and reasonably susceptible to either interpretation. On the one hand, the grammatical structure of the business income definition arguably creates both a transactional and functional test. "Business income" is the subject of the sentence. (§ 25120, subd. (a).) Two predicate clauses containing different verbs, objects and prepositional phrases and separated by a conjunction follow this subject. As such, the definition arguably contains a "compound predicate" that states two independent definitions of business income. (*Kroger, supra,* 673 N.E.2d at p. 713.) In other words, "the statute could grammatically be read as stating: 'Business income means income arising from transactions ***521** and activity in the regular course of the corporation's trade or business, and [business income] includes income from tangible and intangible property ....' " (*Polaroid, supra,* 507 S.E.2d at p. 290.)

Such an interpretation accords with the different language used in the first and second clauses. The first clause focuses on "transactions and activity" and their relationship to "the regular course of the taxpayer's trade or business." (§ 25120, subd. (a).) In contrast, the second clause focuses on "property" and its relationship to "the taxpayer's regular trade or business operations." (*Ibid.*) The creation of two separate predicate clauses with different verbs, objects and prepositional phrases strongly suggests that "the second clause contains a definition distinct from that set forth in the first." (*Polaroid, supra,* 507 S.E.2d at p. 291.) The apparent expansion of "the definition of business income" by the second clause bolsters such a conclusion because a broader definition can hardly exemplify a narrower definition. (*Kroger, supra,* 673 N.E.2d at p. 713.)

(4) On the other hand, the addition of the word "includes" after the conjunction linking the two clauses suggests that the second clause is a subset of the first clause under the last antecedent doctrine. (See § 25120, subd. (a).) According to this doctrine, " 'qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.' " (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680 [183 Cal.Rptr. 520, 646 P.2d 191], quoting *Board of Port Commrs. v. Williams* (1937) 9 Cal.2d 381, 389 [70 P.2d 918].) Arguably, the word "includes" makes the second clause a qualifying clause that modifies the first clause-and not just "business income." (*Uniroyal Tire, supra,* 779 So.2d at p. 232.) In other words, "[t]he concluding twenty-six words ... are added to include transactions involving disposal of fixed assets by taxpayers *who emphasize the trading of assets as an integral part of regular business.*" (*Phillips Petroleum v. Dept. of Revenue* (Iowa 1994) 511 N.W.2d 608, 610 (*Phillips Petroleum*), italics added.)

The language of the second clause provides some support for such an interpretation. The second clause states that the "acquisition, management, *and* disposition" of property must be "integral parts" of the taxpayer's "regular" "business operations." (§ 25120, subd. (a), italics added.) The use of "and" suggests that the second clause merely exemplifies the first because the sale of property " 'that is not regularly disposed of, but rather is held indefinitely,' " arguably cannot be an integral part of the taxpayer's business operations. (*Uniroyal Tire, supra,* 779 So.2d at p. 234, quoting Faber, *When* ***522** *Does the Sale of Corporate Assets Produce Business Income for State Corporate Franchise Tax Purposes?* (May-June 1995) The Tax Executive 179, 187.)

Moreover, the apparent breadth of the second clause equally supports the rejection of the functional test. As the Alabama Supreme Court observed: "If income is business income under the transactional test, then, a fortiori, it is business income under the functional test. In other words, the functional test would include everything that the transactional test includes-and much more." (*Uniroyal Tire, supra,* 779 So.2d at pp. 235-236.) As such, construing section 25120 to create two alternative tests for business income arguably renders the first clause mere surplusage, in violation of the rules of statutory construction. (See *People v. Cruz* (1996) 13 Cal.4th 764, 782 [55 Cal.Rptr.2d 117, 919 P.2d 731].)

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In light of these competing arguments, we conclude that the statutory language is ambiguous as to the existence of a separate functional test. At a minimum, we cannot find that either interpretation is unreasonable based solely on the statutory language. Indeed, the conflicting opinions of our sister courts interpreting the very same language demonstrate that reasonable minds may disagree over whether the business income definition creates a functional test. [FN6] Therefore, we must now turn to extrinsic aids in an effort to ascertain the Legislature's intent. These aids establish that the Legislature intended to create both a transactional and functional test for business income.

FN6 Compare *Uniroyal Tire, supra,* 779 So.2d at page 236 (transactional test only); *Phillips Petroleum, supra,* 511 N.W.2d at page 610 (same); *Western Natural Gas Co. v. McDonald* (1968) 202 Kan. 98 [446 P.2d 781, 783] (*Western Natural Gas*) (same); *McVean & Barlow, Inc. v. New Mexico Bureau of Revenue* (1975) 88 N.M. 521 [543 P.2d 489, 492] (*McVean*) (citing the functional test language but applying the principles of the transactional test); *Associated Partnership I, Inc. v. Huddleston* (Tenn. 1994) 889 S.W.2d 190, 195 (*Associated Partnership I*) (transactional test only) with *Pledger v. Getty Oil Exploration Co.* (1992) 309 Ark. 257 [831 S.W.2d 121, 124-125] (*Pledger*) (applying a separate functional test); *Dist. of Columbia v. Pierce Associates, Inc.* (D.C. 1983) 462 A.2d 1129, 1131 (*Pierce Associates*) (same); *Texaco-Cities Service Pipeline Co. v. McGaw* (1998) 182 Ill.2d 262 [230 Ill.Dec. 991, 695 N.E.2d 481, 485] (*Texaco-Cities*) (same); *Montana Dept. of Revenue v. American Smelting and Refining Co.* (1977) 173 Mont. 316 [567 P.2d 901, 907] (*American Smelting*) (same); *Polaroid, supra,* 507 S.E.2d at page 295 (same); *Simpson Timber Co. v. Dept. of Revenue* (1998) 326 Or. 370 [953 P.2d 366, 369] (*Simpson Timber*) (same); *Ross-Araco Corp. v. Commonwealth of Pennsylvania* (1996) 544 Pa. 74 [674 A.2d 691, 696-697] (*Ross-Araco*) (same).

As an initial matter, the legislative history behind the UDITPA strongly supports the inclusion of a functional test. Because the Legislature adopted the UDITPA almost verbatim (Keesling & Warren, *supra,* 15 UCLA L.Rev. ***523** at p. 156), we look to the history behind the UDITPA for guidance (see *Bonds, supra,* 24 Cal.4th at pp. 16-19). This history reveals that the UDITPA definition of "business income" derives from "California decisional law" which employed a separate functional test for business income. (Peters, *supra,* 25 So.Cal. Tax Inst. at p. 278.)

The first draft of the UDITPA did not distinguish between business and nonbusiness income. (Peters, *supra,* 25 So.Cal. Tax Inst. at pp. 272-273.) After concerns about the constitutionality of the first draft arose, John S. Warren, a California tax administrator, suggested that the Commissioners divide all income into apportionable business income and allocable nonbusiness income. As part of his suggestion, Warren proposed a definition of business income based on language used in certain SBE decisions. (*Id.* at pp. 275-276.) The Commissioners liked Warren's proposal, and "[t]he final draft of the [UDITPA] contained the definitions of business income and nonbusiness income proposed by Mr. Warren." (Peters, *supra,* at p. 276.) Thus, the UDITPA's definition of business income was based on pre-UDITPA decisions of the SBE, and the UDITPA's distinction between business and nonbusiness income was "in line with ... California practice" at the time of its enactment. (Keesling & Warren, *supra,* 15 UCLA L.Rev. at pp. 163-164; see also *Polaroid, supra,* 507 S.E.2d at p. 294 ["the uniform definition of business income, as set forth in UDITPA, finds its origins in early California jurisprudence"].) Accordingly, our interpretation of the business income definition should be guided by the SBE's pre-UDITPA decisions applying language similar to the language of the UDITPA.

These SBE decisions consistently applied an *independent* functional test when determining whether income constituted business income. In doing so, the SBE used language virtually identical to the language in the second clause of the statutory definition. For example, in *Appeal of Marcus-Lesoine, Inc.* (July 7, 1942) 2 SBE 338, 340-341, the SBE held that interest income from conditional sales contracts constituted business income *solely* because "the acquisition, management and liquidation of the intangibles constitute[d] integral parts of the corporation's regular business operations." Similarly, the SBE found that copyright royalties were business income *solely* because the "acquisition, management and disposition of the intangibles constitute[d] integral parts of the corporation's regular business operations." (*Appeal of Houghton Mifflin Co.* (Mar. 28, 1946) 3 SBE 344, 345 (*Houghton Mifflin*).) The SBE also relied *solely* on the functional test when it

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held that patent royalties constituted business income. (*Appeal of National Cylinder Gas Co.* (Feb. 5, 1957) 6 SBE 153, 154 ["We have consistently held ... that income from intangibles is includible in unitary income and subject to [apportionment] if the acquisition, management and disposition of the intangibles ***524** constitute integral parts of the unitary business"]; *Appeal of Intern. Business Machines Corp.* (Oct. 7, 1954) 6 SBE 5, 6-7 ["we have previously held that income from such intangibles [patents] is subject to [apportionment] where the acquisition, management and disposition of the intangibles constitute integral parts of the owner's regular business operations"].) Because these SBE decisions construe the language of the second clause as an independent test for business income, we hold that a separate functional test exists.

The comments to section 1, subdivision (a) of the UDITPA prepared by the Commissioners (Commissioners Comments) bolster our holding. The comment states in part that "[i]ncome from the disposition of property used in a trade or business of the taxpayer is includible within the meaning of business income." (Comrs. Coms., UDITPA, com. foll. § 1, subd. (a), p. 2, reprinted at <http:// www.law.upenn.edu/bll/ulc/fnact99/1920_69/udiftp5 7.htm> [as of May 14, 2001].) By focusing on the "property" and its relationship to the "trade or business" and using the "disposition" language of the second clause (*ibid.*), the Commissioners' comment strongly suggests that a separate functional test for business income exists. Indeed, the comment ostensibly makes all income from the disposition of property used in the taxpayer's business apportionable even if the disposition does not occur "in the regular course of the taxpayer's trade or business." (7A pt. 1 West's U. Laws Ann., *supra*, UDITPA, § 1, subd. (a), pp. 361-362.)

Administrative decisions interpreting the statutory definition of "business income" also support the inclusion of a separate functional test. (5) Although we are not bound by administrative decisions construing a controlling statute, we accord " 'great weight and respect to the administrative construction.' " (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12 [78 Cal.Rptr.2d 1, 960 P.2d 1031] (*Yamaha*), quoting *International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 931, fn. 7 [163 Cal.Rptr. 782, 609 P.2d 1].) The amount of deference given to the administrative construction depends " 'upon *the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.*' " (*Yamaha*, at pp. 14-15, italics added by *Yamaha*, quoting *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 140 [65 S.Ct. 161, 164, 89 L.Ed. 124].)

(3b) In light of these considerations, we find the SBE decisions construing the language of the second clause of the statutory business income definition as an independent functional test for business income highly ***525** persuasive. In *Borden, supra,* (1971-1978 Transfer Binder) Cal.Tax Rptr. (CCH), paragraph 205-616, page 14,897-59, the SBE first addressed the validity of the functional test and held that section 25120 authorized a separate "functional test for business income." In a thorough and well-reasoned opinion, the SBE discussed the legislative history behind the UDITPA and relied heavily on those California administrative decisions that formed the basis for the business income definition. (*Borden*, at pp. 14,897-58 to 14,897-59.) The SBE also cited language in regulations proposed by the Multistate Tax Commission and enacted in California that supported the existence of a separate functional test. (*Id.* at p. 14,987-59.) Finally, the SBE rejected the contrary conclusion reached by the Kansas and New Mexico courts in *Western Natural Gas, supra,* 446 P.2d at page 783, and *McVean, supra,* 543 P.2d at page 492, because these courts did not consider the UDIPTA's history or the regulations. (*Borden*, at p. 14,897-59.). During the 24 years since *Borden*, the SBE has consistently applied both a transactional and functional test when determining whether income constitutes business income under subdivision (a) of section 25120. [FN7] Because the SBE thoroughly considered the issue, reached a reasonable conclusion, and consistently applied this conclusion over the past 24 years, we see no reason to overturn the SBE's long-standing construction. (See *Yamaha, supra,* 19 Cal.4th at pp. 12-15.) ***526**

FN7 (See, e.g., *Appeal of CTS Keene, Inc.* (Feb. 10, 1993) [1993-1995 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 402-589, p. 27,569; *Appeal of Dial Finance Co. of Cal.* (Feb. 10, 1993) [1993-1995 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 402-586, p. 27,553; *Appeal of American Biltrite Inc.* (Nov. 19, 1992) [1991-1992 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 402-531, p. 27,407-3; *Appeal of VSI Corp.* (May 2, 1991) [1991-1992 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 401-937, p. 26,240 (*VSI Corp.*); *Appeal of Masonite Corp.* (Nov. 15, 1988) [1986-1990 Transfer Binder] Cal.Tax

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Rptr. (CCH) ¶ 401-677, p. 25,335; *Appeal of R.H. Macy & Co.* (July 26, 1988) [1986-1990 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 401-639, p. 25,195; *Appeal of U-Haul Co. of Van Nuys* (Mar. 3, 1987) [1986-1990 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 401-489, p. 24,667; *Appeal of Mark Controls Corp.* (Dec. 3, 1986) [1986-1990 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 401-451, p. 24,566 (*Mark Controls*); *Appeal of National Dollar Stores, Inc.* (Sept. 10, 1986) [1984- 1986 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 401-403, p. 24,429 (*National Dollar Stores*); *Appeal of Armour Oil Co.* (June 10, 1986) [1984-1986 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 401-355, p. 24,325; *Appeal of Southwestern Development Co.* (Sept. 10, 1985) [1984-1986 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 401-157, p. 23,898; *Appeal of Calvo Growers of Cal.* (Feb. 28, 1984) [1981-1984 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 400-673, p. 23,035; *Appeal of Johns-Manville Sales Corp.* (Aug. 17, 1983) [1981-1984 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 400-476, p. 22,741; *Appeal of Amwalt Group, Inc.* (July 28, 1983) [1981-1984 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 400-433, p. 22,693 (*Amwalt Group*); *Appeal of Occidental Petroleum Corp.* (June 21, 1983) [1981-1984 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 400-394, p. 22,609 (*Occidental Petroleum*); *Appeal of Standard Oil Co. of Cal.* (Mar. 2, 1983) [1981-1984 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 400-383, p. 22,561 (*Standard Oil*); *Appeal of DPF, Inc.* (Oct. 28, 1980) [1978-1981 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 206-429, p. 14,965-36; *Kroehler, supra*, [1971-1978 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 205-646, p. 14,897-122; *Appeal of New York Football Giants, Inc.* (Feb. 3, 1977) [1971- 1978 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 205-600, p. 14,897-31 (*New York Football Giants*).)

Finally, construing the second clause of the definition as a separate functional test fulfills one of the primary objectives behind the UDITPA-to promote uniformity among the states. (Keesling & Warren, *supra*, 15 UCLA L.Rev. at p. 156.) Although courts in other jurisdictions that have adopted the UDITPA have disagreed over the existence of a separate functional test, the state legislatures in these jurisdictions have not. In four of the five states where the state court rejected the functional test, the state legislature amended the definition of business income to include such a test. [FN8] (See Iowa Code § 422.32; Kan. Stat. Ann. § 79-3271, subd. (a) [taxpayer may elect to apply the functional test]; N.M. Stat. Ann. § 7-4-2, subd. A; Tenn. Code Ann. § 67-4-2004.) Thus, virtually all states adopting the UDITPA now construe the second clause of the business income definition as a separate functional test. In the interests of promoting uniformity, we do the same. Accordingly, Hoechst's income from the reversion of surplus pension plan assets is apportionable as business income if it satisfies *either* the transactional test or the functional test.

FN8 Only Alabama has not amended its definition of business income to include a functional test. Of course, the Alabama Supreme Court only issued its decision rejecting the functional test in August 2000.

B. *The Transactional Test*

(6) Under the transactional test, corporate income is business income if it arises "from transactions and activity in the regular course of the taxpayer's trade or business." (§ 25120, subd. (a).) Upon construing and applying this statutory language, we conclude that Hoechst's reversion of surplus pension plan assets fails to meet the transactional test.

The language of the transactional test is unambiguous, and courts have construed this language in a consistent manner. "The controlling factor by which" the transactional test "identifies business income is the nature of the particular transaction" that generates the income. (*Western Natural Gas, supra*, 446 P.2d at p. 783.) To create business income, these "transactions and activity" must occur "in the *regular* course of the taxpayer's trade or business." (§ 25120, subd. (a), italics added.) "[R]elevant considerations include the frequency and regularity of similar transactions, the former practices of the business, and the taxpayer's subsequent use of the income." (*Associated Partnership I, supra*, 889 S.W.2d at p. 195.) "[U]nprecedented, ... once-in-a-corporate-lifetime occurrence[s]" do not meet the transactional test because they do not occur in the regular course of any busi ness. (*Phillips Petroleum, supra*, 511 N.W.2d at pp. 610-611.) Thus, income arising from "extraordinary" events such as a "complete liquidation *527 and cessation of business" cannot satisfy the transactional test. (*Uniroyal Tire, supra*, 779 So.2d at p. 236.)

Here, the reversion and the activities necessary to

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execute the reversion were extraordinary occurrences. They were not normal trade or business activities of Hoechst, which manufactured and sold a diversified line of chemicals, fibers and specialty products. Indeed, the 1985 reversion of surplus pension plan assets was the first and only such transaction in Hoechst's corporate history. Because the reversion was a "once-in-a-lifetime corporate occurrence," it cannot meet the transactional test. (*Phillips Petroleum, supra,* 511 N.W.2d at pp. 610-611.)

In reaching this conclusion, we reject the Board's attempt to define the relevant "transactions and activity" as the purchase and sale of securities by the fund managers appointed by Hoechst. (§ 25120, subd. (a).) These investments did not result in *any taxable income* to Hoechst *until and unless*: (1) the investments generated more assets than necessary to fund the defined benefits owed to plan members; and (2) Hoechst acted to recapture these surplus assets. Thus, the only transaction or activity that generated any taxable income for Hoechst was the reversion itself. Accordingly, the income from the reversion does not satisfy the transactional test and is apportionable to California only if it meets the functional test.

C. *The Functional Test*

(7a) Under the functional test, corporate income is business income "if the acquisition, management, and disposition of the [income-producing] property constitute integral parts of the taxpayer's regular trade or business operations." (§ 25120, subd. (a).) (8a) After reviewing the statutory language and the applicable extrinsic aids, we hold that the reversion satisfies the functional test. Therefore, the income from the reversion is business income apportionable to California.

(7b) We begin our analysis by examining the statutory language. In contrast to the transactional test, which focuses on the income-producing "transactions and activity," the functional test focuses on the income-producing "property." (§ 25120, subd. (a).) This property may be "tangible" or "intangible" (*ibid.*), and the nature of the relationship between this property and the taxpayer's "business operations" is the critical inquiry (*Texaco-Cities, supra,* 695 N.E.2d at p. 486 [the functional test "focuses upon the role or function of the property as being integral to regular business operations"]). ***528**

Before defining the relationship necessary to meet the functional test, we reject at the outset Hoechst's contention that the statutory term "property" implies that the taxpayer must own or hold legal title to the property. Such an interpretation only considers the term "property" in isolation and ignores the conditional clause that places this term in context: "if the acquisition, management, and disposition of the *property* constitute integral parts of the taxpayer's regular trade or business operations." (§ 25120, subd. (a), italics added.) This conditional clause-and not the vague implications of the term "property"-defines the relationship between the property and the taxpayer required by the functional test.

The conditional clause contains two key phrases: "acquisition, management, and disposition of the property" and "integral parts of the taxpayer's regular trade or business operations." (§ 25120, subd. (a).) The first phrase-"acquisition, management, and disposition of the property"-appears to refer to the taxpayer's interest in and power over the income-producing property. (*Ibid.*) In construing this phrase, the parties focus on the meaning of the word "and." (*Ibid.*) Hoechst contends "and" has a conjunctive meaning, while the Board contends "and" has a disjunctive meaning in the statute. (*Ibid.*) Because "and" is ordinarily conjunctive and because nothing suggests a legislative intent to give "and" a different meaning, we agree with Hoechst. (See *Wilcox, supra,* 21 Cal.4th at p. 977.) We do not, however, end our inquiry there. Rather, we find it both instructive and necessary to consider the meaning of the terms "acquisition," "management," and "disposition" in the context of the business income definition. (§ 25120, subd. (a).)

Upon doing so, we conclude that the phrase "acquisition, management, and disposition" "refers to the conditions of ownership of property by the taxpayer." (*Kroger, supra,* 673 N.E.2d at p. 714.) Such a conclusion follows logically from the ordinary meanings of these words. At the time of the enactment of the California UDITPA, "acquisition" signified the "act of acquiring" (Webster's 3d New Internat. Dict. (1961) p. 19), and "acquire" meant "to come into possession, control, or power of disposal of" (*id.* at p. 18). "[M]anagement" referred to the "act ... of managing," and "manage" meant "to control and direct: handle either well or ill: cope with: Conduct, Administer" and "to direct or carry on business or affairs: Supervise, Administer." (*Id.* at p. 1372.) Finally, "disposition" denoted "*the act or the power* of disposing or disposing of" and, as relevant here, "dispose of" meant "to transfer into new hands or to the control of someone else ... Relinquish, Bestow." (*Id.* at p. 654, italics added.) In light of these definitions, the phrase "acquisition, management, and

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disposition of the property" establishes that the taxpayer must: (1) obtain some interest in and *529 control over the property; (2) control or direct the use of the property; and (3) transfer, or have the power to transfer, control of that property in some manner.

Under this construction, legal ownership or title to the property is not necessary. Such a limitation is too restrictive because property ownership "finds expression through multiple methods." (*Union Oil Co. v. State Bd. of Equal.* (1963) 60 Cal.2d 441, 447 [34 Cal.Rptr. 872, 386 P.2d 496].) "Ownership is not a single concrete entity but a bundle of rights and privileges as well as of obligations." (*Ibid.*, fn. omitted.) Indeed, corporations often control and use property to generate business income without owning or holding legal title to that property. Consequently, we believe the phrase "acquisition, management, and disposition" encompasses the myriad of ways that corporations may control and use the rights and privileges commonly associated with property ownership.

The Commissioners Comments to the UDITPA confirm our belief. In the comment to section 1 of the UDITPA, the Commissioners state that "[i]ncome from the disposition of property" is business income if the property is "*used* in a trade or business of the taxpayer." (Comrs. Coms., UDITPA, com. foll. § 1, subd. (a), p. 2, reprinted at <http://www.law.upenn.edu/bll/ulc/fnact99/1920_69/udiftp57.htm> [as of May 14, 2001], italics added.) In making this statement, the Commissioners clearly contemplated that the functional test would focus on the taxpayer's control and use of the property and not on legalistic formulations of property ownership.

Of course, mere control and use of the income-producing property is not enough to satisfy the functional test. Rather, the taxpayer's control and use of the property must still be an "integral part[] of the taxpayer's regular trade or business operations." (§ 25120, subd. (a).) The critical terms in this second key phrase of the functional test are "integral," "regular," and "operations." (*Ibid.*) As explained below, these terms establish that the taxpayer's control and use of the property must contribute materially to the taxpayer's production of business income so that the property becomes interwoven into and inseparable from the taxpayer's business.

We begin our interpretation of this phrase by defining the terms "regular" and "operations." "[R]egular" means "Normal" or "Typical." (Webster's 3d New Internat. Dict., *supra*, at p. 1913.) In the business context, "operations" mean "the whole process of planning for and operating a business" or "a phase of a business or of business activity." (*Id.* at p. 1581.) As such, the *530 phrase "regular trade or business operations" is unambiguous and refers to the normal or typical business activities of the taxpayer. (§ 25120, subd. (a).)

To reach this conclusion, we reject Hoechst's contention that the word "regular" limits the functional test to normal or customary corporate events. Although "regular" has the same meaning in the transactional and functional tests, it is not used in the same way in these tests. In the transactional test-which focuses on the income-producing transaction-"regular" modifies "course of the taxpayer's trade or business" and makes the nature of the transaction relevant. (*Associated Partnership I, supra,* 889 S.W.2d at p. 195.) In the functional test-which focuses on the income-producing property-"regular" modifies "trade or business operations" and follows the phrase "an integral part of." (§ 25120, subd. (a).) Consequently, "regular," as used in the functional test, does not refer to the nature of the transaction, and the extraordinary nature or infrequency of the income-producing transaction is irrelevant. (See *Citicorp of North America, Inc. v. Franchise Tax Bd.* (2000) 83 Cal.App.4th 1403, 1430 [100 Cal.Rptr.2d 509] (*Citicorp*); see also *Pierce Associates, supra,* 462 A.2d at p. 1131; *Texaco-Cities, supra,* 695 N.E.2d at p. 484; *Polaroid, supra,* 507 S.E.2d at p. 289; *Ross-Araco, supra,* 674 A.2d at p. 693.)

Thus, the phrase "regular trade or business operations" (§ 25120, subd. (a)) establishes that the taxpayer's control and use of the income-producing property must be part of the taxpayer's normal or typical business activities. The statutory term "integral" then provides the touchstone for determining whether the property has a close enough relationship to the taxpayer to satisfy the functional test. (*Ibid.*) Not surprisingly, the parties disagree over the meaning of "integral." (*Ibid.*) Hoechst contends "integral" means "necessary or essential to." The Board counters that "integral" only means "contributing to." We, however, find neither interpretation to be accurate. Instead, we hold that "integral" requires an organic unity between the taxpayer's property and business activities whereby the property contributes materially to the taxpayer's production of business income. [FN9]

FN9 In describing the functional test in terms of the production of *business income*,

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> we mean the production of income that unquestionably fits within the statutory definition of business income.

As an initial matter, we note that the dictionary definition of "integral" arguably supports both parties' positions. As defined by Webster's Third International Dictionary, *supra*, at page 1173, "integral" means "of, *relating to*, or serving to form a whole: *essential to* completeness: organically joined *531 or linked: Constituent, Inherent." (Italics added.) The relevant case law also lends support to both interpretations. On the one hand, we have suggested that "integral" means " 'dependent upon or contributes to' " in the multistate taxation context. (*Superior Oil Co. v. Franchise Tax Bd.* (1963) 60 Cal.2d 406, 413-414 [34 Cal.Rptr. 545, 386 P.2d 33], quoting *Edison California Stores, Inc. v. McColgan* (1947) 30 Cal.2d 472, 481 [183 P.2d 16].) On the other hand, other jurisdictions have used the "essential to" language when construing the functional test. (See, e.g., *Texaco-Cities, supra*, 695 N.E.2d at p. 485; *Union Carbide Corp. v. Offerman* (2000) 351 N.C. 310 [526 S.E.2d 167, 171] (*Union Carbide*).)

Nonetheless, we believe that both interpretations are problematic and do not capture the true meaning of "integral." (§ 25120, subd. (a).) Construing "integral" as "contributing to" makes the test too expansive and creates constitutional problems. Although property that is integral to a taxpayer's business undoubtedly contributes to that business, "integral" must imply something more than a mere contribution. Otherwise, the functional test would encompass all corporate transactions and run afoul of the constitutional limits on state taxation. (See *ASARCO, Inc. v. Idaho State Tax Comm'n* (1982) 458 U.S. 307, 326 [102 S.Ct. 3103, 3114, 73 L.Ed.2d 787] (*ASARCO*) [property must do more than contribute to the taxpayer's business in order to be taxed by a state].) Construing "integral" as "necessary or essential to," however, is too restrictive. Under this interpretation, many sales of corporate property could not satisfy the functional test because a corporate taxpayer presumably will not sell property unless the property is no longer necessary or essential to its business. Such an outcome conflicts with the explanatory comments to the UDITPA which contemplate the apportionment of gains realized from any sale of property used in the taxpayer's trade or business. (Comrs. Coms., UDITPA, com. foll. § 1, subd. (a), p. 2, reprinted at <http://www.law.upenn.edu/bll/ulc/fnact99/1920_69/udiftp57.htm> [as of May 14, 2001].)

Thus, the meaning of "integral" must fall somewhere in between these two interpretations. In forging this middle ground, we once again look to the SBE decisions underlying the functional test for guidance. (See *ante*, at pp. 524-525; see also Keesling & Warren, *supra*, 15 UCLA L.Rev. at pp. 163-164; *Polaroid*, *supra*, 508 S.E.2d at p. 294.) These decisions reveal that the meaning of "integral" comes from our decision in *Holly Sugar Corp. v. Johnson* (1941) 18 Cal.2d 218 [115 P.2d 8] (*Holly Sugar*). (See *Houghton Mifflin*, *supra*, 3 SBE at p. 346 [relying on *Holly Sugar*].) In *Holly Sugar*, we held that losses suffered by a taxpayer from the forced liquidation of stock were apportionable because "the stockholding in question was an integral *532 part of [the taxpayer's] unitary sugar business." (*Holly Sugar*, at p. 225.) The stockholding was "integral" because it could not "reasonably be characterized as an extraneous investment separate and apart from the California business" of the taxpayer. (*Id.* at p. 224.) Rather, "the activities of the two companies" constituted "one indivisible, composite whole, each portion giving value to every other portion." (*Ibid.*) Because of "this organic unity of operation," we regarded the liquidation of the stockholding as an "integral" part of the unitary business of the taxpayer. (*Id.* at pp. 224- 225.)

In the context of the business income definition, the word "integral" therefore refers to an "organic unity" between the income-producing property and the taxpayer's business activities. (*Holly Sugar*, *supra*, 18 Cal.2d at p. 224.) The property must be so interwoven into the fabric of the taxpayer's business operations that it becomes "indivisible" or inseparable from the taxpayer's business activities with both "giving value" to each other. (*Ibid.*) Such a relationship exists when the taxpayer controls and uses the property to contribute materially to the taxpayer's production of business income. (See *Borden*, *supra*, [1971-1978 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 205-616, p. 14,897-59; *New York Football Giants*, *supra*, [1971-1978 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 205-600, p. 14,897-33.) In this way, we capture the true meaning of "integral." (See Webster's 3d Internat. Dict., *supra*, at p. 1173 ["integral" means "serving to *form a whole*: essential to *completeness: organically joined or linked*" (italics added)].)

Forming these interpretations of the statutory language into a cohesive whole, we conclude that income is business income under the functional test if the taxpayer's acquisition, control and use of the

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property contribute materially to the taxpayer's production of business income. In making this contribution, the income-producing property becomes interwoven into and inseparable from the taxpayer's business operations. Such an interpretation of the functional test flows from the ordinary meaning of the statutory language and the California decisions that formed the basis for the UDITPA definition of "business income."

We further note that our interpretation is consistent with Court of Appeal decisions applying the functional test. For example, the Court of Appeal has found business income where the income-producing property contributed materially to the taxpayer's production of business income. In *Citicorp*, the court held that income from a taxpayer's sale of buildings constituted business income under the functional test because "the buildings were constructed or acquired to serve as important locations for [the taxpayer's *533 business] operations." (*Citicorp, supra,* 83 Cal.App.4th at pp. 1429-1430.) Thus, the court premised its finding of business income on the buildings' material contribution to the taxpayer's production of business income and concluded that the buildings were an indivisible part of the taxpayer's business operations. (See *ibid.*; see also *Times Mirror Co. v. Franchise Tax Bd.* (1980) 102 Cal.App.3d 872, 877-878 [162 Cal.Rptr. 630] [income from the taxpayer's sale of a subsidiary's stock was business income because the subsidiary generated business income].)

In contrast, the Court of Appeal has found nonbusiness income where the taxpayer's control and use of the property did not contribute materially to the generation of business income. In *Robert Half,* the court found that losses incurred from the repurchase of a stock warrant constituted nonbusiness income. (*Robert Half, supra,* 66 Cal.App.4th at p. 1028.) Although the court mistakenly focused on the extraordinary nature of the transaction (see *id.* at p. 1025), it reached the correct result. The taxpayer's control and use of the warrants did not contribute materially to the production of any business income and were separate and distinct from the taxpayer's business operations. Therefore, losses from the repurchase of the warrants did not satisfy the functional test.

Our interpretation of the functional test also accords with the SBE's interpretation over the past two decades. On the one hand, the SBE has consistently found business income under the functional test where the taxpayer's control and use of the property contributed materially to the production of business income and became an indivisible part of the taxpayer's business. For example, the SBE found that losses from the sale of goodwill constituted business income because the taxpayer's acquisition and maintenance of this goodwill "contributed materially to the production of business income." (*Borden, supra,* [1971-1978 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 205-616, p. 14,897-59.) The SBE also held that compensation received for the loss of exclusive territorial rights constituted business income because these rights were "an important aspect of the business" and "contributed materially to the production of business income." (*New York Football Giants, supra,* [1971-1978 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 205-600, p. 14,897-33.) Similarly, the SBE found that dividends from a joint venture were business income because these ventures "contributed materially to the production of operating income ... and clearly served to further the operation of" the taxpayer's business. (*Standard Oil, supra,* [1981-1984 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 400-383, at p. 22,571.) Finally, the SBE held that income from stock sales constituted business income because "the assets and activities represented by the stock were fully integrated and *534 functioning parts of [the taxpayer's] existing unitary business." (*Occidental Petroleum, supra,* [1981-1984 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 400-394, p. 22,616.)

On the other hand, the SBE has consistently refused to find business income under the functional test where the taxpayer's control and use of the property did not contribute materially to the production of business income and were separate from the taxpayer's business. For example, the SBE found that rental income from a condominium constituted nonbusiness income because the rental business had no connection to the taxpayer's architectural business. (*Amwalt Group, supra,* [1981-1984 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 400-433, p. 22,696.) Similarly, the SBE held that income from the sale of stock in a company constituted nonbusiness income where the taxpayer exercised no control over and received no special benefits from that company. (*Mark Controls, supra,* [1986-1990 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 401-452, p. 24,569.) Finally, the SBE held that property used to obtain tax benefits did not give rise to business income because the property did not contribute to the production of business income and was not connected to any business activity of the taxpayer. (*VSI Corp., supra,* [1991-1992 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 401-937, pp. 26,241 to 26,242; *National Dollar Stores, supra,* [1984- 1986 Transfer Binder] Cal.Tax

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Rptr. (CCH) ¶ 401-403, p. 24,432.)

Finally, our interpretation is largely consonant with the decisions of other jurisdictions that have adopted the functional test. These jurisdictions have focused on the taxpayer's use of the property and typically find business income where the taxpayer uses that property to produce business income. (See, e.g., *Pierce Associates, supra,* 462 A.2d at p. 1132 [insurance proceeds for flood damage to manufacturing facility used by the taxpayer to generate business income]; *Texaco-Cities, supra,* 695 N.E.2d at pp. 486-487 [income from sale of pipeline and related assets used by the taxpayer to produce business income]; *American Smelting, supra,* 567 P.2d at pp. 907-909 [royalties from patents developed and used by the taxpayer, income from leases of mines and rental of homesites to workers, interest income from short-term investments, income from sale of stock in companies used by the taxpayer for access to raw materials or as customers]; *Simpson Timber, supra,* 953 P.2d at pp. 369-370 [proceeds from condemnation of timbered property used by the taxpayer as a source of raw materials].) These jurisdictions, however, refuse to find business income where the taxpayer has no control over the property or does not use the property in the production of business income. (See, e.g., *Pledger, supra,* 831 S.W.2d at p. 125 [interest income from intercorporate note passively held and not controlled by the taxpayer]; *535 *Ross-Araco, supra,* 674 A.2d at p. 697 [income from sale of land never improved or used by the taxpayer]; *Laurel Pipe Line Co. v. Commonwealth of Pennsylvania* (1994) 537 Pa. 205 [642 A.2d 472, 475] [income from sale of pipeline not used by the taxpayer for over three years].)

(8b) Having established the contours of the functional test, we now apply it to Hoechst's reversion of surplus pension plan assets and conclude that the reversion meets this test. In reaching this conclusion, we find two SBE decisions instructive. In *Appeal of American Snuff Co.* (Apr. 20, 1960) [1959-1962 Transfer Binder] Cal.Tax Rptr. (CCH) paragraph 201-538, page 12,053 (*American Snuff*), the SBE held that interest income from loans made to the taxpayer's employees constituted business income under the functional test. Because the taxpayer made these loans "for the purpose of increasing the efficiency of the employees and they, accordingly, contributed to the operations of the unitary business," the SBE concluded that "the acquisition, management and disposition of" the loans "constitute[d] integral parts of the" taxpayer's "regular business operations." (*Ibid.*) Seventeen years later, the SBE applied the same reasoning and found that a rebate of surplus funds in a retirement plan constituted business income. (*Kroehler, supra,* [1971-1978 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 205-647, p. 14,897-123.) Because the plan served "[a]s an inducement to retain the current employees of the Furniture Division and to attract other qualified employees," and because employees were necessary to conduct the taxpayer's business operations, the SBE held that the "acquisition, management, and disposition of" the plan "constitute[d] integral parts of [the taxpayer's] manufacturing and sales business." (*Ibid.*)

Taken together, these decisions establish that property maintained and used by a taxpayer to retain and attract employees is integral to the taxpayer's business operations. Although these decisions are not binding, we find them especially persuasive because of their longevity, consistency and reasoning. (See *Yamaha, supra,* 19 Cal.4th at pp. 12-14.) Indeed, *American Snuff*-which predates the California UDITPA-is arguably controlling because the Legislature presumably enacted the UDITPA with the understanding that it did not alter existing California law. (See Keesling & Warren, *supra,* 15 UCLA L.Rev. at pp. 163-164 [the UDITPA's distinction between business and nonbusiness income "is in line with ... existing California practice"].) Moreover, at least one other state court applying the functional test has applied similar reasoning to reach a similar conclusion. (See *American Smelting, supra,* 567 P.2d at p. 907 [holding that rental income from homesites rented to employees constituted business income because the homesites were an integral part of the taxpayer's business operations].) ***536**

In light of the reasoning of these decisions, the income from Hoechst's reversion of surplus pension plan assets constitutes business income under the functional test. Hoechst created the income-producing property-the pension plan and trust-in order to retain its current employees and to attract new employees. Hoechst had "broad authority to amend [the] plan" (*Hughes Aircraft, supra,* 525 U.S. at p. 442 [119 S.Ct. at p. 762]), and retained an interest in any surplus pension plan assets. It funded the plan with its business income and used these contributions to reduce its tax liability. Hoechst exercised control over the plan and its assets through various committees composed of its officers and employees. For example, Hoechst controlled: (1) the appointment of trustees over the pension plan assets; (2) the appointment of investment fund managers; and (3) the administration of the plan and its assets. In doing so, Hoechst directed the plan's overall

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investment strategy. Indeed, Hoechst regularly changed trustees and fund managers for various reasons, including inadequate performance, and even "drastically altered" the plan's investment strategy in 1978. The surplus pension plan assets generated from this new investment strategy then allowed Hoechst to reduce or suspend its contributions to the plan otherwise required under ERISA. (See Hughes Aircraft, supra, 525 U.S. at p. 441 [119 S.Ct. at p. 762].) Finally, Hoechst disposed of the pension plan assets by transferring these assets to two new plans and trusts, terminating one of these plans and trusts, and reverting the surplus assets of the terminated plan and trust to itself. Because the pension plan assets contributed materially to Hoechst's production of business income via their effect on Hoechst's labor force, the "acquisition, management and disposition of" these assets "constitute integral parts of" Hoechst's "business operations." (*American Snuff, supra*, [1959- 1962 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 201-538, p. 12,053; *Kroehler, supra*, [1971-1978 Transfer Binder] Cal.Tax Rptr. (CCH) ¶ 205-647, p. 14,897- 123.)

In reaching this conclusion, we recognize that Hoechst did not own or hold legal title to the pension plan assets, and that ERISA imposed many restrictions on Hoechst's control and use of these assets. (See Shaw v. Delta Air Lines, Inc. (1983) 463 U.S. 85, 91 [103 S.Ct. 2890, 2896-2897, 77 L.Ed.2d 490].) Nonetheless, Hoechst's control and use of the pension plan assets still contributed materially to its production of business income by improving the efficiency and quality of its workforce which, in turn, generated Hoechst's business income. Thus, the pension plan assets were integral to Hoechst's business operations, because these assets were interwoven into and inseparable from Hoechst's employee retention and recruitment efforts-an essential part of any business operation.

We further note that apportioning income from the reversion to California is equitable in light of the tax benefits received by Hoechst in connection *537 with its control and use of the pension plan assets. Not only did Hoechst receive an operational benefit from its pension plan contributions, it also received a tax deduction for these contributions throughout the lifetime of the plans. Absent their use in the pension plans, these contributions would have been taxable as business income by California. Thus, Hoechst essentially received the pension plans' contribution to its California business operations *tax free* prior to its reversion of surplus pension plan assets. In fact, absent apportionment of the income from the reversion, Hoechst would receive a windfall because New York-Hoechst's commercial domicile-taxed only a small percentage of the reverted income. Under these circumstances, subjecting income from the reversion to taxation in California is both fair and reasonable.

Finally, the absence of any reference to these pension plan assets in Hoechst's financial statements is irrelevant. These omissions are the product of accounting standards in effect prior to 1985 and do not necessarily reflect the actual relationship between the assets and Hoechst's business operations. In any event, national accounting standards adopted in 1985 now require "expanded disclosures intended to provide more complete and more current information" about pension plan assets in financial statements. (Fin. Acctg. Stds. Bd., Summary of Statement No. 87, Employers' Accounting for Pensions (Dec. 1985) p. 3, at <http://www.rutgers.edu/Accounting/raw/fasb/st/summary/stsum87.htm> [as of May 14, 2001].) The Financial Accounting Standards Board created these standards in an effort to make clearer the link between "pension plan finances" and "the corporations' operations." (*Improving FAS 87* (Oct. 18, 1999) Pensions & Investments, p. 12.) Thus, the failure of Hoechst to report the earnings of its pension plan on its books of account has no bearing here.

We are mindful that the North Carolina Supreme Court reached a contrary conclusion in Union Carbide, supra, 526 S.E.2d at page 171. We, however, find the reasoning of the North Carolina Supreme Court questionable in several respects. First, *Union Carbide* seemed to define "integral" as "essential to." (*Ibid.*) As a result, the court applied an overly restrictive interpretation of the functional test. Second, *Union Carbide* appeared to focus on the surplus rather than the income-producing property-the pension plan assets. (*Ibid.*) Thus, the court mistakenly concluded that the pension plan assets did not contribute to the taxpayer's production of business income. Finally, the North Carolina Supreme Court did not consider the California decisions that gave rise to the UDITPA definition of business income even though the court recognized the California roots of the UDITPA. (*Polaroid, supra*, 508 S.E.2d at p. 294.) Because of these deficiencies, we decline to follow *Union *538 Carbide* despite the UDITPA's interest in promoting uniformity. In any event, our reasoning is consistent with the reasoning used by most other jurisdictions that apply the functional test (see ante, at p. 534), and conforms to the reasoning used by the Montana

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Supreme Court in an analogous situation (see *American Smelting, supra*, 567 P.2d at p. 907). Accordingly, we conclude that the reversion created business income under the functional test.

II

Even though Hoechst's reversion of surplus pension plan assets falls within the statutory definition of business income, subjecting the income from the reversion to taxation in California must still pass constitutional muster. (9) Under the federal due process and commerce clauses, "a State may not tax value earned outside its borders." (*ASARCO, supra*, 458 U.S. at p. 315 [102 S.Ct. at p. 3108].) The taxpayer bears the " 'burden of showing by "clear and cogent evidence" that [the state tax] results in extraterritorial values being taxed.' " (*Exxon Corp. v. Wisconsin Dept. of Revenue* (1980) 447 U.S. 207, 221 [100 S.Ct. 2109, 2119, 65 L.Ed.2d 66], quoting *Butler Bros. v. McColgan* (1942) 315 U.S. 501, 507 [62 S.Ct. 701, 704, 86 L.Ed. 991], in turn quoting *N. & W. Ry. Co. v. No. Carolina* (1936) 297 U.S. 682, 688 [56 S.Ct. 625, 628, 80 L.Ed. 977].) As explained below, Hoechst does not meet this burden. Therefore, apportionment of the income from the reversion to California is constitutional.

In limiting a state's taxing power, courts "are guided by the basic principle that the State's power to tax an individual's or corporation's activities is justified by the 'protection, opportunities and benefits' the State confers on those activities." (*Allied-Signal, supra*, 504 U.S. at p. 778 [112 S.Ct. at p. 2258], quoting *Wisconsin v. J. C. Penney Co.* (1940) 311 U.S. 435, 444 [61 S.Ct. 246, 249-250, 85 L.Ed. 267, 130 A.L.R. 1229].) Thus, there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." (*Miller Bros. Co. v. Maryland* (1954) 347 U.S. 340, 344-345 [74 S.Ct. 535, 539, 98 L.Ed. 744].) Corporate income "earned in the course of activities unrelated to [corporate activities in the taxing] State" is not includible in any apportionment formula. (*Mobil Oil Corp. v. Commissioner of Taxes* (1980) 445 U.S. 425, 439 [100 S.Ct. 1223, 1232, 63 L.Ed.2d 510].) The rationale behind this limitation is self-evident: "In a Union of 50 States, to permit each State to tax activities outside its borders would have drastic consequences for the national economy, as businesses could be subjected to severe multiple taxation." (*Allied-Signal, supra*, 504 U.S. at pp. 777-778 [112 S.Ct. at p. 2258].) *539

In construing these constitutional limitations on a state's taxing power, the United States Supreme Court has focused "on the objective characteristics of the [income-producing] asset's use and its relation to the taxpayer and its activities within the taxing State." (*Allied-Signal, supra*, 504 U.S. at p. 785 [112 S.Ct. at p. 2262].) This relationship must involve a "flow of value ...." (*Container Corp., supra*, 463 U.S. at p. 178 [103 S.Ct. at p. 2947], italics omitted.) As such, only income from assets that "serve an operational rather than an investment function" are apportionable to a state for tax purposes. (*Allied-Signal, supra*, 504 U.S. at p. 787 [112 S.Ct. at p. 2263].) The mere fact that a transaction has a "business purpose" is not enough. (See *id.* at p. 788 [112 S.Ct. at pp. 2263-2264].) Although the United States Supreme Court has not clearly differentiated operational and investment functions, it has stated that an asset serves an operational function if it helps the taxpayer "make better use ... of [its] existing business-related resources." (*Container Corp., supra*, 463 U.S. at p. 178 [103 S.Ct. at p. 2947].)

(8c) Here, the income-producing asset-the pension plan and trust-undoubtedly served an operational function for Hoechst. Hoechst funded the plan and trust with its apportionable business income. It managed the plan and trust by choosing the trustee and appointing a committee of its officers and employees to oversee the trust's administration, to choose its investment managers, and to guide its overall investment strategy. More importantly, Hoechst created and maintained the plan and trust in order to induce its current employees to stay and to attract new employees. As such, the pension plan and trust undoubtedly helped Hoechst "make better use" of an important and existing business-related resource-its employees. (*Container Corp., supra*, 463 U.S. at p. 178 [103 S.Ct. at p. 2947].) Indeed, Hoechst can hardly claim that the pension plan and trust were separable from its employee recruitment and retention efforts-a crucial part of its business operations in California. Accordingly, subjecting an apportionable share of the reverted pension plan assets to taxation in California does not violate the federal due process or commerce clause.

Disposition

We reverse the judgment of the Court of Appeal and remand for further proceedings consistent with this opinion.

George, C. J., Mosk, J., Kennard, J., Baxter, J., and Chin, J., concurred. *540

WERDEGAR, J.

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I respectfully dissent.

The Uniform Division of Income for Tax Purposes Act (Rev. & Tax. Code, § 25120 et seq.) (UDITPA) was intended to help the several states avoid laying conflicting claims on the income of multistate businesses, thereby facilitating compliance with the due process and commerce clauses of the United States Constitution. In today's decision, the court encourages conflicting claims by defining as allocable "business income" (Rev. & Tax. Code, § 25120, subd. (a)) precisely the same type of income that the highest court of a sister state in the only other decision directly on point has defined as nonallocable "nonbusiness income" (*id.*, subd. (d); *Union Carbide Corp. v. Offerman* (2000) 351 N.C. 310 [526 S.E.2d 167]). The court today, in other words, has ensured the UDITPA will not achieve its intended purpose. To what degree the act will fail, only time will tell.

I suspect the act will fail to a large degree, because the majority's definition of business income is potentially all-encompassing. What the majority calls the transactional test captures income from transactions and activity in the regular course of the taxpayer's business. The so-called functional test addresses income from property. "[I]ncome is business income under the functional test," the majority declares, "if the taxpayer's acquisition, control and use of the property contribute materially to the taxpayer's production of business income." (Maj. opn., *ante*, at p. 532.) The taxpayer's creation and indirect management of the ERISA (Employee Retirement Income Security Act of 1974; 29 U.S.C. § 1001 et seq.) trust, the majority reasons, "contributed materially to its production of business income by improving the efficiency and quality of its workforce which, in turn, generated Hoechst's business income." (Maj. opn., *ante*, at p. 536.)

The majority's broad definition of business income under the functional test has two problems, both of which strike at the heart of the UDITPA's purpose of fostering the uniform, constitutional allocation of a single taxpayer's income among the various states entitled to claim a portion thereof.

The first problem is that the majority's definition of business income under the functional test potentially reaches *all* income from business-owned property, thereby rendering illusory, or nearly illusory, the category of nonallocable "nonbusiness" income recognized in the UDITPA. (Rev. & Tax. Code, § 25120, subd. (d).) The majority permits the casual reader to assume that some corporate investments, even after today's far-reaching decision, may not be sufficiently integral to the corporation's business ***541** operations for their sale to generate allocable business income. (See maj. opn., *ante*, at pp. 534-535.) The assumption seems to make the decision less far-reaching and therefore more palatable. But the courts and administrative agencies that wrote the opinions the majority cites for reassurance on this point did not have the benefit of today's decision. After today's decision, income from property is allocable business income if there is "an organic unity between the taxpayer's property and business activities whereby the property contributes materially to the taxpayer's production of business income." (Maj. opn., *ante*, at p. 530.) If this test captures income from an ERISA trust, which a corporation does not own and in which the corporation has only a contingent, reversionary interest, then the test must also capture income from other investments in property owned by the corporation and expected at some point to produce income available for business activities. Because a corporation must be able to draw upon its assets for business purposes as and when necessary, the wise management of cash and surplus assets to achieve an appropriate balance of liquidity, risk and return is just as essential to the production of business income as the wise management of human resources. We can, therefore, be sure the State Board of Equalization will soon ask itself whether income from the cash management accounts and other investments, wherever located, of corporations doing some business in California is not subject to taxation in California on the same basis as reversionary income from an ERISA trust. While the majority correctly observes that the former type of income has not been taxed by nondomiciliary states as allocable business income in the past (see maj. opn., *ante*, at pp. 534-535), the majority's decision offers no principled basis for predicting that such income will not be taxed as business income in the future.

The second problem is that the majority's definition betrays a narrow, parochial focus on the decisions of our own State Board of Equalization. We cannot safely assume our sister states will share the majority's firm conviction that California law is best. While Californians who participated in drafting the UDITPA may well have been influenced in that exercise by their knowledge of California law (see maj. opn., *ante*, at p. 522-523), it does not follow that we may properly assume the UDITPA adopted prior California law wholesale, or that we may treat the pre-UDITPA decisions of a single state's administrative agency as equivalent to authoritative interpretations of a uniform, multistate law. The

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official comments to the UDITPA do not even mention California law.

That said, I nevertheless agree with the majority that it may be "equitable" (maj. opn., *ante*, at p. 536) for California to tax the reversion to the extent Hoechst Celanese Corporation has deducted its contributions to the pension ***542** plan on its prior California tax returns. But equity in this sense is not a concern of the UDITPA. It is, instead, the domain of the tax benefit rule, a judicially developed principle that cancels out an earlier deduction when careful examination shows that a later event is fundamentally inconsistent with the premise on which the deduction was initially based. (*Hillsboro National Bank v. Commissioner* (1983) 460 U.S. 370, 373, 383 [103 S.Ct. 1134, 1138, 1143, 75 L.Ed.2d 130].) ***543**

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