Hearing: March 23, 2012
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ITEM 5

FINAL STAFF ANALYSIS
PROPOSED PARAMETERS AND GUIDELINES

Elections Code Section 14310
Statutes 2000, Chapter 260 (SB 414)

Voter Identification Procedures
03-TC-23

County of San Bernardino, Claimant

TABLE OF CONTENTS

Exhibit A

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

COMMISSION ON STATE MANDATES
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October 10, 2006

Ms. Bonnie Ter Keurst
Reimbursable Projects Manger
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 W. Hospitality Lane
San Bernardino, CA 92415-0018

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Adopted Statement of Decision and Draft Parameters and Guidelines
Voter Identification Procedures (03-TC-23)
County of San Bernardino, Claimant
Elections Code Section 14310, as amended by Statutes 2000, Chapter 260

Dear Ms. Ter Keurst:

The Commission on State Mandates adopted the attached Statement of Decision on October 4, 2006. State law provides that reimbursement, if any, is subject to Commission approval of parameters and guidelines for reimbursement of the mandated program, approval of a statewide cost estimate, a specific legislative appropriation for such purpose, a timely-filed claim for reimbursement, and subsequent review of the claim by the State Controller's Office.

Following is a description of the responsibilities of all parties and of the Commission during the parameters and guidelines phase.

- **Draft Parameters and Guidelines**. Pursuant to California Code of Regulations, title 2, section 1183.12 (operative September 6, 2005), the Commission staff is expediting the parameters and guidelines process by enclosing draft parameters and guidelines to assist the claimant. The proposed reimbursable activities are limited to those approved in the Statement of Decision by the Commission.
- **Claimant's Review of Draft Parameters and Guidelines**. Pursuant to California Code of Regulations, title 2, section 1183.12, subdivisions (b) and (c), the successful test claimant may file modifications and/or comments on the proposal with Commission staff by **October 31, 2006.** The claimant may also propose a reasonable reimbursement methodology pursuant to Government Code section 17518.5 and California Code of Regulations, title 2, section 1183.13. The claimant is required to submit an original and two (2) copies of written responses to the Commission and to simultaneously serve copies on the state agencies and interested parties on the mailing list.
- **State Agencies and Interested Parties Comments**. State agencies and interested parties may submit recommendations and comments on staff's draft proposal and the claimant's

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DATE: 10/10/07 INITIAL: AE
CHRON: _____ FILE: ✓
WORKING BINDER: _____

modifications and/or comments within 30 days of service. State agencies and interested parties are required to submit an original and two (2) copies of written responses or rebuttals to the Commission and to simultaneously serve copies on the test claimant, state agencies, and interested parties on the mailing list. The claimant and other interested parties may submit written rebuttals. (See Cal. Code Regs., tit. 2, § 1183.11.)

- **Adoption of Parameters and Guidelines**. After review of the draft parameters and guidelines and all comments, Commission staff will recommend the adoption of an amended, modified, or supplemented version of staff's draft parameters and guidelines. (See Cal. Code Regs., tit. 2, § 1183.14.)

Please contact Nancy Patton at (916) 323-3562 if you have any questions.

Sincerely,

PAULA HIGASHI
Executive Director

Enclosures: Adopted Statement of Decision, Draft Parameters and Guidelines

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Elections Code Section 14310 as amended by Statutes 2000, Chapter 260 (SB 414); Filed on October 1, 2003, By County of San Bernardino, Claimant.	No. 03-TC-23 *Voter Identification Procedures* 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 October 4, 2006)

STATEMENT OF DECISION

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

Paula Higashi

PAULA HIGASHI, Executive Director

October 10, 2006

Date

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM: Elections Code Section 14310 as amended by Statutes 2000, Chapter 260 (SB 414); Filed on October 1, 2003, By County of San Bernardino, Claimant.	Case No.: 03-TC-23 *Voter Identification Procedures* 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 October 4, 2006)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on October 4, 2006. Bonnie Ter Keurst, appeared for the claimant, County of San Bernardino. Carla Castañeda and Susan Geanacou appeared on behalf of the Department of Finance (DOF).

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

The Commission adopted the staff analysis to partially approve this test claim at the hearing by a vote of 6-0.

Summary of Findings

This test claim, filed by County of San Bernardino on October 1, 2003, addresses an amendment to Elections Code section 14310, regarding counting "provisional ballots." A provisional ballot is a regular ballot that has been sealed in a special envelope, signed by the voter, and then deposited in the ballot box. Provisional ballots can be required for several reasons, generally to prevent unregistered individuals from voting, or to prevent registered voters from voting twice. For example, provisional ballots may be required when poll workers cannot immediately verify an individual's name on the official roster, or if a voter requested an absentee ballot, but instead comes to the polling place without bringing the absentee ballot.

Statutes 2000, chapter 260, amended Elections Code section 14310, subdivision (c)(1), to add a requirement that elections officials "compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration."

Claimant alleges that prior to this amendment: "the county elections official was not legally required to perform provisional ballot signature comparison for voter identification purposes. ...

Enactment of this statute has increased the duties of the county elections official, and requires the official to provide a higher-level of service for an existing program."

DOF filed comments on November 14, 2003, agreeing with the claimant that Statutes 2000, chapter 260 "may have resulted in new state-mandated activities."

The Commission finds that although prior law required that "the elections official shall examine the records with respect to all provisional ballots cast," the law did not require that each signature on a provisional ballot be directly compared to the signature on the voter's registration affidavit. This is akin to the analysis by the court in *Long Beach Unified School Dist.* (1990) 225 Cal.App.3d 155, 173, which found a higher level of service was mandated when general law on a existing program is changed to require performance of activities in a very specific manner.

The Commission concludes that Elections Code section 14310, subdivision (c)(1), as amended by Statutes 2000, chapter 260, mandates a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514, for performing the following specific new activity as part of statutorily-required elections:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)

The Commission concludes that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

BACKGROUND

This test claim addresses an amendment to Elections Code section 14310, regarding counting "provisional ballots." A provisional ballot is a regular ballot that has been sealed in a special envelope, signed by the voter, and then deposited in the ballot box. According to information from the Secretary of State's website: [1]

> A voter is asked to vote a provisional ballot at the polls due to one of the following reasons:
>
> - **The voter's name is not on the official roster of voters and the election officer cannot verify the voter's voting eligibility on Election Day.** The Elections Official's Office will check the registration records. If further research determines that the voter is eligible to vote in the election, the provisional ballot will be counted.
> - **A voter has moved within the county, but did not re-register to vote.** The Elections Official will verify the voter's prior registration before the provisional ballot will be counted. The voter's registration will then be updated with the voter's current address.

[1] At < http://www.ss.ca.gov/elections/elections_provisional.htm> (as of Oct. 4, 2006.)

- **Records indicate that the voter requested an absentee ballot and the voter fails to turn in the absentee ballot at the polls on Election Day.** The Elections Official's Office will check the records, and if the voter did not vote an absentee ballot, the voter's provisional ballot will be counted.
- **The voter is a first- time Federal Election voter in the county and was unable to provide the required proof of identification.** The Elections Official's Office will verify the voter's eligibility to vote by comparing the signature on the voter's registration with the signature on the provisional ballot envelope.

Provisional ballots are counted during the official canvass[2] when:

Prior to the completion of the official canvass (the vote tally), the Elections Official's Office establishes, from voter registration records, the claimant's right to vote the ballot.

Statutes 2000, chapter 260, amended Elections Code section 14310, subdivision (c)(1), to add a requirement that elections officials "compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration."

Claimant's Position

Claimant, County of San Bernardino, filed this test claim on October 1, 2003.[3] Claimant contends that Elections Code section 14310, as amended by Statutes 2000, chapter 260, constitutes a reimbursable state-mandated program, "by requiring the elections official to compare signatures on provisional ballot envelopes with the signatures on the voter's affidavit of registration for voter identification purposes."

Claimant's written comments, dated August 3, 2006, state that "The County of San Bernardino concurs with the draft staff analysis as written and has no further comment."

Department of Finance's Position

DOF filed comments on November 14, 2003, agreeing with the claimant that Statutes 2000, chapter 260 "may have resulted in new state-mandated activities." Comments on the draft staff analysis, dated August 14, 2006, concur with the analysis, stating:

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[2] Elections Code section 335.5 defines "official canvass," as follows:

> The "official canvass" is the public process of processing and tallying all ballots received in an election, including, but not limited to, provisional ballots and absentee ballots not included in the semifinal official canvass. The official canvass also includes the process of reconciling ballots, attempting to prohibit duplicate voting by absentee and provisional voters, and performance of the manual tally of 1 percent of all precincts.

Elections Code section 318 provides: "'Election' means any election including a primary that is provided for under this code."

[3] Potential reimbursement period for this claim begins no earlier than July 1, 2002, based on the filing date of the test claim. (Current Gov. Code, § 17557, subd. (e).)

County elections officials were required to examine the voter's affidavit of registration and establish the provisional ballot-casting voter's right to vote. This was commonly performed by examining the voter's physical/computer-scanned registration card (affidavit of registration), but officials were not required to use a specific method of verification. Chapter 260 mandated a higher level of service by specifying that a signature comparison is the method of verification.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6, of the California Constitution[4] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[5] "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."[6] 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.[7] 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.[8]

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.[9] 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

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

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

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

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

[8] *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 Dist. v. Honig* (1988) 44 Cal.3d 830, 835 *(Lucia Mar)*.

[9] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

legislation.[10] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[11]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[12]

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.[13] 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."[14]

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

In order for the test claim statute to be subject to article XIII B, section 6 of the California Constitution, it must constitute a "program." In *County of Los Angeles v. State of California*, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one 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.[15] The court has held that only one of these findings is necessary.[16]

The Commission finds that verifying provisional ballots imposes a program within the meaning of article XIII B, section 6 of the California Constitution under both tests. Local elections officials provide a service to the members of the public by verifying that those who vote provisional ballots are eligible to cast a ballot. The test claim statute also requires local elections officials to engage in administrative activities solely applicable to local government, thereby imposing unique requirements that do not apply generally to all residents and entities of the state.

Accordingly, the Commission finds that the test claim statute constitutes a "program" and, thus, may be subject to subvention pursuant to article XIII B, section 6 of the California Constitution *if*

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

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

[12] *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.

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

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

[15] *County of Los Angeles, supra*, 43 Cal.3d at page 56.

[16] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

the statute also mandates a new program or higher level of service, and costs mandated by the state.

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

Elections Code Section 14310:

As background, Elections Code section 14310, subdivision (a), provides:

> (a) At all elections, a voter claiming to be properly registered but whose qualification or entitlement to vote cannot be immediately established upon examination of the index of registration for the precinct or upon examination of the records on file with the county elections official, shall be entitled to vote a provisional ballot … .

The test claim legislation, Statutes 2000, chapter 260, amended Elections Code section 14310, subdivision (c)(1) as follows,[17] indicated in underline and strikeout:

> (c)(1) During the official canvass, the elections official[18] shall examine the records with respect to all provisional ballots cast. Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. A variation of the signature caused by the substitution of initials for the first or middle name, or both, shall not invalidate the ballot.

Claimant alleges that prior to this amendment: "the county elections official was not legally required to perform provisional ballot signature comparison for voter identification purposes. ... Enactment of this statute has increased the duties of the county elections official, and requires the official to provide a higher-level of service for an existing program."

Test claim legislation mandates a new program or higher level of service within an existing program when it compels a local agency or school district to perform activities not previously required.[19] The courts have defined a "higher level of service" in conjunction with the phrase "new program" to give the subvention requirement of article XIII B, section 6 meaning. Accordingly, "it is apparent that the subvention requirement for increased or higher level of service is directed to state-mandated increases in the services provided by local agencies in

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[17] Elections Code section 14310 has been subsequently amended, but the later statutes have not been included in this test claim, and this particular provision has not changed.

[18] Elections Code section 320 provides the following definition:

> "Elections official" means any of the following:
>
> (a) A clerk or any person who is charged with the duty of conducting an election.
>
> (b) A county clerk, city clerk, registrar of voters, elections supervisor, or governing board having jurisdiction over elections within any county, city, or district within the state.

[19] *Lucia Mar Unified School Dist.*, *supra*, 44 Cal.3d 830, 836.

existing programs."[20] A statute mandates a reimbursable "higher level of service" when the statute, as compared to the legal requirements in effect immediately before the enactment of the test claim legislation, increases the actual level of governmental service to the public provided in the existing program.[21]

Although prior law required that "the elections official shall examine the records with respect to all provisional ballots cast," the law did not require that each signature on a provisional ballot be directly compared to the signature on the voter's registration affidavit. This is akin to the analysis by the court in *Long Beach Unified School Dist., supra,* 225 Cal.App.3d 155, 173, which found a higher level of service was mandated when general law on a existing program is changed to require performance of activities in a very specific manner:

> A mere increase in the cost of providing a service which is the result of a requirement mandated by the state is not tantamount to a higher level of service. [Citation omitted.] However, a review of the Executive Order and guidelines shows that a higher level of service is mandated because their requirements go beyond constitutional and case law requirements. Where courts have *suggested* that certain steps and approaches may be helpful, the Executive Order and guidelines *require* specific actions. For example, school districts are to conduct mandatory biennial racial and ethnic surveys, develop a "reasonably feasible" plan every four years to alleviate and prevent segregation, include certain specific elements in each plan, and take mandatory steps to involve the community, including public hearings which have been advertised in a specific manner. While all these steps fit within the "reasonably feasible" description of *Jackson* and *Crawford*, the point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts.

The Commission finds that Elections Code section 14310, subdivision (c)(1), as amended by Statutes 2000, chapter 260, mandates a new program or higher level of service within an existing program by compelling local elections officials to perform the following activity when conducting the official canvass for elections:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected.

However, although the procedures established by Elections Code section 14310, subdivision (c)(1) are required to be followed at all elections, some elections are held entirely at the discretion of the local agency and would not result in reimbursable costs.

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[20] *County of Los Angeles, supra*, 43 Cal.3d 46, 56; *San Diego Unified School District, supra*, 33 Cal.4th 859, 874.

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

In *Kern High School Dist., supra,* 30 Cal.4th 727, at page 743, the California Supreme Court affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777. The Court stated the following:

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

Thus, the Court held as follows:

> [*W]e reject claimants' assertion that they have been legally compelled to incur* notice and agenda *costs, and hence are entitled to reimbursement from the state*, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][22]

The Court left undecided whether a reimbursable state mandate "might be found in circumstances short of legal compulsion—for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program."[23]

In *San Diego Unified School Dist., supra,* the Court discusses the potential pitfalls of extending "the holding of *City of Merced* so as to preclude reimbursement ... whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[24] In particular, the Court examines the factual scenario from *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, in which:

> an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (*Id.*, at pp. 537-538, 234 Cal.Rptr. 795.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ--and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642, such costs would not be reimbursable for the simple reason that the local agency's decision to employ

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[22] *Id.* at page 731.

[23] *Ibid.*

[24] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 887.

> firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and *hence we are reluctant to endorse, in this case,* an application of the rule of *City of Merced* that might lead to such a result. [Emphasis added.]

Yet the Court did not rely on this analysis to reach its conclusions, thus the statements are considered dicta. However, the Commission recognizes that the Court was giving notice that the *City of Merced* "discretionary" rationale is not without limitation. What the Court did *not* do was disapprove either the *City of Merced,* or its own rationale and holding in *Kern High School Dist.*

Rather, the 2003 decision of the California Supreme Court in *Kern High School Dist.* remains good law, relevant, and its reasoning applies here. The Supreme Court explained, "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[25] Likewise, compliance with *Voter Identification Procedures* is not a *reimbursable* state-mandated program for local special elections scheduled at the option of the local agency, *if* the issue could have legally been held for the next regular local or statewide election date.

Elections Code section 1000 provides that "The established election dates in each year are as follows:"

> (a) The second Tuesday of April in each even-numbered year.
>
> (b) The first Tuesday after the first Monday in March of each odd-numbered year.
>
> (c) The first Tuesday after the first Monday in June in each year.
>
> (d) The first Tuesday after the first Monday in November of each year.

Elections Code section 1001 provides that "Elections held in June and November of each even-numbered year are statewide elections and these dates are statewide election dates." The Commission finds that eligible costs from the *Voter Identification Procedures* program for any statewide election dates, including special elections called by the Governor, are reimbursable.

Elections Code section 1002 provides that "Except as provided in Section 1003, notwithstanding any other provisions of law, all state, county, municipal, district, and school district elections shall be held on an established election date." Elections Code section 1003 provides a list of types of elections that may be held on dates other than established election dates, for example, "(e) County, municipal, district, and school district initiative, referendum, or recall elections."

Elections Code section 1300 et seq contain the general elections date provisions for local agencies and school districts. Elections Code section 1303, for example, requires that "the regular election to select governing board members in any school district, community college district, or county board of education shall be held on the first Tuesday after the first Monday in November of each odd-numbered year." The Commission finds that eligible costs from the

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[25] *Kern High School Dist., supra*, 30 Cal.4th at page 743.

Voter Identification Procedures program are reimbursable, for this type of regular, statutorily-required local election.

An example where costs of complying with the *Voter Identification Procedures* program would not be reimbursable is found in Elections Code section 9222:

> The legislative body of *the city may submit to the voters, without a petition therefor, a proposition* for the repeal, amendment, or enactment of any ordinance, to be voted upon at any succeeding regular or special city election, and if the proposition submitted receives a majority of the votes cast on it at the election, the ordinance shall be repealed, amended, or enacted accordingly. A proposition may be submitted, or *a special election may be called for the purpose of voting on a proposition*, by ordinance or resolution. The election shall be held not less than 88 days after the date of the order of election.

Using this example, if city officials call for a special municipal election for a vote on such a proposition, at a time other than a scheduled statewide election, this is a voluntary election on the part of the city. There are many such examples found in the Elections Code, where special elections may be called at the option of a local government, or they can be held and consolidated with other elections.[26] In broad terms, the Commission finds that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable under the *Kern* decision.

Issue 3: Does the test claim statute impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Reimbursement under article XIII B, section 6 is required only if any new program or higher-level of service is also found to impose "costs mandated by the state." 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. The claimant estimated costs of $1000 or more for the test claim allegations. The claimant also stated that none of the Government Code section 17556 exceptions apply. For the activity listed in the conclusion below, the Commission agrees and finds accordingly that it imposes costs mandated by the state upon local elections officials within the meaning of Government Code section 17514.

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[26] Elections Code sections 1405, 1410, and 1415 hold three more examples.

CONCLUSION

The Commission concludes that Elections Code section 14310, subdivision (c)(1), as amended by Statutes 2000, chapter 260, mandates a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514, for performing the following specific new activity as part of statutorily-required elections:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)[27]

The Commission concludes that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

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[27] As amended by Statutes 2000, chapter 260, operative January 1, 2001.

DRAFT PARAMETERS AND GUIDELINES

Elections Code Section 14310
Statutes 2000, Chapter 260 (SB 414)

Voter Identification Procedures
(03-TC-23)

County of San Bernardino, Claimant

I. SUMMARY OF THE MANDATE

On October 4, 2006, the Commission on State Mandates (Commission) adopted a Statement of Decision finding that the test claim legislation 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 to perform the following activities:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)

The Commission found that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

II. ELIGIBLE CLAIMANTS

Any city, county, and city and county that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557, subdivision (c), as amended by Statutes 1998, chapter 681, states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The County of San Bernardino filed the test claim on October 1, 2003, establishing eligibility for fiscal year 2002-2003. Therefore, costs incurred pursuant to Statutes 2000, chapter 260, are reimbursable on or after July 1, 2002.

Actual costs for one fiscal year shall be included in each claim. Estimated costs of the subsequent year may be included on the same claim, if applicable. Pursuant to Government Code section 17561, subdivision (d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.

If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant, the following activities are reimbursable:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)[1]

When a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

[1] As amended by Statutes 2000, chapter 260, operative January 1, 2001.

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[2] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND OTHER REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service

[2] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the Statement of Decision, is on file with the Commission.

Commission on State Mandates

Original List Date: 10/8/2003
Last Updated: 7/19/2006
List Print Date: 10/10/2006
Claim Number: 03-TC-23
Issue: Voter Identification Procedures

Mailing Information: Notice of adopted SOD

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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DRAFT PARAMETERS AND GUIDELINES

Elections Code Section 14310
Statutes 2000, Chapter 260 (SB 414)

Voter Identification Procedures
(03-TC-23)

County of San Bernardino, Claimant

I. SUMMARY OF THE MANDATE

On October 4, 2006, the Commission on State Mandates (Commission) adopted a Statement of Decision finding that the test claim legislation 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 to perform the following activities:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)

The Commission found that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

II. ELIGIBLE CLAIMANTS

Any city, county, and city and county that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557, subdivision ~~(c),~~ (e), ~~as amended by Statutes 1998, chapter 681~~, states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The County of San Bernardino filed the test claim on October 1, 2003, establishing eligibility for fiscal year 2002-2003. Therefore, costs incurred pursuant to Statutes 2000, chapter 260, are reimbursable on or after July 1, 2002.

Actual costs for one fiscal year shall be included in each claim. ~~Estimated costs of the subsequent year may be included on the same claim, if applicable~~. Pursuant to Government Code section 17561, subdivision (d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.

If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant, the following activities are reimbursable:

A. One-Time Activities

1. Updating polices and procedures to implement the reimbursable activities listed in Section IV., B, of these parameters and guidelines.
2. Modifying Registrar of Voter's computer system to record the mandated provisional ballot signature comparing activities.
3. Training empoyees who perform the reimbursable activites listed in Section IV., B, of these parameters and guidelines. (One-time activity per employee.)

B. Ongoing Activities

1. Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)[2]

When a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

[1] As amended by Statutes 2000, chapter 260, operative January 1, 2001.

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Uniform Allowances (Time)

The uniform time allowances cover the cost of the salaries and benefits of the employees performing the ongoing activities listed in Part B. 1., in Section IV of these parameters and guidelines. For purposes of the following calculations, productive hours mean: "Time spent performing any kind of mental or physical work. Paid leave is not included."

Elections Official Comparing Signature on Provisional Ballot Envelope with the Signature on the Voter's Affidavit of Registration

For activity IV. B. 1. multiply as follows:

(the total number of eligible provisional ballots cast) x (0.01 hour[2]) x (the productive hourly rate {total wages and related benefits divided by productive hours} for employees performing the reimbursable activities.)

The Commission has not identified any circumstances that would cause an eligible claimant to incur additional costs to perform any other activities not incorporated in Section IV of these parameters and guidelines. Eligible claimants incurring any such costs within the scope of the reimbursable activities may submit a request to amend the parameters and guidelines to the commission for such costs to be approved for reimbursement, subject to the provisions of Government Code section 17557 and California Code of Regulations, title 2, section 1183.2.

B. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits[3]

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

[2] Equivalent to 0.60 minute or 36 seconds.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

6. Training

Report the cost of training an employee to perform the reimbursable activities, as specified in Section IV of this document. Report the name and job classification of each employee preparing for, attending, and/or conducting training necessary to implement the reimbursable activities. Provide the title, subject, and purpose (related to the mandate of the training session), dates attended, and location. If the training encompasses subjects broader than the reimbursable activities, only the pro-rata portion can be claimed. Report employee training time for each applicable reimbursable activity according to the rules of cost element A..1, Salaries and Benefits, and ~~B.~~A.2, Materials and Supplies as stated in this section. Report the cost of consultants who conducted the training according to the rules of cost element A..3, Contracted Services.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of

using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[4-3] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND OTHER REIMBURSEMENTS

[4-3] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the Statement of Decision, is on file with the Commission.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

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October 10, 2006

Ms. Bonnie Ter Keurst
Reimbursable Projects Manger
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 W. Hospitality Lane
San Bernardino, CA 92415-0018

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Adopted Statement of Decision and Draft Parameters and Guidelines
Voter Identification Procedures (03-TC-23)
County of San Bernardino, Claimant
Elections Code Section 14310, as amended by Statutes 2000, Chapter 260

Dear Ms. Ter Keurst:

The Commission on State Mandates adopted the attached Statement of Decision on October 4, 2006. State law provides that reimbursement, if any, is subject to Commission approval of parameters and guidelines for reimbursement of the mandated program, approval of a statewide cost estimate, a specific legislative appropriation for such purpose, a timely-filed claim for reimbursement, and subsequent review of the claim by the State Controller's Office.

Following is a description of the responsibilities of all parties and of the Commission during the parameters and guidelines phase.

- **Draft Parameters and Guidelines**. Pursuant to California Code of Regulations, title 2, section 1183.12 (operative September 6, 2005), the Commission staff is expediting the parameters and guidelines process by enclosing draft parameters and guidelines to assist the claimant. The proposed reimbursable activities are limited to those approved in the Statement of Decision by the Commission.
- **Claimant's Review of Draft Parameters and Guidelines**. Pursuant to California Code of Regulations, title 2, section 1183.12, subdivisions (b) and (c), the successful test claimant may file modifications and/or comments on the proposal with Commission staff by **October 31, 2006.** The claimant may also propose a reasonable reimbursement methodology pursuant to Government Code section 17518.5 and California Code of Regulations, title 2, section 1183.13. The claimant is required to submit an original and two (2) copies of written responses to the Commission and to simultaneously serve copies on the state agencies and interested parties on the mailing list.
- **State Agencies and Interested Parties Comments**. State agencies and interested parties may submit recommendations and comments on staff's draft proposal and the claimant's

MAILED: ✓ FAXED: _____
DATE: 10/10/07 INITIAL: AE
CHRON: _____ FILE: ✓
WORKING BINDER: _____

modifications and/or comments within 30 days of service. State agencies and interested parties are required to submit an original and two (2) copies of written responses or rebuttals to the Commission and to simultaneously serve copies on the test claimant, state agencies, and interested parties on the mailing list. The claimant and other interested parties may submit written rebuttals. (See Cal. Code Regs., tit. 2, § 1183.11.)

- **Adoption of Parameters and Guidelines**. After review of the draft parameters and guidelines and all comments, Commission staff will recommend the adoption of an amended, modified, or supplemented version of staff's draft parameters and guidelines. (See Cal. Code Regs., tit. 2, § 1183.14.)

Please contact Nancy Patton at (916) 323-3562 if you have any questions.

Sincerely,

PAULA HIGASHI
Executive Director

Enclosures: Adopted Statement of Decision, Draft Parameters and Guidelines

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Elections Code Section 14310 as amended by Statutes 2000, Chapter 260 (SB 414); Filed on October 1, 2003, By County of San Bernardino, Claimant.	No. 03-TC-23 *Voter Identification Procedures* 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 October 4, 2006)

STATEMENT OF DECISION

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

Paula Higashi

PAULA HIGASHI, Executive Director

October 10, 2006

Date

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM: Elections Code Section 14310 as amended by Statutes 2000, Chapter 260 (SB 414); Filed on October 1, 2003, By County of San Bernardino, Claimant.	Case No.: 03-TC-23 *Voter Identification Procedures* 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 October 4, 2006)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on October 4, 2006. Bonnie Ter Keurst, appeared for the claimant, County of San Bernardino. Carla Castañeda and Susan Geanacou appeared on behalf of the Department of Finance (DOF).

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

The Commission adopted the staff analysis to partially approve this test claim at the hearing by a vote of 6-0.

Summary of Findings

This test claim, filed by County of San Bernardino on October 1, 2003, addresses an amendment to Elections Code section 14310, regarding counting "provisional ballots." A provisional ballot is a regular ballot that has been sealed in a special envelope, signed by the voter, and then deposited in the ballot box. Provisional ballots can be required for several reasons, generally to prevent unregistered individuals from voting, or to prevent registered voters from voting twice. For example, provisional ballots may be required when poll workers cannot immediately verify an individual's name on the official roster, or if a voter requested an absentee ballot, but instead comes to the polling place without bringing the absentee ballot.

Statutes 2000, chapter 260, amended Elections Code section 14310, subdivision (c)(1), to add a requirement that elections officials "compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration."

Claimant alleges that prior to this amendment: "the county elections official was not legally required to perform provisional ballot signature comparison for voter identification purposes. ...

Enactment of this statute has increased the duties of the county elections official, and requires the official to provide a higher-level of service for an existing program."

DOF filed comments on November 14, 2003, agreeing with the claimant that Statutes 2000, chapter 260 "may have resulted in new state-mandated activities."

The Commission finds that although prior law required that "the elections official shall examine the records with respect to all provisional ballots cast," the law did not require that each signature on a provisional ballot be directly compared to the signature on the voter's registration affidavit. This is akin to the analysis by the court in *Long Beach Unified School Dist.* (1990) 225 Cal.App.3d 155, 173, which found a higher level of service was mandated when general law on a existing program is changed to require performance of activities in a very specific manner.

The Commission concludes that Elections Code section 14310, subdivision (c)(1), as amended by Statutes 2000, chapter 260, mandates a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514, for performing the following specific new activity as part of statutorily-required elections:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)

The Commission concludes that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

BACKGROUND

This test claim addresses an amendment to Elections Code section 14310, regarding counting "provisional ballots." A provisional ballot is a regular ballot that has been sealed in a special envelope, signed by the voter, and then deposited in the ballot box. According to information from the Secretary of State's website: [1]

> A voter is asked to vote a provisional ballot at the polls due to one of the following reasons:
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> - **The voter's name is not on the official roster of voters and the election officer cannot verify the voter's voting eligibility on Election Day.** The Elections Official's Office will check the registration records. If further research determines that the voter is eligible to vote in the election, the provisional ballot will be counted.
> - **A voter has moved within the county, but did not re-register to vote.** The Elections Official will verify the voter's prior registration before the provisional ballot will be counted. The voter's registration will then be updated with the voter's current address.

[1] At < http://www.ss.ca.gov/elections/elections_provisional.htm> (as of Oct. 4, 2006.)

- **Records indicate that the voter requested an absentee ballot and the voter fails to turn in the absentee ballot at the polls on Election Day.** The Elections Official's Office will check the records, and if the voter did not vote an absentee ballot, the voter's provisional ballot will be counted.
- **The voter is a first- time Federal Election voter in the county and was unable to provide the required proof of identification.** The Elections Official's Office will verify the voter's eligibility to vote by comparing the signature on the voter's registration with the signature on the provisional ballot envelope.

Provisional ballots are counted during the official canvass[2] when:

Prior to the completion of the official canvass (the vote tally), the Elections Official's Office establishes, from voter registration records, the claimant's right to vote the ballot.

Statutes 2000, chapter 260, amended Elections Code section 14310, subdivision (c)(1), to add a requirement that elections officials "compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration."

Claimant's Position

Claimant, County of San Bernardino, filed this test claim on October 1, 2003.[3] Claimant contends that Elections Code section 14310, as amended by Statutes 2000, chapter 260, constitutes a reimbursable state-mandated program, "by requiring the elections official to compare signatures on provisional ballot envelopes with the signatures on the voter's affidavit of registration for voter identification purposes."

Claimant's written comments, dated August 3, 2006, state that "The County of San Bernardino concurs with the draft staff analysis as written and has no further comment."

Department of Finance's Position

DOF filed comments on November 14, 2003, agreeing with the claimant that Statutes 2000, chapter 260 "may have resulted in new state-mandated activities." Comments on the draft staff analysis, dated August 14, 2006, concur with the analysis, stating:

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[2] Elections Code section 335.5 defines "official canvass," as follows:

> The "official canvass" is the public process of processing and tallying all ballots received in an election, including, but not limited to, provisional ballots and absentee ballots not included in the semifinal official canvass. The official canvass also includes the process of reconciling ballots, attempting to prohibit duplicate voting by absentee and provisional voters, and performance of the manual tally of 1 percent of all precincts.

Elections Code section 318 provides: "'Election' means any election including a primary that is provided for under this code."

[3] Potential reimbursement period for this claim begins no earlier than July 1, 2002, based on the filing date of the test claim. (Current Gov. Code, § 17557, subd. (e).)

County elections officials were required to examine the voter's affidavit of registration and establish the provisional ballot-casting voter's right to vote. This was commonly performed by examining the voter's physical/computer-scanned registration card (affidavit of registration), but officials were not required to use a specific method of verification. Chapter 260 mandated a higher level of service by specifying that a signature comparison is the method of verification.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6, of the California Constitution[4] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[5] "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."[6] 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.[7] 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.[8]

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.[9] 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

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

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

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

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

[8] *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 Dist. v. Honig* (1988) 44 Cal.3d 830, 835 *(Lucia Mar)*.

[9] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

legislation.[10] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[11]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[12]

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.[13] 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."[14]

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

In order for the test claim statute to be subject to article XIII B, section 6 of the California Constitution, it must constitute a "program." In *County of Los Angeles v. State of California*, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one 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.[15] The court has held that only one of these findings is necessary.[16]

The Commission finds that verifying provisional ballots imposes a program within the meaning of article XIII B, section 6 of the California Constitution under both tests. Local elections officials provide a service to the members of the public by verifying that those who vote provisional ballots are eligible to cast a ballot. The test claim statute also requires local elections officials to engage in administrative activities solely applicable to local government, thereby imposing unique requirements that do not apply generally to all residents and entities of the state.

Accordingly, the Commission finds that the test claim statute constitutes a "program" and, thus, may be subject to subvention pursuant to article XIII B, section 6 of the California Constitution *if*

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

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

[12] *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.

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

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

[15] *County of Los Angeles, supra*, 43 Cal.3d at page 56.

[16] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

the statute also mandates a new program or higher level of service, and costs mandated by the state.

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

Elections Code Section 14310:

As background, Elections Code section 14310, subdivision (a), provides:

> (a) At all elections, a voter claiming to be properly registered but whose qualification or entitlement to vote cannot be immediately established upon examination of the index of registration for the precinct or upon examination of the records on file with the county elections official, shall be entitled to vote a provisional ballot … .

The test claim legislation, Statutes 2000, chapter 260, amended Elections Code section 14310, subdivision (c)(1) as follows,[17] indicated in underline and strikeout:

> (c)(1) During the official canvass, the elections official[18] shall examine the records with respect to all provisional ballots cast. Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. A variation of the signature caused by the substitution of initials for the first or middle name, or both, shall not invalidate the ballot.

Claimant alleges that prior to this amendment: "the county elections official was not legally required to perform provisional ballot signature comparison for voter identification purposes. ... Enactment of this statute has increased the duties of the county elections official, and requires the official to provide a higher-level of service for an existing program."

Test claim legislation mandates a new program or higher level of service within an existing program when it compels a local agency or school district to perform activities not previously required.[19] The courts have defined a "higher level of service" in conjunction with the phrase "new program" to give the subvention requirement of article XIII B, section 6 meaning. Accordingly, "it is apparent that the subvention requirement for increased or higher level of service is directed to state-mandated increases in the services provided by local agencies in

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[17] Elections Code section 14310 has been subsequently amended, but the later statutes have not been included in this test claim, and this particular provision has not changed.

[18] Elections Code section 320 provides the following definition:

> "Elections official" means any of the following:
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> (a) A clerk or any person who is charged with the duty of conducting an election.
>
> (b) A county clerk, city clerk, registrar of voters, elections supervisor, or governing board having jurisdiction over elections within any county, city, or district within the state.

[19] *Lucia Mar Unified School Dist.*, *supra*, 44 Cal.3d 830, 836.

existing programs."[20] A statute mandates a reimbursable "higher level of service" when the statute, as compared to the legal requirements in effect immediately before the enactment of the test claim legislation, increases the actual level of governmental service to the public provided in the existing program.[21]

Although prior law required that "the elections official shall examine the records with respect to all provisional ballots cast," the law did not require that each signature on a provisional ballot be directly compared to the signature on the voter's registration affidavit. This is akin to the analysis by the court in *Long Beach Unified School Dist., supra,* 225 Cal.App.3d 155, 173, which found a higher level of service was mandated when general law on a existing program is changed to require performance of activities in a very specific manner:

> A mere increase in the cost of providing a service which is the result of a requirement mandated by the state is not tantamount to a higher level of service. [Citation omitted.] However, a review of the Executive Order and guidelines shows that a higher level of service is mandated because their requirements go beyond constitutional and case law requirements. Where courts have *suggested* that certain steps and approaches may be helpful, the Executive Order and guidelines *require* specific actions. For example, school districts are to conduct mandatory biennial racial and ethnic surveys, develop a "reasonably feasible" plan every four years to alleviate and prevent segregation, include certain specific elements in each plan, and take mandatory steps to involve the community, including public hearings which have been advertised in a specific manner. While all these steps fit within the "reasonably feasible" description of *Jackson* and *Crawford*, the point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts.

The Commission finds that Elections Code section 14310, subdivision (c)(1), as amended by Statutes 2000, chapter 260, mandates a new program or higher level of service within an existing program by compelling local elections officials to perform the following activity when conducting the official canvass for elections:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected.

However, although the procedures established by Elections Code section 14310, subdivision (c)(1) are required to be followed at all elections, some elections are held entirely at the discretion of the local agency and would not result in reimbursable costs.

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[20] *County of Los Angeles, supra*, 43 Cal.3d 46, 56; *San Diego Unified School District, supra*, 33 Cal.4th 859, 874.

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

In *Kern High School Dist., supra,* 30 Cal.4th 727, at page 743, the California Supreme Court affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777. The Court stated the following:

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

Thus, the Court held as follows:

> [*W]e reject claimants' assertion that they have been legally compelled to incur* notice and agenda *costs, and hence are entitled to reimbursement from the state*, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][22]

The Court left undecided whether a reimbursable state mandate "might be found in circumstances short of legal compulsion—for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program."[23]

In *San Diego Unified School Dist., supra,* the Court discusses the potential pitfalls of extending "the holding of *City of Merced* so as to preclude reimbursement ... whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[24] In particular, the Court examines the factual scenario from *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, in which:

> an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (*Id.*, at pp. 537-538, 234 Cal.Rptr. 795.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ--and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642, such costs would not be reimbursable for the simple reason that the local agency's decision to employ

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[22] *Id.* at page 731.

[23] *Ibid.*

[24] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 887.

> firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and *hence we are reluctant to endorse, in this case,* an application of the rule of *City of Merced* that might lead to such a result. [Emphasis added.]

Yet the Court did not rely on this analysis to reach its conclusions, thus the statements are considered dicta. However, the Commission recognizes that the Court was giving notice that the *City of Merced* "discretionary" rationale is not without limitation. What the Court did *not* do was disapprove either the *City of Merced,* or its own rationale and holding in *Kern High School Dist.*

Rather, the 2003 decision of the California Supreme Court in *Kern High School Dist.* remains good law, relevant, and its reasoning applies here. The Supreme Court explained, "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[25] Likewise, compliance with *Voter Identification Procedures* is not a *reimbursable* state-mandated program for local special elections scheduled at the option of the local agency, *if* the issue could have legally been held for the next regular local or statewide election date.

Elections Code section 1000 provides that "The established election dates in each year are as follows:"

> (a) The second Tuesday of April in each even-numbered year.
>
> (b) The first Tuesday after the first Monday in March of each odd-numbered year.
>
> (c) The first Tuesday after the first Monday in June in each year.
>
> (d) The first Tuesday after the first Monday in November of each year.

Elections Code section 1001 provides that "Elections held in June and November of each even-numbered year are statewide elections and these dates are statewide election dates." The Commission finds that eligible costs from the *Voter Identification Procedures* program for any statewide election dates, including special elections called by the Governor, are reimbursable.

Elections Code section 1002 provides that "Except as provided in Section 1003, notwithstanding any other provisions of law, all state, county, municipal, district, and school district elections shall be held on an established election date." Elections Code section 1003 provides a list of types of elections that may be held on dates other than established election dates, for example, "(e) County, municipal, district, and school district initiative, referendum, or recall elections."

Elections Code section 1300 et seq contain the general elections date provisions for local agencies and school districts. Elections Code section 1303, for example, requires that "the regular election to select governing board members in any school district, community college district, or county board of education shall be held on the first Tuesday after the first Monday in November of each odd-numbered year." The Commission finds that eligible costs from the

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[25] *Kern High School Dist., supra*, 30 Cal.4th at page 743.

Voter Identification Procedures program are reimbursable, for this type of regular, statutorily-required local election.

An example where costs of complying with the *Voter Identification Procedures* program would not be reimbursable is found in Elections Code section 9222:

> The legislative body of *the city may submit to the voters, without a petition therefor, a proposition* for the repeal, amendment, or enactment of any ordinance, to be voted upon at any succeeding regular or special city election, and if the proposition submitted receives a majority of the votes cast on it at the election, the ordinance shall be repealed, amended, or enacted accordingly. A proposition may be submitted, or *a special election may be called for the purpose of voting on a proposition*, by ordinance or resolution. The election shall be held not less than 88 days after the date of the order of election.

Using this example, if city officials call for a special municipal election for a vote on such a proposition, at a time other than a scheduled statewide election, this is a voluntary election on the part of the city. There are many such examples found in the Elections Code, where special elections may be called at the option of a local government, or they can be held and consolidated with other elections.[26] In broad terms, the Commission finds that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable under the *Kern* decision.

Issue 3: Does the test claim statute impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Reimbursement under article XIII B, section 6 is required only if any new program or higher-level of service is also found to impose "costs mandated by the state." 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. The claimant estimated costs of $1000 or more for the test claim allegations. The claimant also stated that none of the Government Code section 17556 exceptions apply. For the activity listed in the conclusion below, the Commission agrees and finds accordingly that it imposes costs mandated by the state upon local elections officials within the meaning of Government Code section 17514.

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[26] Elections Code sections 1405, 1410, and 1415 hold three more examples.

CONCLUSION

The Commission concludes that Elections Code section 14310, subdivision (c)(1), as amended by Statutes 2000, chapter 260, mandates a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514, for performing the following specific new activity as part of statutorily-required elections:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)[27]

The Commission concludes that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

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[27] As amended by Statutes 2000, chapter 260, operative January 1, 2001.

DRAFT PARAMETERS AND GUIDELINES

Elections Code Section 14310
Statutes 2000, Chapter 260 (SB 414)

Voter Identification Procedures
(03-TC-23)

County of San Bernardino, Claimant

I. SUMMARY OF THE MANDATE

On October 4, 2006, the Commission on State Mandates (Commission) adopted a Statement of Decision finding that the test claim legislation 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 to perform the following activities:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)

The Commission found that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

II. ELIGIBLE CLAIMANTS

Any city, county, and city and county that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557, subdivision (c), as amended by Statutes 1998, chapter 681, states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The County of San Bernardino filed the test claim on October 1, 2003, establishing eligibility for fiscal year 2002-2003. Therefore, costs incurred pursuant to Statutes 2000, chapter 260, are reimbursable on or after July 1, 2002.

Actual costs for one fiscal year shall be included in each claim. Estimated costs of the subsequent year may be included on the same claim, if applicable. Pursuant to Government Code section 17561, subdivision (d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.

If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant, the following activities are reimbursable:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)[1]

When a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

[1] As amended by Statutes 2000, chapter 260, operative January 1, 2001.

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[2] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND OTHER REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service

[2] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the Statement of Decision, is on file with the Commission.

Commission on State Mandates

Original List Date: 10/8/2003
Last Updated: 7/19/2006
List Print Date: 10/10/2006
Claim Number: 03-TC-23
Issue: Voter Identification Procedures

Mailing Information: Notice of adopted SOD

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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DRAFT PARAMETERS AND GUIDELINES

Elections Code Section 14310
Statutes 2000, Chapter 260 (SB 414)

Voter Identification Procedures
(03-TC-23)

County of San Bernardino, Claimant

I. SUMMARY OF THE MANDATE

On October 4, 2006, the Commission on State Mandates (Commission) adopted a Statement of Decision finding that the test claim legislation 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 to perform the following activities:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)

The Commission found that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

II. ELIGIBLE CLAIMANTS

Any city, county, and city and county that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557, subdivision ~~(c),~~ (e), ~~as amended by Statutes 1998, chapter 681~~, states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The County of San Bernardino filed the test claim on October 1, 2003, establishing eligibility for fiscal year 2002-2003. Therefore, costs incurred pursuant to Statutes 2000, chapter 260, are reimbursable on or after July 1, 2002.

Actual costs for one fiscal year shall be included in each claim. ~~Estimated costs of the subsequent year may be included on the same claim, if applicable~~. Pursuant to Government Code section 17561, subdivision (d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.

If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant, the following activities are reimbursable:

A. One-Time Activities

1. Updating polices and procedures to implement the reimbursable activities listed in Section IV., B, of these parameters and guidelines.
2. Modifying Registrar of Voter's computer system to record the mandated provisional ballot signature comparing activities.
3. Training empoyees who perform the reimbursable activites listed in Section IV., B, of these parameters and guidelines. (One-time activity per employee.)

B. Ongoing Activities

1. Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)[2]

When a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

[1] As amended by Statutes 2000, chapter 260, operative January 1, 2001.

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Uniform Allowances (Time)

The uniform time allowances cover the cost of the salaries and benefits of the employees performing the ongoing activities listed in Part B. 1., in Section IV of these parameters and guidelines. For purposes of the following calculations, productive hours mean: "Time spent performing any kind of mental or physical work. Paid leave is not included."

Elections Official Comparing Signature on Provisional Ballot Envelope with the Signature on the Voter's Affidavit of Registration

For activity IV. B. 1. multiply as follows:

(the total number of eligible provisional ballots cast) x (0.01 hour[2]) x (the productive hourly rate {total wages and related benefits divided by productive hours} for employees performing the reimbursable activities.)

The Commission has not identified any circumstances that would cause an eligible claimant to incur additional costs to perform any other activities not incorporated in Section IV of these parameters and guidelines. Eligible claimants incurring any such costs within the scope of the reimbursable activities may submit a request to amend the parameters and guidelines to the commission for such costs to be approved for reimbursement, subject to the provisions of Government Code section 17557 and California Code of Regulations, title 2, section 1183.2.

B. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits[3]

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

[2] Equivalent to 0.60 minute or 36 seconds.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

6. Training

Report the cost of training an employee to perform the reimbursable activities, as specified in Section IV of this document. Report the name and job classification of each employee preparing for, attending, and/or conducting training necessary to implement the reimbursable activities. Provide the title, subject, and purpose (related to the mandate of the training session), dates attended, and location. If the training encompasses subjects broader than the reimbursable activities, only the pro-rata portion can be claimed. Report employee training time for each applicable reimbursable activity according to the rules of cost element A..1, Salaries and Benefits, and ~~B.~~A.2, Materials and Supplies as stated in this section. Report the cost of consultants who conducted the training according to the rules of cost element A..3, Contracted Services.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of

using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[4-3] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND OTHER REIMBURSEMENTS

[4-3] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the Statement of Decision, is on file with the Commission.

Exhibit B

AUDITOR/CONTROLLER-RECORDER
COUNTY CLERK

COUNTY OF SAN BERNARDINO

AUDITOR/CONTROLLER • 222 West Hospitality Lane, Fourth Floor
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RECORDER • COUNTY CLERK • 222 West Hospitality Lane, First Floor
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LARRY WALKER
Auditor/Controller-Recorder
County Clerk

ELIZABETH A. STARBUCK
Assistant Auditor/Controller-Recorder
Assistant County Clerk

November 28, 2006

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

(And Interested Parties *(See Enclosed Mailing List)*)

RE: Draft Parameters and Guidelines
Voter Identification Procedures (03-TC-23)
County of San Bernardino, Claimant
Statutes of 2000, Chapter 260
Elections Code Section 14310

Dear Ms. Higashi:

The County of San Bernardino (County) has reviewed the draft parameters and guidelines (P & G's) for the above named claim as proposed by the Commission staff. Pursuant to California Code of Regulations, title 2, section 1183.12, subdivisions (b) and (c), we are submitting modifications as notated (italicized and underlined) in the attached copy.

On October 4, 2006, the Commission on State Mandates (Commission) found the Test Claim to be a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 to perform the following activities:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected.

Since the above activities are repetitious in nature and can be performed in a small time increment, the County of San Bernardino is proposing a unit cost method to be incorporated in the P & G's. A time study was performed in a joint effort by the County Registrar of Voters and our office. A two (2) Pass Category process was developed for provisional ballots: Pass 1 and Pass 2. The Pass 1 category involved pulling up the signature on the voter's affidavit of registration, and comparing with the signature on each provisional ballot envelope. When the

signatures did not match, the provisional ballot was placed aside as Pass 2. The Pass 2 category involved further research in pulling up the provisional voter's signature.

Since the Statutes of 2000, Chapter 260 mandates the comparison of signatures only; our time study was just limited to Pass 1 category activities. We have enclosed copies of our time study documents for your review and approval. Based on our time study, we conclude that:

a) it takes an average of **0.01 hour**[1] to compare signature on each provisional ballot envelope with the signature on the voter's affidavit of registration; and

b) it costs the county an average of **$0.45** to perform the above mandated activities for each provisional ballot.

As a representative for the claimant, I request that the Commission staff incorporate the modifications and the unit cost method as presented in the Parameters and Guidelines for this reimbursable state-mandated program.

DECLARATION of CLAIMANT:

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.

Bonnie Ter Keurst
Manager, Reimbursable Projects Section

Enclosed:

- Modified Draft Parameters and Guidelines
- SB90 Time Study Plan
- Provisional Ballot Processing Procedures: Pass 1 Category Activities
- Unit Time/Cost Calculation
- SB90 Time Study Form (Only sample included. The whole time study form package are available upon request)

[1] Equivalent to 0.60 minute or 36 seconds.

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COUNTY OF SAN BERNARDINO

LARRY WALKER
Auditor/Controller-Recorder
County Clerk

ELIZABETH A. STARBUCK
Assistant Auditor/Controller-Recorder
Assistant County Clerk

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am employed by the County of San Bernardino, State of California. My business address is 222 West Hospitality Lane, Fourth Floor, San Bernardino, CA 92415-0018. I am 18 years of age or older.

On November 30, 2006, I faxed and/or mailed the letter dated November 28, 2006 and other related documents to the Commission on State Mandates in response to the Draft Parameters and Guidelines for Voter Identification Procedures (03-TC-23), and also faxed and/or mailed the documents to the other parties listed on this mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 30, 2006 at San Bernardino, California.

Jai Prasad

Jai Prasad
Accountant II
Reimbursable Projects Section

Commission on State Mandates

Original List Date: 10/8/2003
Last Updated: 7/19/2006
List Print Date: 10/10/2006
Claim Number: 03-TC-23
Issue: Voter Identification Procedures

Mailing Information: Notice of adopted SOD

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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Claimant

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DRAFT PARAMETERS AND GUIDELINES

Elections Code Section 14310
Statutes 2000, Chapter 260 (SB 414)

Voter Identification Procedures
(03-TC-23)

County of San Bernardino, Claimant

I. SUMMARY OF THE MANDATE

On October 4, 2006, the Commission on State Mandates (Commission) adopted a Statement of Decision finding that the test claim legislation 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 to perform the following activities:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)

The Commission found that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

II. ELIGIBLE CLAIMANTS

Any city, county, and city and county that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557, subdivision (c), as amended by Statutes 1998, chapter 681, states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The County of San Bernardino filed the test claim on October 1, 2003, establishing eligibility for fiscal year 2002-2003. Therefore, costs incurred pursuant to Statutes 2000, chapter 260, are reimbursable on or after July 1, 2002.

Actual costs for one fiscal year shall be included in each claim. Estimated costs of the subsequent year may be included on the same claim, if applicable. Pursuant to Government Code section 17561, subdivision (d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.

If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant, the following activities are reimbursable:

A. *One-Time Activities*

1. *Updating policies and procedures to implement the reimbursable activities listed in Section IV., B, of these parameters and guidelines.*

2. *Modifying Registrar of Voter's computer system to record the mandated provisional ballot signature comparing activities.*

3. *Training employees who perform the reimbursable activities listed in Section IV., B, of these parameters and guidelines. (One-time activity per employee.)*

B. *Ongoing Activities*

1. Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)[1]

[1] As amended by Statutes 2000, chapter 260, operative January 1, 2001.

When a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Uniform Allowances (Time)

The uniform time allowances cover the cost of the salaries and benefits of the employees performing the ongoing activities listed in Part B. 1., in Section IV of these parameters and guidelines. For purposes of the following calculations, productive hours mean: "Time spent performing any kind of mental or physical work. Paid leave is not included."

Elections Official Comparing Signature on Provisional Ballot Envelope with the Signature on the Voter's Affidavit of Registration

For activity IV. B. 1. multiply as follows:

(the total number of eligible provisional ballots cast) x (0.01 hour[2]) x (the productive hourly rate [total wages and related benefits divided by productive hours] for employees performing the reimbursable activities).

The Commission has not identified any circumstances that would cause an eligible claimant to incur additional costs to perform any other activities not incorporated in Section IV of these parameters and guidelines. Eligible claimants incurring any such costs within the scope of the reimbursable activities may submit a request to amend the parameters and guidelines to the Commission for such costs to be approved for reimbursement, subject to the provisions of Government Code section 17557 and California Code of Regulations, title 2, section 1183.2.

B. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

[2] Equivalent to 0.60 minute or 36 seconds.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

6. Training

Report the cost of training an employee to perform the reimbursable activities, as specified in Section IV. of this document. Report the name and job classification of each employee preparing for, attending, and/or conducting training necessary to implement the reimbursable activities. Provide the title, subject, and purpose (related to the mandate of the training session), date attended, and location. If the training encompasses subjects broader than the reimbursable activities, only the pro-rata portion can be claimed. Report employee training time for each applicable reimbursable activity according to the rules of cost element B.1, Salaries and Benefits, and B.2, Materials and Supplies as stated in this section. Report the cost of consultants who conduct the training according to the rules of cost element B.3, Contracted Services.

C. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or

2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[3] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement

[3] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND OTHER REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the Statement of Decision, is on file with the Commission.

County of San Bernardino
Auditor/Controller-Recorder
Reimbursable Projects Section

SB 90 Time Study Plan
Voter Identification Procedures
Statutes of 2000, Chapter 260

Plan Overview:

Date Prepared:	11/17/2006
Agency:	San Bernardino County
Address:	222 W. Hospitality Lane, 4th Floor, San Bernardino, CA 92415
Mandate:	Voter Identification Procedures (03-TC-23); Statutes of 2000, Chapter 260; Elections Code Section 14310
Overview:	The above program requires election officials to use the procedures that apply to the comparison of signatures on absentee ballots, for comparing the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration.
History:	On 10/1/2003 County of San Bernardino filed Voter Identification Procedures test claim with the Commission on State Mandates (CSM). The CSM adopted the Statement on Decision on 10/4/2006, concluding that this program mandates higher level of service on local agencies.

Departments involved:

a)	Responsible for time study:	Registrar of Voters (ROV)
	Contact Person:	Melissa Eickman
	Position Classification:	Absentee Voter Manager
	Phone:	(909) 387-2084
b)	Compiling & filing time study:	Auditor/Controller-Recorder (ACR)
	Contact Person:	Jai Prasad
	Position Classification:	Accountant II
	Phone:	(909) 386-8854

Employee Classes:

a) Clerk III Advanced - temporary workers

Program Scope:

a)	Approximate Costs:	$4,500
b)	Total Provisional Ballots Casted:	Approximately 10,000
c)	Ballots to be studied:	560 (5.6% of population) ****

County of San Bernardino
Auditor/Controller-Recorder
Reimbursable Projects Section

**** Due to the repetitious nature of comparing signatures and smaller time increments involved (minutes), we deemed performing time study on 560 provisional ballots will provide reasonable average unit time/cost for performing Voter Identification Procedures mandated activities.

Plan Details:

The performance of the time study and the reporting of the results to the CSM will be a joint effort between ACR and ROV.

Activity	Time/Schedule
1) Prepare time study plan	November 17, 2006
2) Submit for review	November 20, 2006
3) Final plan and details	November 22, 2006
4) Performance of time study	November 27, 2006
5) Analyze and compile results	November 28 & 29, 2006
6) Submit results to the State	November 30, 2006

Time Period: The time study will be performed after Election Day, which is scheduled on 11/7/2006. The location of the time-study will be at ROV. ACR staff will assist ROV staff in conducting time studies, and recording the results. ACR will finally compile the time study results, incorporate the results in the draft parameters & guidelines, and submit to the State for review by 11/30/2006.

Reimbursable Program Activities:

Comparing the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration by using procedures that apply to the comparison of signatures on the absentee ballots.

Activities Performed:

****Please see the attached *Provisional Ballot Processing Procedures – Pass 1 Category Activities.*

Comments: The above activities are performed in one setting. Thus, the time studying will begin when Activity #1 starts, and will stop after the last activity is completed.

County of San Bernardino
Auditor/Controller-Recorder
Reimbursable Projects Section

Employee Universe:	Clerk III Advanced (temporary workers) – 14 total
Sample selection method:	5 Clerk III Advanced will be selected – each clerk will study 112 ballots.
Time periods to be studied:	N/A – only 560 provisional ballots will be studied altogether.
Documentation:	Time study forms (prepared contemporaneously) will document the time started and ended performing provisional ballot signature comparisons.
Time Increments:	Minutes
Validation of product:	Each time-studied provisional ballot's identification number will be recorded on the time study sheet.
Record Retention:	If approved by the CSM, the time study records will be retained at the ACR until the Provisional Ballot becomes a dead mandate.
Attachment:	a) Provisional Ballot Processing Procedures – Pass 1 Category Activities b) Time Study Form (Only sample included. The whole time study form package can be provided upon request) c) Unit Time/Cost Calculation Schedule

Employee Universe:	Clerk III Advanced (temporary workers) – 14 total
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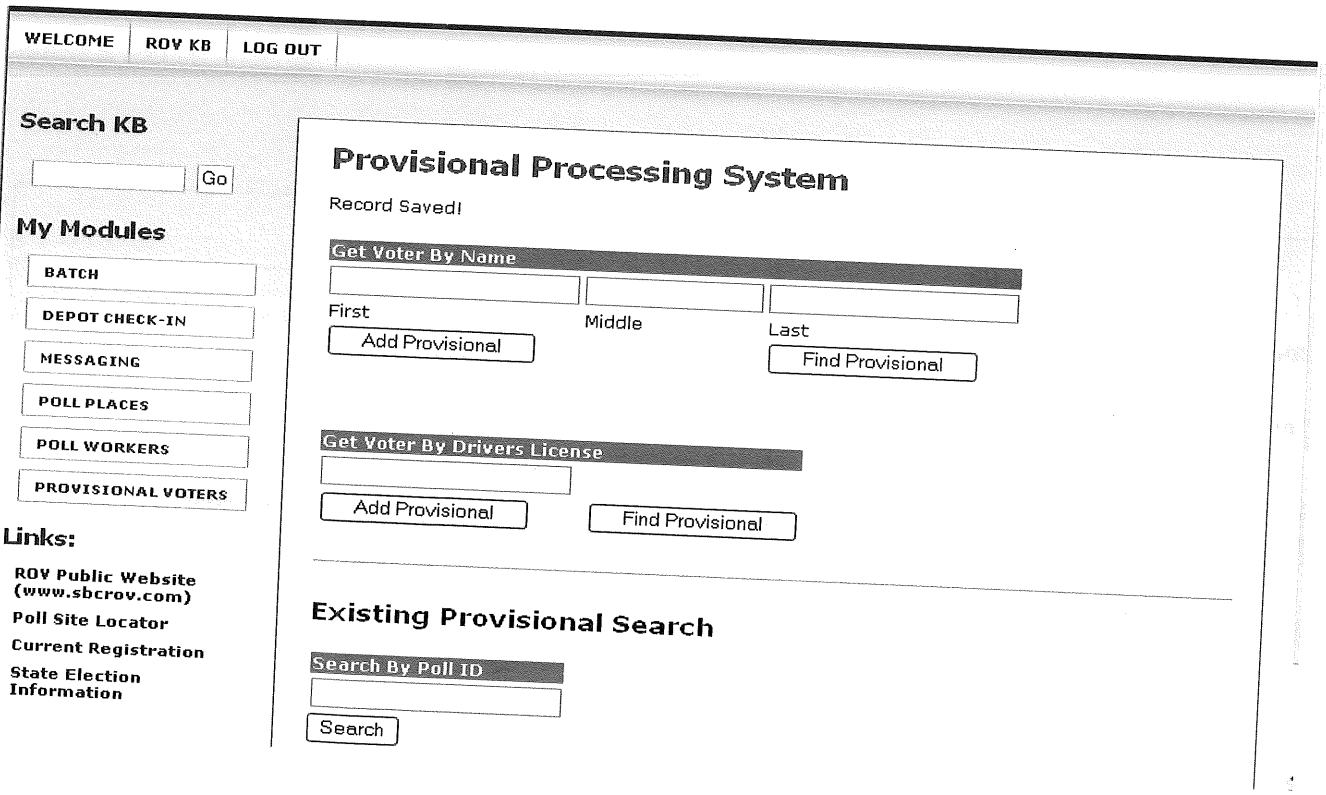
County of San Bernardino
Registrar of Voters
Provisional Ballot Processing Procedures
Pass 1 Category Activities

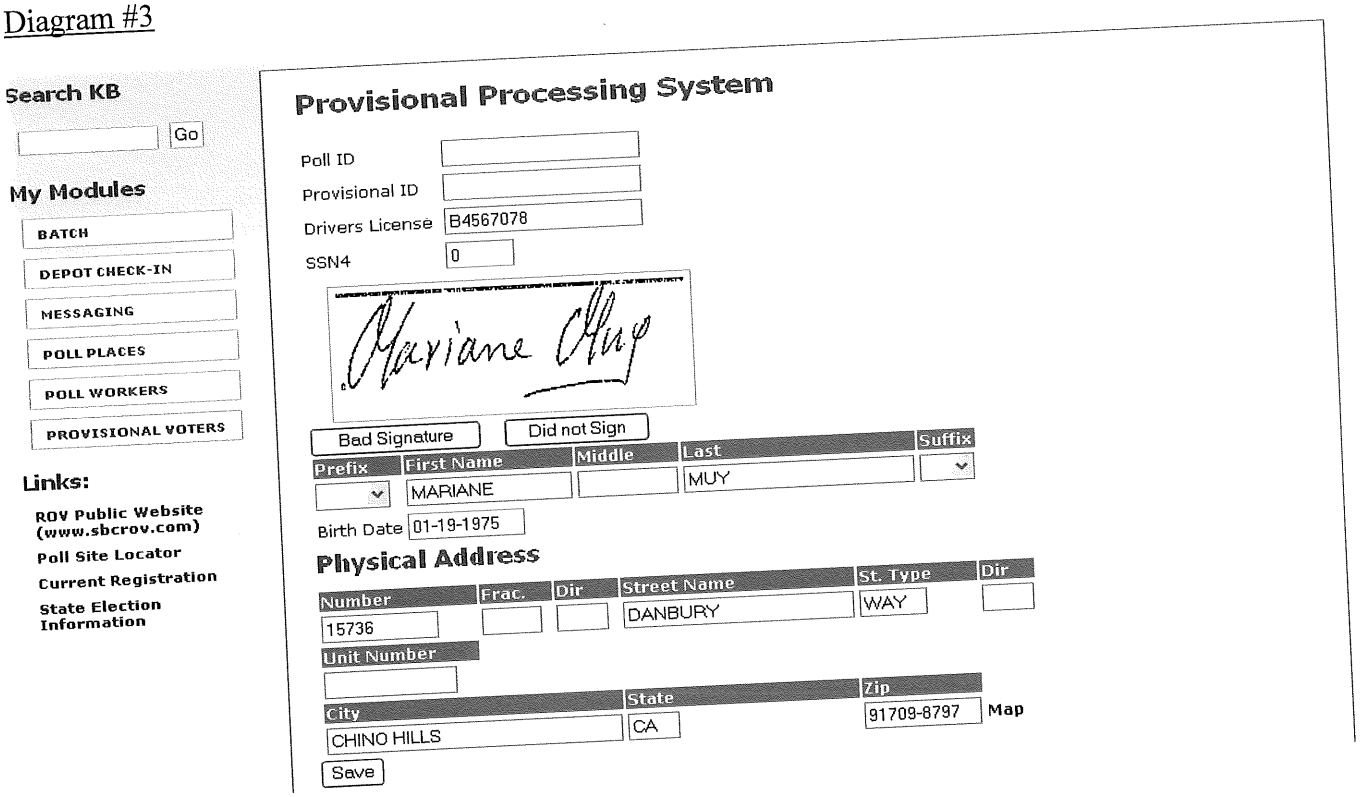
FIND A VOTER OPTION 1 or 2 See diagram #1 & #2	ACTION
After logging in the system Http://Rov-Web01/Provisional:	
#1: Type First 2 Letters Of First Name And A Percent Sign (%)	Tab Twice
Type Last Name	Enter Or Click On Add Provisional
#2: Type in DL Number	Enter Or Click On Add Provisional
System Will List All Voters With That Last Name	Click On Name Of Voter You Are Searching For.
If Voter Is Not Listed	Click Voter Not Found/Add Provisional
Type In Full Name	Click On Add Provisional

Diagram #1



County of San Bernardino
Registrar of Voters
Provisional Ballot Processing Procedures
Pass 1 Category Activities

Diagram #3



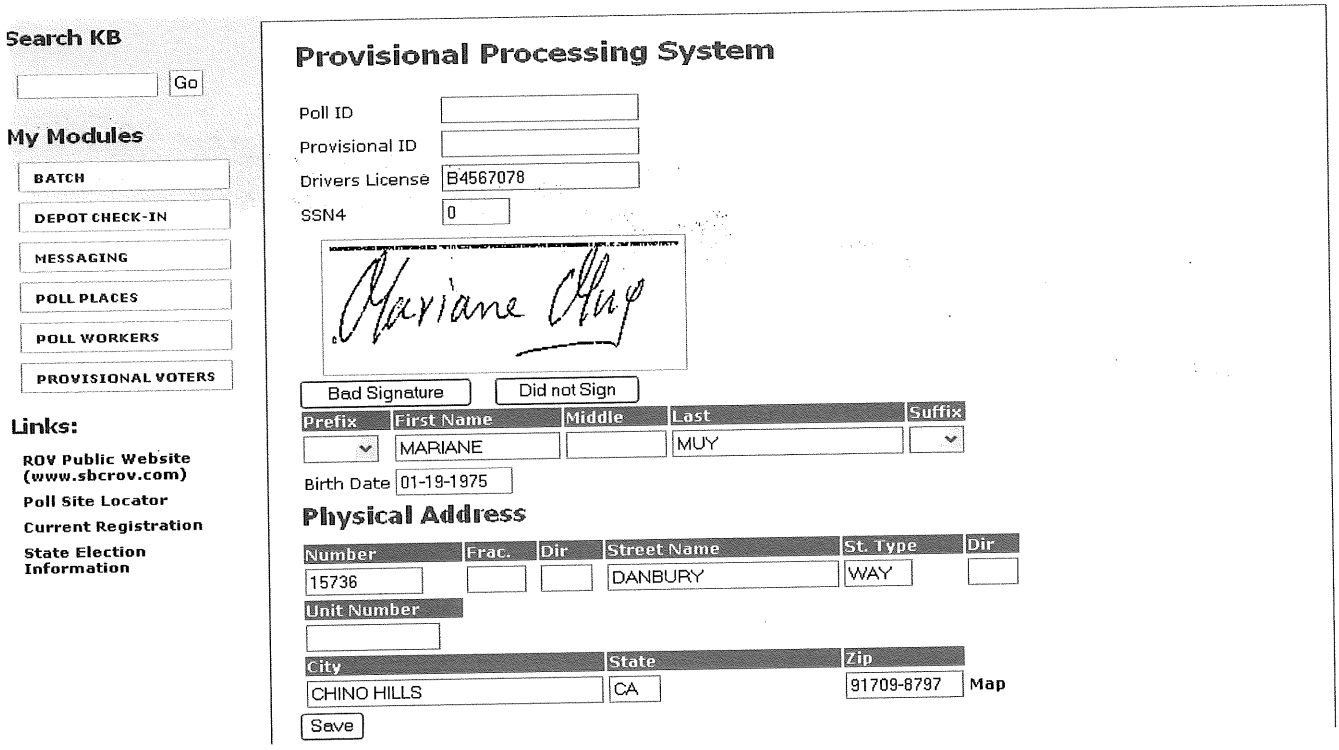
Provisional Sheet	
Initial Top Of Provisional Sheet	
Vote Counts (Accepted)	Check Count
Vote Does Not Count	Check No Count Check Challenge Code Reason

Challenge Codes	
Signature Does Not Match	Voter Did Not Sign
Voted Absentee	Not Registered

Moving Around Screens	
To Get To Find Voter Screen	Click On Grey Provisional Voter Square
To Refine Search From Select A Voter Screen	Click On Back
To Find A Voter Already Entered	From Find Voter Screen Type In Voter Name Click On Find Provisional
To Find A Voter Already Entered	From Find Voter Screen Type In Poll Id

County of San Bernardino
Registrar of Voters
Provisional Ballot Processing Procedures
Pass 1 Category Activities

Diagram #3



Provisional Sheet	
Initial Top Of Provisional Sheet	
Vote Counts (Accepted)	Check Count
Vote Does Not Count	Check No Count Check Challenge Code Reason

Challenge Codes	
Signature Does Not Match	Voter Did Not Sign
Voted Absentee	Not Registered

Moving Around Screens	
To Get To Find Voter Screen	Click On Grey Provisional Voter Square
To Refine Search From Select A Voter Screen	Click On Back
To Find A Voter Already Entered	From Find Voter Screen Type In Voter Name Click On Find Provisional
To Find A Voter Already Entered	From Find Voter Screen Type In Poll Id

County of San Bernardino
Auditor/Controller-Recorder
Reimbursable Projects Section

SB90 Time Study

Unit Time/Cost Calculation

Voter Identification Procedures

Statutes of 2000, Chapter 260

a)	Total Provisional Ballots Time Studied:	560
b)	Total Employees involved in the Time Study:	5
c)	Total Provisional Ballots assigned to each employee:	112
d)	Total SB90 Time Study Forms assigned to each employee (16 ballots per form):	7
e)	Total SB90 Time Study Forms Generated:	35

Time Study Form #	Date	Employee Name	Employee Number	Employee Classification	Department Name	Total Ballots Studied per Time Study Form	Total Time Spent on Ballots per Time Study Form (minutes)	**Average Time Spent Per Ballot (minutes)**	Labor Hourly Rate ($)	**Total Labor Cost ($)**	ICRP %	**Total Cost ($)**	**Average Cost per Provisional Ballot ($)**
1	11/27/2006	Rosanda Gude	N/A	Temporary Employee	Registrar of Voters	16.0	12.30	0.77	$ 13.77	2.82	237.46%	9.53	$ 0.60
2	11/27/2006	Rosanda Gude	N/A	Temporary Employee	Registrar of Voters	16.0	13.03	0.81	13.77	2.99	237.46%	10.09	0.63
3	11/27/2006	Rosanda Gude	N/A	Temporary Employee	Registrar of Voters	16.0	8.37	0.52	13.77	1.92	237.46%	6.48	0.41
4	11/27/2006	Rosanda Gude	N/A	Temporary Employee	Registrar of Voters	16.0	6.72	0.42	13.77	1.54	237.46%	5.20	0.33
5	11/27/2006	Rosanda Gude	N/A	Temporary Employee	Registrar of Voters	16.0	8.05	0.50	13.77	1.85	237.46%	6.23	0.39
6	11/27/2006	Rosanda Gude	N/A	Temporary Employee	Registrar of Voters	16.0	6.67	0.42	13.77	1.53	237.46%	5.17	0.32
7	11/27/2006	Rosanda Gude	N/A	Temporary Employee	Registrar of Voters	16.0	5.10	0.32	13.77	1.17	237.46%	3.95	0.25
8	11/27/2006	Ruben Aldama	N/A	Temporary Employee	Registrar of Voters	16.0	10.62	0.66	13.77	2.44	237.46%	8.22	0.51
9	11/27/2006	Ruben Aldama	N/A	Temporary Employee	Registrar of Voters	16.0	9.55	0.60	13.77	2.19	237.46%	7.40	0.46
10	11/27/2006	Ruben Aldama	N/A	Temporary Employee	Registrar of Voters	16.0	10.08	0.63	13.77	2.31	237.46%	7.81	0.49
11	11/27/2006	Ruben Aldama	N/A	Temporary Employee	Registrar of Voters	16.0	8.07	0.50	13.77	1.85	237.46%	6.25	0.39
12	11/27/2006	Ruben Aldama	N/A	Temporary Employee	Registrar of Voters	16.0	9.57	0.60	13.77	2.20	237.46%	7.41	0.46
13	11/27/2006	Ruben Aldama	N/A	Temporary Employee	Registrar of Voters	16.0	7.68	0.48	13.77	1.76	237.46%	5.95	0.37
14	11/27/2006	Ruben Aldama	N/A	Temporary Employee	Registrar of Voters	16.0	6.78	0.42	13.77	1.56	237.46%	5.25	0.33
15	11/27/2006	Christina Morales	N/A	Temporary Employee	Registrar of Voters	16.0	15.77	0.99	13.77	3.62	237.46%	12.21	0.76
16	11/27/2006	Christina Morales	N/A	Temporary Employee	Registrar of Voters	16.0	27.36	1.71	13.77	6.28	237.46%	21.19	1.32
17	11/27/2006	Christina Morales	N/A	Temporary Employee	Registrar of Voters	16.0	23.42	1.46	13.77	5.37	237.46%	18.14	1.13
18	11/27/2006	Christina Morales	N/A	Temporary Employee	Registrar of Voters	16.0	16.15	1.01	13.77	3.71	237.46%	12.51	0.78
19	11/27/2006	Christina Morales	N/A	Temporary Employee	Registrar of Voters	16.0	10.72	0.67	13.77	2.46	237.46%	8.30	0.52
20	11/27/2006	Christina Morales	N/A	Temporary Employee	Registrar of Voters	16.0	13.60	0.85	13.77	3.12	237.46%	10.53	0.66

	Time Study Form #	Date	Employee Name	Employee Number	Employee Classification	Department Name	Total Ballots Studied per Time Study Form	Total Time Spent on Ballots per Time Study Form (minutes)	**Average Time Spent Per Ballot (minutes)**	Labor Hourly Rate ($)	**Total Labor Cost ($)**	ICRP %	**Total Cost ($)**	**Average Cost per Provisional Ballot ($)**
	21	11/27/2006	Christina Morales	N/A	Temporary Employee	Registrar of Voters	16.0	9.20	0.58	13.77	2.11	237.46%	7.13	0.45
	22	11/27/2006	Chris Francisco	N/A	Temporary Employee	Registrar of Voters	16.0	10.10	0.63	13.77	2.32	237.46%	7.82	0.49
	23	11/27/2006	Chris Francisco	N/A	Temporary Employee	Registrar of Voters	16.0	7.57	0.47	13.77	1.74	237.46%	5.86	0.37
	24	11/27/2006	Chris Francisco	N/A	Temporary Employee	Registrar of Voters	16.0	6.05	0.38	13.77	1.39	237.46%	4.69	0.29
	25	11/27/2006	Chris Francisco	N/A	Temporary Employee	Registrar of Voters	16.0	7.75	0.48	13.77	1.78	237.46%	6.00	0.38
	26	11/27/2006	Chris Francisco	N/A	Temporary Employee	Registrar of Voters	16.0	5.97	0.37	13.77	1.37	237.46%	4.62	0.29
	27	11/27/2006	Chris Francisco	N/A	Temporary Employee	Registrar of Voters	16.0	7.72	0.48	13.77	1.77	237.46%	5.98	0.37
	28	11/27/2006	Chris Francisco	N/A	Temporary Employee	Registrar of Voters	16.0	3.95	0.25	13.77	0.91	237.46%	3.06	0.19
	29	11/27/2006	Virginia Cooper	N/A	Temporary Employee	Registrar of Voters	16.0	8.82	0.55	13.77	2.02	237.46%	6.83	0.43
	30	11/27/2006	Virginia Cooper	N/A	Temporary Employee	Registrar of Voters	16.0	4.50	0.28	13.77	1.03	237.46%	3.49	0.22
	31	11/27/2006	Virginia Cooper	N/A	Temporary Employee	Registrar of Voters	16.0	5.85	0.37	13.77	1.34	237.46%	4.53	0.28
	32	11/27/2006	Virginia Cooper	N/A	Temporary Employee	Registrar of Voters	16.0	4.35	0.27	13.77	1.00	237.46%	3.37	0.21
	33	11/27/2006	Virginia Cooper	N/A	Temporary Employee	Registrar of Voters	16.0	4.08	0.26	13.77	0.94	237.46%	3.16	0.20
	34	11/27/2006	Virginia Cooper	N/A	Temporary Employee	Registrar of Voters	16.0	4.83	0.30	13.77	1.11	237.46%	3.74	0.23
	35	11/27/2006	Virginia Cooper	N/A	Temporary Employee	Registrar of Voters	16.0	4.95	0.31	13.77	1.14	237.46%	3.83	0.24
Total							560.00	325.30	**0.58**	minute	$74.66		$251.94	**$ 0.45**
									34.9	seconds				
									0.01	hour				

Exhibit C

DEPARTMENT OF FINANCE
OFFICE OF THE DIRECTOR

ARNOLD SCHWARZENEGGER, GOVERNOR
STATE CAPITOL ■ ROOM 1145 ■ SACRAMENTO CA ■ 95814-4998 ■ WWW.DOF.CA.GOV

January 5, 2007

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 October 10, 2006, the Department of Finance has reviewed the draft parameters and guidelines proposed by the Commission on State Mandates related to Claim No. 03-TC-23, "Voter Identification Procedures". The Commission on State Mandates has identified the following activity as reimbursable:

> Using the procedures that apply to the comparison of signatures on absentee ballots, the election official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected.

The Commission has made an important distinction by identifying that when a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable

If the actual cost method is to be used, Finance supports the proposed parameters and guidelines and recommends limiting reimbursement to staff time.

Alternatively, Finance would consider a reimbursement methodology that utilizes unit costs or other data to eliminate the need for actual cost reporting. If an alternative reimbursement methodology is adopted by the Commission, Finance recommends that it be the only mechanism for reimbursement of voter identification procedure related activities.

In determining appropriate unit costs, parties should consider:

1) Statistics regarding provisional ballots cast, processed and invalidated.
2) Estimated cost of processing and verifying signatures.
3) Offsetting revenues charged to cities, special districts, school districts and candidates in the elections.

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 October 10, 2006 letter have been provided with copies of this letter via either United States Mail, e-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

PROOF OF SERVICE

Test Claim Name: Voter Identification Procedures
Test Claim Number: 03-TC-23

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 January 5, 2007, 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

SB 90 Service
C/O David M. Griffiths & Associates
Attention: Allan Burdick
4320 Auburn Boulevard, Suite 200
Sacramento, CA 95841

County of Los Angeles
Department of Auditor-Controller
Kenneth Hahn Hall of Administration
Attention: Leonard Kaye
500 West Temple Street, Room 603
Los Angeles, CA 90012

County of San Bernardino
Office of Auditor / Controller / Recorder
Attention: Marcia Faulkner
222 West Hospitality Lane, Fourth Floor
San Bernardino, CA 92415 - 0018

Wellhouse and Associates
Attention: David Wellhouse
9175 Kiefer Boulevard, Suite 121
Sacramento, CA 95826

B-08
Mr. Jim Spano
State Controller's Office
Division of Audits
300 Capitol Mall, Suite 518
Sacrarmento, CA 95814

Ms. Bonnie Ter Keurst
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 West Hospitality Lane
San Bernadino, CA 92415-0018

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95826

D-15
Mr. John Mott-Smith
Secretary of State's Office
1500 11th Street
Sacramento, CA 95814

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

B-08
Ms. Ginny Brummels
State Controller's Office
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Blvd., Suite 106
Roseville, CA 95661

A-15
Ms. Susan Geanacou
Department of Finance
915 L Street, Suite 1190
Sacramento, CA 95814

Mr. Glen Everroad
City of Newport Beach
3300 Newport Blvd.
P O Box 1768
Newport Beach, CA 92659-1768

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 5, 2007 at Sacramento, California.

Antonio Lockett

ICC: DITHRIDGE, LYNN, GEANACOU, FEREBEE, CASTANEDA, FILE
I:\MANDATES\Voter Identification Procedures\voter identification P&G response (2).doc

AUDITOR/CONTROLLER-RECORDER
COUNTY CLERK

AUDITOR/CONTROLLER • 222 West Hospitality Lane, Fourth Floor
San Bernardino, CA 92415-0018 • (909) 387-8322 • Fax (909) 386-8830
RECORDER • COUNTY CLERK • 222 West Hospitality Lane, First Floor
San Bernardino, CA 92415-0022 • (909) 387-8306 • Fax (909) 386-8940

COUNTY OF SAN BERNARDINO

LARRY WALKER
Auditor/Controller-Recorder
County Clerk

ELIZABETH A. STARBUCK
Assistant Auditor/Controller-Recorder
Assistant County Clerk

December 27, 2007

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

RE: Reasonable Reimbursement Methodology
Voter Identification Procedures (03-TC-23)
County of San Bernardino, Claimant
Statutes of 2000, Chapter 260
Elections Code Section 14310

Dear Ms. Higashi:

The County of San Bernardino (County) and the Department of Finance have been working to develop a Reasonable Reimbursement Methodology (RRM) to incorporate into the above named claim, Voter Identification Procedures' parameters and guidelines (P&G). In conjunction with the California Association of Clerks and Election Officials (Association), surveys have been sent out on two separate occasions and responses have been received and quantified for all fifty eight California counties.

The next steps in our planned process are: 1) to contact a representative sample of the counties to confirm the parameters of the information provided on the survey, and 2) the County will be doing a secondary time study during the February 2008 election.

We plan to have the necessary information collected by mid-March, at which time we will confer with the Association. With their approval of a RRM methodology, we will move forward with submitting a P&G draft document.

Please advise the County if you have any concerns or need additional information with the process as presented.

Thank you for your consideration of this matter

Howard Ochi
Chief Deputy Auditor

cc: Alice Jarboe, County of Sacramento
Carla Castaneda, Department of Finance
Patrick McGinn, Department of Finance

Exhibit E

AUDITOR/CONTROLLER-RECORDER
COUNTY CLERK

COUNTY OF SAN BERNARDINO

AUDITOR/CONTROLLER • 222 West Hospitality Lane, Fourth Floor
San Bernardino, CA 92415-0018 • (909) 387-8322 • Fax (909) 386-8830
RECORDER • COUNTY CLERK • 222 West Hospitality Lane, First Floor
San Bernardino, CA 92415-0022 • (909) 387-8306 • Fax (909) 386-9050

LARRY WALKER
Auditor/Controller-Recorder
County Clerk

ELIZABETH A. STARBUCK, CGFM
Assistant Auditor/Controller-Recorder
Assistant County Clerk

December 22, 2009

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

RE: Withdrawal of Request for Reasonable Reimbursement Methodology
Voter Identification Procedures (03-TC-23)
County of San Bernardino, Claimant
Statutes of 2000, Chapter 260
Elections Code Section 14310

Dear Ms. Higashi:

On October 4, 2006, the Commission on State Mandates (Commission) adopted a Statement of Decision finding that the test claim legislation 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 to perform the following activities:

> *Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected.*

On October 10, 2006, the Commission sent a notification of Adopted Statement of Decision and Draft Parameters and Guidelines. The claimant requested an extension to file comments. The November 30, 2006 extension date was approved for good cause. The claimant's request was based on working with the County Registrar of Voters to develop a Reasonable Reimbursement Methodology (RRM) and/or unit cost for this program. There was an election on November 7, 2006. The claimant developed a time study, a case sampling, and a compilation of results based on the election day activities. November 28, 2006, the claimant submitted comments to the draft staff analysis. The recommendation for revision addressed a unit cost method.

On December 13, 2006, the claimant was notified by the Department of Finance (DOF) that they were interested in working with the claimant to develop an RRM. Efforts to

complete that process have been ongoing since that time. However, at this time, pursuant to Government Code 17557.1 (d) the claimant is requesting withdrawal from the development of an RRM. An amended proposal to the Parameters and Guidelines is being sent under separate cover.

Your attention to this matter is greatly appreciated.

Regards,

Bonnie Ter Keurst

Bonnie Ter Keurst
Manager, Reimbursable Projects Section
Auditor/Controller-Recorder's Office
County of San Bernardino

CLAIMANT'S REVISED
PROPOSED PARAMETERS AND GUIDELINES

Elections Code Section 14310
Statutes 2000, Chapter 260 (SB 414)

Voter Identification Procedures

03-TC-23

County of San Bernardino, Claimant

I. SUMMARY OF THE MANDATE

On October 4, 2006, the Commission on State Mandates (Commission) adopted a Statement of Decision finding that the test claim legislation imposes a partially reimbursable state-mandated program upon local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The Commission approved this test claim for the following reimbursable activity:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)

II. ELIGIBLE CLAIMANTS

Any city, county, and city and county that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557, subdivision (e), states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The County of San Bernardino filed the test claim on October 1, 2003. Therefore, costs incurred pursuant to Elections Code Section 14310 are reimbursable on or after July 1, 2002.

Actual costs for one fiscal year shall be included in each claim. Pursuant to Government Code section 17561, subdivision (d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.

If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant, the following activities are reimbursable:

A. One-Time Activities:
   1. Update policies and procedures to implement the reimbursable activities.
   2. Modify election computer system to record the mandated provisional ballot signature-comparing activities
   3. Train employees who perform the reimbursable activities.

B. Ongoing Activities
   1. Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)

      When a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

V. CLAIM PREPARATION AND SUBMISSION

Claimants may claim costs mandated by the state pursuant to the reasonable reimbursement methodology or by filing an actual cost claim as described below.

A. Reasonable Reimbursement Methodology- Ongoing costs only

The Commission is adopting a reasonable reimbursement methodology to reimburse local agencies and school districts for all direct and indirect costs, as authorized by Government Code section 17557, subdivision (b), in lieu of payment of total actual costs incurred for the reimbursable activities specified in Section IV. above.

1. Reasonable Reimbursement Methodology

The definition of reasonable reimbursement methodology is in Government Code section 17518.5, as follows:

(a) Reasonable reimbursement methodology means a formula for reimbursing local agency and school districts for costs mandated by the state, as defined in Section 17514.

(b) A reasonable reimbursement methodology shall be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or other projections of local costs.

(c) A reasonable reimbursement methodology shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost efficient manner.

(d) Whenever possible, a reasonable reimbursement methodology shall be based on general allocation formulas, uniform cost allowances, and other approximations of local costs mandated by the state rather than detailed documentation of actual local costs. In cases when local agencies and school districts are projected to incur costs to implement a mandate over a period of more than one fiscal year, the determination of a reasonable reimbursement methodology may consider local costs and state reimbursements over a period of greater than one fiscal year, but not exceeding 10 years.

(e) A reasonable reimbursement methodology may be developed by any of the following:

(1) The Department of Finance.

(2) The Controller.

(3) An affected state agency.

(4) A claimant.

(5) An interested party.

2. Formula

The reasonable reimbursement methodology shall allow each eligible claimant to be reimbursed at the rate of $1.80 per provisional ballot envelope examined by the agency for all direct and indirect costs of performing the activities, as described in Section IV, Reimbursable Activities.

The rate per provisional ballot shall be adjusted each year by the Implicit Price Deflator referenced in Government Code section 17523.

Reimbursement is determined by multiplying the rate per provisional ballot for the appropriate fiscal year by the number of provisional ballots examined by the agency.

B. Actual Cost Claims

Although the Commission adopted a reasonable reimbursement methodology for this mandated program, any claimant may instead choose to file a reimbursement claim based on actual costs.

Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a

document created at or near the same time as the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of the Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

Claimants may use time studies to support salary and benefit costs when an activity is task repetitive. Time study usage is subject to the review and audit conducted by the State Controller's Office.

The claimant is allowed to claim and be reimbursed for increased costs for reimbursable activities identified above. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

1. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

   Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

   Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

   Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract

consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

2. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or

2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[1] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the application of a reasonable reimbursement methodology or reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and

---

[1] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the Statement of Decision, is on file with the Commission.

CLAIMANT'S REVISED PROPOSED PARAMETERS AND GUIDELINES

Elections Code Section 14310
Statutes 2000, Chapter 260 (SB 414)

Voter Identification Procedures

03-TC-23

County of San Bernardino, Claimant

Declaration of Bonnie Ter Keurst
In Support of Claimant

I, Bonnie Ter Keurst, declare as follows:

1. I am the Reimbursable Projects Section Manager for the Office of the Auditor/Controller-Recorder, County of San Bernardino. I have been in the employ of the County for 12 years. I have personal knowledge of the facts stated herein, and if called upon to testify, I could do so competently.

2. On October 23, 2006, I submitted a request to the Commission on State Mandates for an extension of time to file comments on the draft Parameters and Guidelines for the Voter Identification Procedures test claim. The request, granted on November 30, 2006, was based upon the test claimant working with the County Registrar of Voters to develop a Reasonable Reimbursement Methodology (RRM). As there was an election on November 7, 2006, claimant developed a time study, case sampling and compilation of results based on election day activities which were mandated under the test claim.

3. On November 28, 2006, I submitted comments on the Draft Staff Analysis requesting a uniform time allowance of 36 seconds per eligible provisional ballot.

4. On December 13, 2006, pursuant to the recent legislation AB 1222, I received an e-mail from Patrick McGinn, a budget analyst with the Department of Finance (DOF), stating the department's interest in working together on surveys to establish a RRM. A true and correct copy of which is attached as Exhibit A and incorporated by reference as though fully set forth.

5. On December 15, 2006, the DOF distributed a survey to all counties. I was provided a copy of the survey questions and later the survey results. A true and correct copy of the spreadsheet results and the survey letter as prepared by the DOF is attached as Exhibit B and incorporated by reference as though fully set forth.

6. For the intervening months between December 2006 and July 2007, I continued to work with the DOF and the California Association of Clerks and Elections Officials (CACEO), specifically Alice Jarboe of Sacramento County, to refine the surveys to ensure the questions were clear and the answers complete. A true and correct copy of the resulting data is attached as Exhibit C and incorporated by reference as though fully set forth.

7. By July 24, 2007, the original survey had been followed by a supplementary survey that incorporated a general election, a primary election and a special election. Also, during this period, Alice Jarboe and Carla Castaneda, of the DOF, met with the Registrar of Voters Legislative Committee. As a result of that meeting and a subsequent conference call between Commission staff, the DOF and me, it was determined that the scope of the original time study had been too narrowly defined.

8. Work on the RRM continued and on December 12, 2007, I met with the DOF and San Bernardino Registrar of Voters' representatives. It was decided that an additional time study was needed. Using the February 2008 election, eight counties participated in the time study using both manual and automated processes.

9. On May 23, 2008, I received a proposal from Carla Shelton, DOF, which was based on two key assumptions regarding standardized employee costs and

standardized Indirect Cost Rates (ICRs). A true and correct copy of which is attached as Exhibit D and incorporated by reference as though fully set forth.

10. On June 20, 2008, I submitted my response to the DOF proposal citing the errors I believed resulted in an incorrect final figure. I used the 2006 survey results for my calculations. A true and correct copy of which is attached as Exhibit E and incorporated by reference as though fully set forth.

11. On June 26, 2008, I was copied via e-mail from Alice Jarboe, on behalf of the CACEO, to Carla Shelton, DOF, and Carla Castaneda, DOF, ICRP figures which had been discussed during a meeting the day before. A true and correct copy of which is attached as Exhibit F and incorporated by reference as though fully set forth.

12. On July 7, 2008, Alice Jarboe sent out the latest survey results as to how many provisional ballots are cast in the recent statewide elections. A true and correct copy of which is attached as Exhibit G and incorporated by reference as though fully set forth.

13. On July 30, 2008, Carla Shelton, DOF, sent me a spreadsheet detailing eight counties' Permanent Absentee Voter Mandate Program claims for FY 2002 through 2006. A true and correct copy of which is attached as Exhibit H and incorporated by reference as though fully set forth.

14. On August 6, 2008, I received a new proposal from Carla Shelton, DOF, of $1.74 per ballot. A true and correct copy of which is attached as Exhibit I and incorporated by reference as though fully set forth.

15. On August 13, 2008, I spoke with Carla Castaneda, DOF, regarding their August 6 proposed figure of $1.74. I thought that the figure was weighted improperly. I agreed to put together spreadsheets with various analyses of the data to see which we thought was most fair. A true and correct copy of the e-mail memorializing this conversation is attached as Exhibit J and incorporated by reference as though fully set forth.

16. On September 9, 2008, I sent the spreadsheets discussed on August 13,

2008. A true and correct copy of the e-mail is attached as Exhibit K and incorporated by reference as though fully set forth.

17. Throughout this process I created and updated several spreadsheets to analyze the various data collections that had been employed.

a. A true and correct copy of my reworking of the DOF figures (Exhibit H) is attached as Exhibit L and incorporated by reference as though fully set forth.

b. A true and correct copy of San Bernardino's February 2008 time study data is attached as Exhibit M and incorporated by reference as though fully set forth.

c. A true and correct copy of the cost calculations from the February 2008 time studies is attached as Exhibit N and incorporated by reference as though fully set forth.

d. A true and correct copy of the salary calculation from the February 2008 time studies is attached as Exhibit O and incorporated by reference as though fully set forth.

e. A true and correct copy of the unit time calculation based upon the February 2008 time studies is attached as Exhibit P and incorporated by reference as though fully set forth.

f. A true and correct copy of my analysis involving a few scenarios of the original DOF survey results from December 2006 is attached as Exhibit Q and incorporated by reference as though fully set forth.

g. A true and correct copy of my analysis applying the scenarios of Exhibit Q to the February 2008 time studies is attached as Exhibit R and incorporated by reference as though fully set forth.

h. A true and correct copy of my analysis of the San Bernardino's February 2008 time study data and DOF provided data is attached as Exhibit S and incorporated by reference as though fully set forth.

18. Based upon my analyses of the various survey data and time study data, I believe that $1.80 per ballot, as indicated in Exhibit S, is the best estimate of costs. The data I used is based on cost information from a representative sample of eligible claimants and information provided by an association. My spreadsheets demonstrate that I have considered the variation in costs among local agencies to implement the mandate in a cost-efficient manner.

I declare under penalty of perjury that the foregoing is true and correct as based upon my personal knowledge, information or belief, and that this declaration is executed this 27 day of May, 2010, at San Bernardino, California.

Bonnie Ter Keurst

Bonnie Ter Keurst
RPS Manager
Auditor-Controller/Recorder
Treasurer/Tax Collector/County Clerk's Office
County of San Bernardino

Exhibit A

(3)

Ter Keurst, Bonnie - ACR

From: McGinn, Patrick [Patrick.McGinn@dof.ca.gov]
Sent: Wednesday, December 13, 2006 11:04 AM
To: Ter Keurst, Bonnie - ACR
Subject: FW: Voter identification procedures 03-TC-23
Attachments: elections survey.doc

Patrick J. Mcginn
finance budget analyst
department of finance
915 L street, 12th floor
sacramento ca 95814
916.445.3274 x3092
916.323.9584 facsimile

From: McGinn, Patrick
Sent: Wednesday, December 13, 2006 10:59 AM
To: Bonnie Ter Keurst (btkeurst@acr.sbcounty.gov)
Subject: Voter identification procedures 03-TC-23

Bonnie, good morning

As I relayed with you this morning our mandates unit is interested in either working with you on this survey Or at least getting you and your elections personnel to provide input and support to our efforts to get Responses from other registrars of voters. We are wondering
1) are there other questions you think we should ask
2) are there better ways to word these questions
3) would you like to be included in the names and numbers of people to contact for questions.
4) would you add language to the initial paragraph as far as instructions or purpose
5) do you have any other comments or concerns

Please feel free to edit or ask questions, then we can set up a time to talk as a group hopefully before Friday As we would like to get it out this week.

Thanks

<<elections survey.doc>>

Patrick J. Mcginn
finance budget analyst
department of finance

Exhibit B

	county	provisionals cast	valid cast	employees staff or temp.	computer?	time per ballot in seconds	total/all hours	total cost for provisionals	average cost per ballot	revenues in tot. percent	$1,000? threshold
1	SLO	2019	1802	regular	no	60	29	11,769	6.71		yes
2	glenn	58	56	regular	no	180	2.8	153	2.73	0.00	no
3	fresno	6359	6147	both	no	60	32	9,000	1.3		yes
4	lassen	47	45	regular	no	600	5	140	3		no
5	alameda	18186	16200	both	no	minutes**	96	13,000	0.71		yes
6	tuolumne	328	262	regular	yes	60	4.5	86	0.33		no
7	humboldt	678	578	regular	no	30	4.82	4,919	8.51		no
8	nevada	918	755	regular	no	60	20	920	1		no
9	marin	3118	2742	both	no	60	40	1,142.50	0.42	0.33	yes
10	ventura	6137	5327	both	no	3	4.439	11,280	1.83		yes
11	amador	148	119	regular	no	180	7	250	1.7	0.40	no
12	yolo	1880	1399	regular	no	5	2	4,547	3.25	0.26	no
13	tehama	232	186	regular	no	2.3	12	376.2	3.13	0.25	no
14	santa clara	12017	10257	both	no	180	671	41,848	4.08	0.26	yes
15	napa	351	274	regular	both	105	8	205.36	0.75	0.43	no
16	del norte	39	39	regular	no	300	3.25	120	3		no
17	el dorado	779	699	regular	no	90	17.47	284.59	0.41		no
18	stanislaus	2943	2767	both	no	120	8	6,000	2.17		yes
19	san joaquin	4325	3631	both	no	900	120	28000	6.66		yes
20	calaveras	205	189	regular	no	60	3.5	128	0.68	0.00	no
21	kern	2935	2197	regular	no	300	64	21,250	7.24		yes
22	shasta	852	767	regular	both	30	65	1,724	2.25	0.05	no
23	sutter	712	646	both	both	60	24	300	0.46		no
24	orange	22788	20465	both	no	210	1364	96,726	4.75	0.53	yes
25	placer	1997	1729	both	no	250	129.7	2,672	1.55	0.90	no
26	san francisco	10915	8768	both	no	375	895	32,372	3.69	0.17	yes
27	mendocino	659	609	regular	no	30	12	2,895	4.75	0.48	no
28	contra costa	10776	9472	both	no	60	158	27,954	2.59		yes
29	sonoma	2569	2357	both	no	120	78.6	2,595.20	1.1		no
30	los angeles	110915	97925	both	no	1050	73260	462,000	4.16	0.41	yes
		225885	198409			191.04	2571.37	$784,656.64	2.83	31.87%	43.30%
		percentage of valid votes	0.878363			average in seconds	average	total	average	average revenue percentage	meeting $1,000 threshold

DEPARTMENT OF FINANCE
ARNOLD SCHWARZENEGGER, GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

December 15, 2006

Re: Voter Identification Procedures, Test Claim, 03-TC-23
Statutes of 2000, Chapter 260; Elections Code Section 14310

Dear Elections Official,

The Commission on State Mandates has determined the above named test claim to be a reimbursable state mandated program. This program requires election officials to use the procedures that apply to the comparison of signatures on absentee ballots, for comparing the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration.

The Department of Finance is conducting a survey regarding Provisional Ballots cast in the November 7, 2006 election. Your responses to the following questions will greatly assist us in gathering data related to the above mandate. If you have any questions, please do not hesitate to call (916) 445-3274 and ask for either Carla Castañeda or Patrick McGinn. Thank you for your time and effort.

Questions:

1) How many provisional ballots were cast in your county?

2) How many ballots were identified as valid, requiring signature verification?

3) What employee class verified the signatures, e.g. regular or temporary employees?

4) Are provisional ballot signatures verified by staff or computer software?

5) What was the average time it took to verify the signature on one provisional ballot cast?

6) How much time did it take to verify signatures for all valid provisional ballots cast?

7) What was the approximate cost of processing all valid provisional ballots?

8) What was an average cost of processing each valid provisional ballot?

9) What approximate percentage of the 2006 November election costs were charged to cities , school districts and special districts for their portion of the cost of the election?

10) Do you have any additional comments?

Name: Title: County: Phone Number:

I certify, that to the best of my ability and knowledge, that the above information is reasonably accurate and verifiable.

Signature: _____ Date: _____

Please fax the response back to (916) 323-9584, or reply by email by January 5, 2007.

Exhibit C

County	Prvisnls Cast	Valid cast	STAFF/Temp	Time/Ballot (sec)	Total Hours	Total Cost	Avg cost	Rev in Total %	$1,000
Alameda	18186	16200	BOTH	21.3	96	$13,000	$1		YES
Alpine	1	0	REGULAR	15	0.04	$1	$1	0.00	NO
Amador	148	119	REGULAR	180	7	$250	$2	0.40	NO
Butte	1707	1587	REGULAR			$16,914	$10	0.73	YES
Calaveras	205	189	REGULAR	60	3.5	$128	$1	0.00	NO
Colusa	35	35	REGULAR	270	3	$330	$9		
Contra Costa	10776	9472	BOTH	60	158	$27,954	$3	0.47	YES
Del Norte	39	39	REGULAR	300	3.25	$120	$3		NO
El Dorado	779	699	REGULAR	90	17.47	$285	$0		NO
Fresno	6359	6147	BOTH	60	32	$9,000	$1		YES
Glenn	58	56	REGULAR	180	2.8	$153	$3	0.00	NO
Humboldt	678	578	REGULAR	30	4.82	$4,919	$9		NO
Imperial	946	790	REGULAR	120	27	$1,431	$2	0.37	NO
Inyo	51	37	REGULAR	600	8.5	$318	$6	0.15	NO
Kern	2935	2197	REGULAR	300	64	$21,250			YES
Kings	760	754	REGULAR	1050	251	$7,835	$10	0.35	YES
Lake	0	0	REGULAR	0	0	$0	$0	0.00	NO
Lassen	47	45	REGULAR	600	5	$140	$3		NO
Los Angeles	110915 (2)	97925	BOTH	15	73260	$462,000	$4	0.41	YES
Madera	749	639	REGULAR	5	6			0.48	
Marin	3118	2742	BOTH	60	40	$1,143	$0	0.33	YES
Mariposa	132	108	REGULAR	240	16	$190	$1		NO
Mendocino	659	609	REGULAR	30	12	$2,895	$5	0.48	NO
Merced	556	417	REGULAR	120	18.5	$349	$1	0.20	NO
Modoc	10	9	REGULAR	120	0.3	$5	$1	0.10	NO
Mono	53	29	REGULAR	20	0.25			0.00	no
Monterey	2852	2558	TEMPORARY	90	85	$1,279	$1	0.38	NO
Napa	351	274	REGULAR	105	8	$205	$1	0.43	NO
Nevada	918	755	REGULAR	60	20	$920	$1		NO
Orange	22788 (3)	20465	BOTH	210	1364	$96,726	$5	0.53	YES
Placer	1997	1729	BOTH	250	129.7	$2,672	$2	0.90	no
Plumas	137	136	REGULAR	240	9	$750	$5	0.24	NO
Riverside	14443	11917	BOTH	217		$13,796	$1	0.26	YES
Sacramento				100					
San Benito	254	231	REGULAR	60					NO
San Bernardino	10016 (1)	8088	BOTH	58	78.2	$3,633	$0	0.16	YES
San Diego	26564 (4)	23882	BOTH	30	200	$72,800	$3	0.35	YES
San francisco	10915	8768	BOTH	375	895	$32,372	$4	0.17	YES
San Joaquin	4325	3631	BOTH	900	120	$28,000	$7	0.06	YES
San Mateo	7575	6317	TEMPORARY	120	40	$7,040	$1	0.46	YES
Santa Barbara	3126	2791	BOTH	300	233	$18,323	$7	0.13	YES
Santa Clara	12017	10257	BOTH	180	671	$41,848	$4	0.26	YES
Santa Cruz	3220	2762	BOTH	30	23	$345	$0	0.48	YES
Shasta	852	767	REGULAR	30	65	$1,724	$2	0.05	NO
Sierra	0	0		0	0	$0	$0	0.00	NO
Siskiyou	196	171	REGULAR	900	28	$1,000	$6		NO
SLO	2019	1802	REGULAR	60	29	$11,769	$7	0.60	YES
Solano	2230	1943	BOTH	600	465	$20,000	$10	0.14	YES
Sonoma	2569	2357	BOTH	120	78.6	$2,595	$1		NO
Stanislaus	2943	2767	BOTH	120	8	$6,000	$2		YES
Sutter	712	646	BOTH	60	24	$300	$0		NO
Tehama	232	186	REGULAR	2.3	12	$376	$3	0.25	NO
Trinity	100	0388	Regular						NO
Tulare	2136	1841	REGULAR	120	62	$3,547	$2	0.68	NO
Tuolumne	328	262	REGULAR	60	4.5	$86	$0		NO
Ventura	6137	5327	BOTH	3	4.439	$11,280	$2	0.27	YES
Yolo	1880	1399	REGULAR	5	2	$4,547	$3	0.26	NO
Yuba	294	248	REGULAR	60	4.54	$5,804	$23	0.31	NO
Average				180.21	1484.89		3.40	29.59%	

58 counties listed

Exhibit D

(9)

Ter Keurst, Bonnie - ACR

From: Shelton, Carla [Carla.Shelton@dof.ca.gov]
Sent: Friday, May 23, 2008 11:19 AM
To: Ter Keurst, Bonnie - ACR
Cc: Castaneda, Carla; Jarboe. Alice
Subject: Unit Cost Rates - Voter Identification Process
Attachments: Voter Identification Procedures Excel Chart_Bonnie.xls

Hi Bonnie,

Attached is Finance's spreadsheet showing estimated unit cost rates based on the provisional ballots time study conducted on the February 5, 2008 primary election. The methodology is as follows:

- The estimates are calculated based on the standard costs of an employee for a year, which includes benefits, OE&E, and indirect costs.
- Two base hourly salary ranges are provided: a low range of $18.66 and mid range of $21.33; this information is determined by calculating the average of the specified range for all (possible) election classifications. For example, the low range of an election assistant salary ($3078) plus the low range of an election program coordinator ($3523) to get an average low range salary of $3300 (3078+3523/2); this salary is divided by 2080 hours to get a base hourly rate of $15 (3300/2080).
- The estimated average time spent on a provisional ballot is 1.8 minutes; information is based on the time study data.
- Three indirect costs rates are used to determined 3 different unit costs for the low and mid salary ranges.

The assumptions are that a standard cost of an employee should be a reasonable way to consider the variation in time spent by a regular or temp employee and an average of the possible election classifications should take into consideration the variation of costs of the employee verifying the signature (first and second pass). Further, an indirect cost rate of 25% is based on ICRP information provided by Santa Clara; this percent needs further review since my percent does not match how the county calculated their ICRP percentage (76.47%).

This spreadsheet is a draft for your review and feedback; it has not been approved or seen by Finance management. This is an attempt to develop (collaboratively) a reasonable unit cost rate, and any assistance or direction that you may provide would be greatly appreciated.

If you have any questions, then please do not hesitate to contact me.

<<Voter Identification Procedures Excel Chart_Bonnie.xls>>

Carla Shelton
Finance Analyst
915 L Street, Suite 1280
Sacramento, CA 95814
(916) 445-3274 ext.3091 (Office)
(916) 327-0225 (Fax)
email Carla.Shelton@dof.ca.gov

Voter Identification
RRM Proposal Calculations
Unit Cost Per Absentee Ballot

[4]Average Time Per Ballot	Low Hrly Salary Rate	Mid Hrly Salary Rate	Survey ICRP	Mean ICRP	State ICRP
1.8	$18.66	$21.33	0.25	0.18	0.10

Low Salary Calculations	$18.66			
Annual Salary		$36,872	$36,872	$36,872
[1] *Benefit*		$12,389	$12,389	$12,389
[2] *OE&E*		$18,000	$18,000	$18,000
[3] *Indirect costs*		$13,718	$9,877	$5,487
Total Salary		$80,979	$77,138	$67,261
Hrly Rate		$38.93	$37.09	$32.34
Rate per Min.		0.65	0.62	0.54
Estimated Cost Per Ballot		1.17	1.11	0.97

Mid Salary Calculations:	$21.33			
Annual Salary		$42,153	$42,153	$42,153
[1] *Benefit*		$14,163	$14,163	$14,163
[2] *OE&E*		$18,000	$18,000	$18,000
[3] *Indirect costs*		$15,038	$10,827	$6,015
Total Salary		$89,354	$85,144	$74,316
Hrly Rate		$42.96	$40.93	$35.73
Rate per Min.		0.72	0.68	0.60
Estimated Cost Per Ballot		1.29	1.23	1.07

[1] *Benefit rate is .336 percent*
[2] *OE&E costs include general expense, office automation, printing communications training facilities operations*
[3] *Indirect costs based on calculation received from Santa Clara to determine ICRP rate.*
[4] *Average time to process ballot is calculated at 1.8 minutes based on county respondent surveys.*

Voter Identification
County Respondents
Election Classifications and Salaries

County	Classification	Monthly Minimum	Monthly Maximum	Monthly Mid Range	Hrly Salary Low Range	Hrly Salary Mid Range	Hrly Salary High Range
Yolo	Election Aide	1873	2276	2075	10.81	11.97	13.13
Yolo	Election Tech.	2509	3049	2779	14.48	16.03	17.59
Stanislaus	Election Inspector		1610		9.29		
Stanislaus	Election Officer		1176		6.79		
Sacramento	Election Asst.	2539	3085	2812	14.65	16.22	17.80
Kern	EPC	5507	6722	6115	31.77	35.28	38.78
Kern	ESC	3027	3695	3361	17.46	19.39	21.32
Kern	EMSW	2335	2851	2593	13.47	14.96	16.45
Kern	OSC	3119	3807	3463	17.99	19.98	21.96
Kern	OSP	2517	3072	2795	14.52	16.12	17.72
Kern	OST	2222	2712	2467	12.82	14.23	15.65
San Bernardino	Election Analyst	5139	6565	5852	29.65	33.76	37.88
San Bernardino	ESA	2527	3232	2880	14.58	16.61	18.65
San Bernardino	Election Asst.	3078	3929	3504	17.76	20.21	22.67
San Bernardino	ROV		905	905	5.22	5.22	5.22
Los Angeles	Election Asst. (Temp)	0	0	0	14.26	14.26	14.26
Los Angeles	Election Asst. II	0	0	0	18.62	18.62	18.62
Los Angeles	Election Asst. III	0	0	0	26.40	26.40	26.40
Santa Clara	EDC	6081	7392	6737	35.08	38.86	42.65
Santa Clara	EMPS	4582	5568	5075	26.43	29.28	32.12
Santa Clara	EPC	4505	5445	4975	25.99	28.70	31.41
Santa Clara	ES	4197	5070	4634	24.21	26.73	29.25
Santa Clara	EST I	3820	4613	4217	22.04	24.33	26.61
Santa Clara	EST II	4197	5070	4634	24.21	26.73	29.25
Solano	EC	4413	5365	4889	25.46	28.21	30.95
Solano	E. Program Supervisor	3523	4325	3924	20.33	22.64	24.95
Solano	Elections Clerk (Extra Help)	0	0	0	13.85	15.27	16.83
Solano	Elections Mapping Tech	3349	4072	3711	19.32	21.41	23.49
Solano	Elections Tech.	2706	3323	3015	15.61	17.39	19.17
Solano	Elections Tech. (Lead)	2878	3533	3206	16.60	18.49	20.38
	Average	$3,362	$4,116	$3,739	$18.66	$21.33	$23.26
	Median	$3,027	$3,428	$3,283	$17.61	$19.68	$21.64

559.68 ÷ 30 = 18.66 597.31 ÷ 28 = 21.33

Voter Identification
County Respondents
Election Classifications and Salaries

Comments
This classification receives a flat rate. Information received off PeopleSoft Database reporting job classifications and salary reports. Used Stanislaus' human resources/employment website.
Entered a hard entry for the low salary. Computed Midlevel hourly wage by combining the high and low monthly salary, dividing by 2, then multiplying the midlevel monthly salary by 12, and divide by 2080 hours per year.
The ROV makes a maximum of 10,863.17 per year. Divided amount by 12 to get a monthly figure.

Exhibit E

Response to Department of Finance draft proposal for
Voter Identification Test Claim

In reviewing the draft as sent to me 5/23/2008, I have the following observations:

1. The methodology for the salary estimates and classification was stated as follows: The estimates are calculated based on the standard costs of an employee for a year, which includes benefits, OE&E, and indirect costs. My concerns are
    a. Some of the numbers seem artificially low, ie San Bernardino County ROV $5.22, Stanislaus Election Officer $6.79.
    b. While your methodology outline does not indicate as such, if some of these numbers are time-weighted, it has the effect of lowering the average hrly salaries. Also, it doesn't look like you are using the monthly median rates in the calcs that you sent to me, but those rates are including the 0s so that the median numbers are low as well.
    c. In SB90 claims, we base the salary rates on productive hourly rates. The rates that you are working with, I believe are base salary, again making them lower than the claimable amount.
    d. The positions that you have listed do not match with the positions that are identified in the time study. Example: The County of San Bernardino uses a service for the temporary help. Those dollars would fall in the services and supplies category of the SB 90 claim and would not be found in a salary schedule from our Human Resources group.

2. The second point in the methodology is a calculation of averaging the base hourly salary ranges. This calculation does not take into account weighting the time. In the time studies, there are instances where this responsibility is limited to one or two positions and is not performed by the positions as listed on the "Election Classifications and Salaries" workpaper.

3. In the third point: 1.8 is low. The average times from the time study were 2.41, 2.03 and 1.96. The median was the lowest and it was 1.88.

4. On the issue of indirect cost rates:
    a. Santa Clara's ICRP rate of 76.47% is correct based on the copy you sent to me.
    b. I do not agree with one ICRP rate for all. Counties' rates will vary based on business practices. Case in point: The County of San Bernardino has a very high rate. The rate has recently been reviewed by the state and found to be accurate. To apply 25% to our County is to understate the expenses.
    c. Using the 10% default rate is not accurate. It is just that – a default rate and does not reflect any of the agency rates as submitted.
    d. Your calculation includes an indirect costs rate (ICRP) and an overhead rate. For the County of San Bernardino and Santa Clara, the overhead costs are included in the ICRP calculation. In some instances in the time study, only an overhead rate was submitted. In those cases I used that rate

for my calcs. For the agencies where there was an overhead rate and an ICRP, I used only the ICRP.

5. Finally, the issue that the COSM staff addresses to approve the proposal is "The proposed reasonable reimbursement methodology is based on cost information from a representative sample of eligible claimants and considers the variation in costs among local agencies to implement the mandate in a cost efficient manner." I believe that the calculations need to be tied more directly to the time study information as provided by the participating agencies. I also feel that the numbers need to be compared with the November 2006 survey where responses were received from most all counties. Your proposal is significantly lower than a number that would make 50% of the agencies whole.

We had discussed getting a number of provisional ballots from the State. They have indicated that the number was not available. I used the 2006 survey results to provide an estimate. (*Below*)

Provisional Ballots * 2008 State Counts	Feb, 2008 Election Provisionals	Feb, 2008 Election Turnout	Feb, 2008 Total Registered	Nov, 2006 Election Provisionals (Envelope #)	Nov, 2006 Election Provisionals (Sig Checked)
County of Kern	5,730	154,365	282,829	2,935	2,197
County of Los Angeles	176,866	2,183,998	3,963,780 [4]	110,915	97,925
County of Sacramento	9,008	357,297	611,954	5,790	4,976
County of San Bernardino	20,258	376,614	723,661	10,016	8,088
County of Santa Clara	23,640	457,692	689,052	12,017	10,257
County of Solano	4,514	108,973 [3]	168,577	2,230	1,943
County of Stanislaus	4,311	101,691	209,212 [4]	2,943	2,767
County of Yolo	1,832	53,969	90,706	1,880	1,399
	246,159	3,794,599	6,739,771	148,726	129,552
Total -All Counties	*504,424* [1, 2]	9,068,415	15,712,753	309,667	265,731 [2]

[1] Number provided by state was notated as 21 of the 54 counties - 280,545.

[2] Surveyed County numbers in 2006 survey represent 48.8% of total (129552/265731) *Number estimated using 48.8%; State indicated number was not available*

[3] Solano submitted 110,083 in the survey

[4] LA Survey number - 3,951,957; Stanislaus Survey number - 213769

Exhibit F

(11)

Ter Keurst, Bonnie - ACR

From: Jarboe. Alice [JarboeA@saccounty.net]
Sent: Thursday, June 26, 2008 2:48 PM
To: Allan P Burdick/MAXIMUS; Shelton, Carla; Castaneda, Carla
Cc: Ter Keurst, Bonnie - ACR
Subject: Sample ICRP formula and preliminary Voter ID totals
Attachments: Provisional ID 6 2008 County Provisional Ballot survey.xls; icrp sample.xls

Hi all,

Attached is the ICRP I promised you during yesterday's meeting. The left hand portion of the spreadsheet uses numbers from the right hand side of the spreadsheet. The right side is our actual line item costs from several years ago, and shows these broken out into unallowable, direct and indirect columns. Please give me a call at 916 875-6255 if you want to go over this together.

I have also attached the preliminary survey of total provisional ballots counties received from 2003 through the June 2008 election. Only 20 counties have responded so far and not all respondents had numbers from all years/elections.

Thanks,
Alice Jarboe

ICRP0001

voter registration
indirect cost rate proposal
for use in determining charge rates only

Accts	00/01 Actual	Allowable Indirect	Un-Allowable	Allowable Direct	
Salaries - Reg Empl.	1,444,543	714,584		729,959	(from time sheets)
Salaries - Other	552,544			552,544	
Benefits (37.4)	539,861	267,254		272,607	
total - Salaries & Benefits	2,536,948	981,838		1,555,110	
Other Dept Expenditures:					
Service & Supplies		905,541	11,146	1,265,215	
Interest		25,428		0	
Intrafund Charges		659		0	
total Other Dept Expend.		931,628			
Cost Allocation Plan (excludes rollforward)		199,601			
Total Allowable Indirect Costs		2,113,067			
Indirect as a % of Total Salaries and Benefits					
Total Indirect Costs		2,113,067		ICRP Rate for fiscal year	
Total Direct Sal & Ben		1,555,110		136 %	

		"2000/2001 Budgeted	Spent
	COUNTY EXPENDITURES	5,672,890	4,903,115
	SALARIES / BENEFITS	2,811,758	2,536,947
10111000	REGULAR EMPLOYEES	1,513,592	1,444,543
10112100	EXTRA HELP	529,000	377,517
10112200	EXTRA HELP IN LIEU	0	66
10113100	STRAIGHT TIME OT	0	5
10113200	TIME/ONE HALF OT	80,000	86,763
10114100	PREMIUM PAY	15,261	19,053
10114300	ALLOWANCES	4,800	4,800
10115200	TERMINAL PAY	96,113	64,340
10121000	RETIREMENT	174,229	166,437
10122000	OASDHI	115,149	128,725
10123000	GROUP INS	247,588	208,673
10124000	WORK COMP INS	14,342	14,342
10125000	SUI INS	21,684	21,684

Benefit Rate:
539,861 benefits
1,444,543 regular salary
37.4 %

				Allowable Indirect	Un-Allow.	Allowable Direct
	SERVICES & SUPPLIES	**2,641,214**	**2,181,901**	**905541**	**11146.34**	**1265215**
20200500	ADVERTISING	9,500	1,989			1989
20201600	BLUEPRINT SUP	6,300	656			656
20202100	BOOKS/PER SVC	0	634	634		
20202200	BOOKS/PER SUP	2,850	2,295	2295		
20202900	BUS/CONFERENCE EXP	25,525	41,179	34104	7,075	
20203500	ED/TRAINING SVC	76,000	63,816	7319		56,497
20203700	TUITION REIMBURSEMNT	1,500	244		244	
20203801	RECOG ITEMS-EMPLOYEE	0	3,814	1387		2,427
20203804	WORKPLACE AMENITIES	0	1,610	1610		
20203805	FOOD PURCH/SERVICES	0	3,016	1289		1,727
20203806	COMMUNITY BASED MEAL	0	52	52		
20203900	EMP TRANSPORTATION	12,000	13,304	2880		10,424
20204500	FREIGHT/CARTAGE	31,500	26,033	241		25,792
20204501	RELOCATION MOVERS	0	1,512	1512		
20204503	DUMP FEES	0	119	119		
20205100	INS LIABILITY	3,537	3,537	3537		
20206100	MEMBERSHIP DUES	2,500	2,410	2410		
20206600	MICROFILM SUP	1,200	362	186		176
20207600	OFFICE SUPPLIES	16,000	11,910	11051		859
20208100	POSTAL SVC	207,000	120,668	18246		102,422
20208500	PRINTING SVC	40,000	8,861	621		8,240
20217100	RENTS/LEASES/RL PROP	36,000	24,200			24,200
20223600	FUEL/LUBRICANTS	0	83			83
20226100	OFFICE EQ MAINT SVC	3,000	2,290	2290		
20226200	OFFICE EQ MAINT SUP	20,000	66,570	64788		1,782
20226400	MODULAR FURNITURE	45,150	18,687	18494		193
20226500	INVENTORIABLE EQ	0	3,827		3827	
20227500	RENT/LEASE EQ	20,000	15,641	14674		967
20250605	SERVICE FEES	0	1,742			1,742
20252100	TEMPORARY SVC	180,625	122,417	13695		108,722
20257100	SECURITY SVC	2,300	1,100			1,100
20281200	DATA PROCESSING SUP	407,120	222,481	217204		5,277
20281700	ELECTION SVC	204,500	247,389			247,389
20281800	ELECTION SUP	600,000	568,219	5269		562,950
20281900	REGISTRATION SVC	35,000	9,800	315		9,485
20289800	OTHER OP EXP SUP	5,000	15,195	3679		11,516
20291100	SYSTEM DEV SVC	20,000	26,186	26186		0
20291200	SYSTEM DEV SUP	87,000	26,373	26373		0
20291500	COMPASS COSTS	60,782	56,919	56919		0
20292100	GS PRINTING SVC	30,000	36,232	5241		30,991
20292200	GS MAIL/POSTAGE	45,000	34,383	1434		32,949
20292300	GS MESSENGER SVC	2,224	2,289	1645		644
20292500	GS PURCHASING SVC	4,468	4,464	4464		0
20292600	GS STORE CHARGES	7,000	5,577	3686		1,891
20292700	GS WAREHOUSE CHARGES	5,874	6,875	6875		0
20292800	GS EQUIP RENTAL LT	8,500	8,572	4944		3,628
20292900	GS WORK REQUEST	15,000	250			250
20293406	TRANSPORTATION SVCS	0	744			744
20293500	PUBLIC WORKS STORES	1,200	2,500	37		2,463
20294200	CO FACILITY USE CHGS	237,439	237,432	237432		0
20296200	GS PARKING CHGS	900	900	900		0
20298300	GS SURPLUS PROP MGMT	520	516	516		0
20298700	GS TELEPHONE SVC	102,200	98,988	98988		0
20298900	GS TELEPHONE INSTALL	19,000	5,043			5,043
	OTHER CHARGES	**147,181**	**124,766**	**25428**	**99339**	**0**
30321000	INTEREST EXPENSE	47,842	25,428	25428		
30323000	LEASE OBLIG RETIRE	99,339	99,339		99339	
	FIXED ASSETS - EQUIP	**70,000**	**58,841**	**0**	**58841**	**0**
43431100	EQUIP FAFP DP GOV'T	70,000	58,841		58841	
	INTRAFUND CHARGES	**2,737**	**659**	**659**		**0**
60642000	PHARMACY SUP	150	72	72		0
60654400	SAFETY PROGRAM SVC	587	587	587		0
60697900	OTHER SVC	2,000	0			0

Exhibit G

Hi Alice:
I spoke with Carla Castaneda. Carla Shelton is on vacation this week. They are going to look at changing their calc to incorporate the productive hourly rate as well as looking at the rates on other claims. We are going to touch base the week of July 21st. I'll let you know what we come up with.
Thanks for your help!

Bonnie Ter Keurst
Manager, Reimbursable Projects
County of San Bernardino
(909) 386-8850

From: Jarboe. Alice [mailto:JarboeA@saccounty.net]
Sent: Monday, July 07, 2008 2:16 PM
To: Abby Kelly; Allan Burdick; Glasby, Angela; Brandy Jakobsen; Carol Prado; Cathy Cooper; Celia Peterson; Claudio Valenzuela; Cynthia Helton; Debbie Van Eperen; Debi Russell; Deborah Seiler; Dolores Provencio; Elma Rosas; Erika Bonilla; Ferlyn Junio; Ginger Bernard; Jane Crownover; Jarboe. Alice; Jayne Streiff; Jeanine Mangewala; Joseph Ripley; Juliana Gmur; Karen Rhea; Kate Gold; Kathleen Connors; Larry Herrera ; Laurie Cassady; Lee Lundrigan; Linda Tulett; Lindsey McWilliams; Lori Meirowsky; Pa Mee Thao; Pamela Givans; Renea westfall; Rose Rodarte; Sandy Brockman; Susan German; Kouba, Terry; Theresa Thompson; Ume Ngozi; Vicki Kunimitsu
Cc: Shelton, Carla; Shelton, Carla; Ter Keurst, Bonnie - ACR
Subject: Latest Provisional Survey results

Hi everyone,

Attached is the result of the latest survey – this shows how many provisional ballots the counties had from the past few statewide elections. Again, thanks to all who contributed.

Alice

Provisional Ballots 2003 through 2008

COUNTY	TOTAL	2003 special	2004 primary	2004 general	2005 special	2006 primary	2006 general	2008 feb	2008 june
1. ALAMEDA	0								
2. ALPINE	20	approximately 0 to 3 received for each election							
3. AMADOR	0								
4. BUTTE	10,970	1332	712	2,498	1259	581	1707	2481	400
5. CALAVERAS	0								
6. COLUSA	0								
7. CONTRA COSTA	69,408	7930	4,507	17,314	7025	3936	10776	14929	2991
8. DEL NORTE	0								
9. EL DORADO	5,191	500	87	1,084	607	389	779	1297	448
10. FRESNO	0								
11. GLENN	377	44	10	75	60	29	58	77	24
12. HUMBOLDT	0								
13. IMPERIAL	0								
14. INYO	0								
15. KERN	26,546	4119	1,512	6,875	2668	1699	2935	5688	1050
16. KINGS	0								
17. LAKE	0								
18. LASSEN	443			112	89	35	47	119	41
19. LOS ANGELES	793,274	121595	44,112	204,579	72726	39308	110915	176479	23560
20. MADERA	5,908	943	453	1,469	639	446	749	984	225
21. MARIN	17,584		1,488	3,202	2862	1245	3118	4471	1198
22. MARIPOSA	795		69	346		48	130	174	28
23. MENDOCINO	0								
24. MERCED	0								
25. MODOC	0								
26. MONO	0								
27. MONTEREY	0								
28. NAPA	0								
29. NEVADA	4,533		112	1,017	686	917	155	1325	321
30. ORANGE	0								
31. PLACER	15,305	2250	934	2,957	1955	1131	1997	3316	765
32. PLUMAS	447	0	31	48	32	45	139	120	32
33. RIVERSIDE	90,390	13628	6,444	19,057	10542	4153	13861	19975	2730
34. SACRAMENTO	50,565	8455	2,665	13,186	6281	2785	6191	8517	2485
35. SAN BENITO	1,790	375	434	102	181	101	254	287	56
36. SAN BERNARDINO	113,844	16318	5,415	44,888	10139	4246	10016	20258	2564
37. SAN DIEGO	216,039	30918	20,552	49,229	21233	14075	26527	53505	
38. SAN FRANCISCO	0								
39. SAN JOAQUIN	0								
40. SAN LUIS OBISPO	0								
41. SAN MATEO	0								
42. SANTA BARBARA	0								
43. SANTA CLARA	98,044	13304	6,450	22,232	10721	5554	12017	23307	4459
44. SANTA CRUZ	22,824	4400	1,731	4,636	2954	1263	3225	4615	
45. SHASTA	5,957	699	399	1,915	691	312	852	911	178
46. SIERRA	0								
47. SISKIYOU	0								
48. SOLANO	0								
49. SONOMA	17,880		2,050	4,350	2688	1378	2569	4096	749
50. STANISLAUS	30,737	6726	1,988	10,572	2450	1444	3237	3723	597
51. SUTTER	2,108	229	81	295	207	55	712	439	90
52. TEHAMA	757				145	93	233	237	49
53. TRINITY	0								
54. TULARE	17,325	2497	1,164	5,051	1811	952	2136	3172	542
55. TUOLUMNE	2,410	295	309	501	307	195	297	417	89
56. VENTURA	0								
57. YOLO	9,383		672	2,050	1725	750	1880	1832	474
58. YUBA	0								
		236557	104381	419640	162683	87165	217512	356751	46145

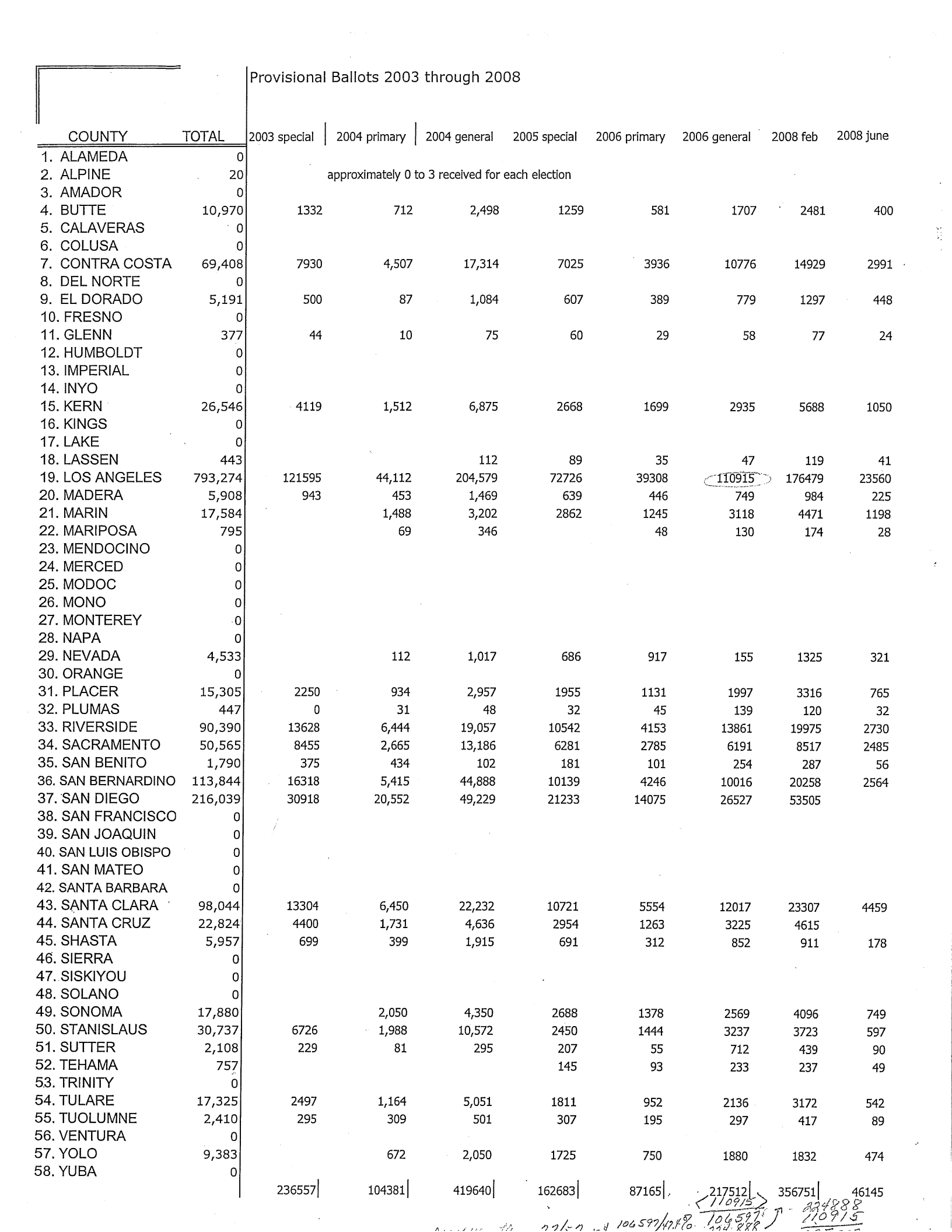


Exhibit H

Ter Keurst, Bonnie - ACR

From: Castaneda, Carla [Carla.Castaneda@dof.ca.gov]
Sent: Wednesday, July 30, 2008 4:40 PM
To: Ter Keurst, Bonnie - ACR
Cc: Shelton, Carla
Subject: RE: Voter Identification

Bonnie,
We asked the SCO for claims data from more counties. Feel free to direct us to specific counties as well. We thought we had a representative sample (based on number of ballots) but when we got the data it seemed too small a set given the variation in the information.

Thanks again for your patience.

Kern
LA
Sac
SB
SC
Stan
Yolo
Sacramento

From: Shelton, Carla
Sent: Wednesday, July 30, 2008 3:26 PM
To: 'Ter Keurst, Bonnie - ACR'
Cc: Castaneda, Carla
Subject: FW: Voter Identification

Hi Bonnie,

Attached is the Voter Identification unit cost rate spreadsheet for eight counties covering fiscal years 2002 through 2006. The data is based on the claiming information submitted for Program 083: Permanent Absentee Voter Mandate Program. We would like to review more counties prior to proposing the exclusion of San Bernardino; San Bernardino data tends to skew the results.

Please review and do not hesitate to contact Carla Castañeda at 916/327-0103, extension 3090 or myself, if you have any questions. We can speak tomorrow. Have a great day.

<< File: Average Rate Estimate_Revised_Meeting.xls >>

Carla Shelton
Finance Analyst
915 L Street, Suite 1280
Sacramento, CA 95814
(916) 445-3274 ext.3091 (Office)
(916) 327-0225 (Fax)
email Carla.Shelton@dof.ca.gov

From: Castaneda, Carla
Sent: Friday, July 25, 2008 2:17 PM
To: 'Ter Keurst, Bonnie - ACR'
Cc: Shelton, Carla
Subject: Voter Identification

Hi Bonnie,
We need to review some claims again to make sure we did not forget benefit information. We will get back to you either next Tuesday or Wednesday and share a copy of our worksheet with you before the meeting on Thursday.

Program 083
Permanent Absentee Voters Mandate Program
Claim Summary

Voter Identification Procedures
Unit Cost Rate

County	Productive Hourly Rate	ICRP	Benefits	Hourly Rate
Los Angeles: Permanent	15.80	122.70%	44.53%	50.87
Los Angeles: Temporary	9.87	122.70%	4.87%	23.05
San Bernardino: Clerk II	19.23	298.85%	0.00%	76.70
San Bernardino: Clerk III	20.16	298.85%	0.00%	80.41
San Bernardino: Elections Clerk I	27.18	298.85%	0.00%	108.41
San Bernardino: Public Servant	13.03	298.85%	0.00%	51.97
San Bernardino:	32.10	298.85%	0.00%	128.03
Sacramento: Assistant	17.31	149.60%	41.73%	61.24
Sacramento: Supervisor	23.88	149.60%	37.12%	81.73
Stanislaus: Admin Clerk II	15.05	83.40%	56.00%	43.06
Stanislaus: Admin Clerk I	14.60	83.40%	40.60%	37.65
Stanislaus: Personnel Srvc. Contract	20.00	83.40%	7.20%	39.32
Stanislaus: Personnel Srvc. Contract	9.25	83.40%	11.50%	18.93
				61.64

	Time	Cost Per PB
61.64	1.8	**$1.85**
	1.5	**$1.54**

Voter Identification Procedures
Unit Cost Rate

County	Productive Hourly Rate	ICRP	Benefits	Hourly Rate
Los Angeles: Permanent	16.44	113.92%	47.73%	51.95
Los Angeles: Temporary	9.84	113.92%	5.36%	22.19
San Bernardino: Elections	34.36	237.46%	0.00%	115.95
San Bernardino: Elections	28.20	237.46%	0.00%	95.16
San Bernardino: Clerk III	20.12	237.46%	0.00%	67.90
San Bernardino: Clerk II	21.30	237.46%	0.00%	71.88
San Bernardino: Public Ser	11.08	237.46%	0.00%	37.39
San Bernardino: Fiscal Cle	23.07	237.46%	0.00%	77.85
Sacramento: Supervisor	24.20	133.70%	40.58%	79.51
Sacramento: Assistant	17.55	133.70%	44.08%	59.09
				67.89

	Time	Cost per PB
67.89	1.8	**$2.04**
	1.5	**$1.70**

Voter Identification Procedures
Unit Cost Rate

County	Productive Hourly Rate	ICRP	Benefits	Hourly Rate
Los Angeles: Permanent	15.80	110.33%	54.26%	51.27
Los Angeles: Temporary	11.22	110.33%	4.93%	24.75
San Bernardino: Clerk	28.69	237.46%	0.00%	96.82
San Bernardino: Clerk II	22.54	237.46%	0.00%	76.06
San Bernardino: Public Svs	14.38	237.46%	0.00%	48.53
Sacramento: Supervisor	38.71	171.30%	29.73%	136.24
Sacramento: Assistant	17.67	171.30%	41.27%	67.72
Sacramento: Temp	11.61	171.30%	11.61%	35.15
Yolo: Admin Asst	19.30	86.10%	44.40%	51.86
Yolo: Spvr Elections Tech	17.24	86.10%	44.40%	46.33
				63.47

	Time	Cost per PB
63.47	1.8	**$1.90**
	1.5	**$1.59**

Voter Identification Procedures
Unit Cost Rate

County	Productive Hourly Rate	ICRP	Benefits	Hourly Rate
Los Angeles: Permanent	16.26	99.15%	53.69%	49.76
Los Angeles: Temporary	10.36	99.15%	4.03%	21.46
San Bernardino: Payroll Sp	26.53	278.69%	0.00%	100.47
San Bernardino: OA II	21.29	278.69%	0.00%	80.62
San Bernardino: OA III	25.05	278.69%	0.00%	94.86
San Bernardino: OA IV	27.64	278.69%	0.00%	104.67
San Bernardino: Ofc Spc	28.25	278.69%	0.00%	106.98
San Bernardino: Public Ser	11.65	278.69%	0.00%	44.12
Sacramento: Assistant	18.25	145.68%	46.91%	65.87
Sacramento: Asst O/T	27.38	145.68%	7.65%	72.41
Solano: Election Coordinat	29.18	87.48%	23.68%	67.66
Solano: Election Tech.	19.55	87.48%	22.87%	45.02
Solano: Accting. Tech.	26.87	87.48%	23.60%	62.26
Solano: Election Tech.	20.14	87.48%	23.24%	46.53
Solano: IT Specialist I	36.46	87.48%	22.30%	83.60
Solano: Sr. Systems Analy	40.33	87.48%	24.37%	94.04
Solano: Extra Help	18.50	87.48%	0.00%	34.68
Solano: Extra Help	16.70	87.48%	0.00%	31.31
Solano: Extra Help	18.50	87.48%	0.00%	34.68
Solano: Extra Help	18.50	87.48%	0.00%	34.68
Solano: Extra Help	14.03	87.48%	0.00%	26.30
Solano: Extra Help	18.50	87.48%	0.00%	34.68
				60.76

	Time	Cost per PB
60.76	1.8	**$1.82**
	1.5	**$1.52**

Voter Identification Procedures
Unit Cost Rate

County	Productive Hourly Rate	ICRP	Benefits	Hourly Rate
Kern: Various Election Staff	16.15	156.85%	62.37%	$67.34
Kern: Various Election Staff	15.21	156.85%	62.37%	$63.43
Kern: Various Election Staff	13.95	156.85%	62.37%	$58.19
Kern: Various Election Staff	15.36	156.85%	62.37%	$64.06
Kern: Various Election Staff	21.33	156.85%	62.37%	$88.97
Kern: Various Election Staff	16.15	156.85%	62.37%	$67.34
Kern: Various Election Staff	12.46	156.85%	62.37%	$51.95
Kern: Various Election Staff	15.21	156.85%	62.37%	$63.43
Kern: Various Election Staff	21.33	156.85%	62.37%	$88.97
Kern: Various Election Staff	20.92	156.85%	62.37%	$87.26
Los Angeles: Permanent	15.90	106.08%	55.83%	$51.07
Los Angeles: Temporary	11.05	106.08%	4.08%	$23.71
Sacramento: Supervisor	26.16	145.92%	47.23%	$94.72
Sacramento: Assistant	19.19	145.92%	52.34%	$71.89
Sacramento: Clerk	19.19	145.92%	52.34%	$71.89
San Bernardino: Ofc Asst III	23.73	349.63%	0.00%	106.70
San Bernardino: Ofc Spclst	29.13	349.63%	0.00%	130.98
Santa Clara: OSIII	31.94	102.58%	53.00%	$99.00
Santa Clara: OSII	26.46	102.58%	53.00%	$82.01
Santa Clara: Election Proc. Supervisor	38.66	102.58%	53.00%	$119.83
				77.64

	Time	Cost per PB
77.64	1.8	**$2.33**
	1.5	**$1.94**

Exhibit I

14

Ter Keurst, Bonnie - ACR

From: Jarboe. Alice [JarboeA@saccounty.net]
Sent: Wednesday, August 06, 2008 12:51 PM
To: Ter Keurst, Bonnie - ACR
Subject: RE: Voter Identification Provisional Ballot Mandate (Unit Cost Spreadsheet)

Hi Bonnie,

With your permission, I'll forward this email/spreadsheet to the SB90 group. We're meeting tomorrow and I know they would like to see this information. What's your feeling on the $1.74 rate?

Alice

From: Shelton, Carla [mailto:Carla.Shelton@dof.ca.gov]
Sent: Wednesday, August 06, 2008 12:33 PM
To: Ter Keurst, Bonnie - ACR; Jarboe. Alice
Cc: Castaneda, Carla
Subject: Voter Identification Provisional Ballot Mandate (Unit Cost Spreadsheet)

Hi Bonnie,

The Voter Identification spreadsheet for the 2006/2007 fiscal year reflecting the additional Program 083 (Permanent Absentee Voters) cost information for San Jose, San Diego, Orange County, and Ventura is attached for your review. The results show that the average hourly rate is approximately $63.33, and the costs per ballot for 1.5 and 1.8 minutes are $1.58 and $1.90, respectively. After comparing your estimates of $1.73 and $2.13 with the spreadsheet's actual amounts and calculating a standard deviation of 22 cents, we found that the average amount of **$1.74** is a representative cost per ballot. If you find that this amount is reasonable, then please share with the other counties and we will share with our management, as well. If you need more time for review, then please let us know.

Please do not hesitate to speak with Carla Castañeda at 916/445-3274, extension 3090 or myself for any questions you may have.

Standard deviation is essentially a weighted average of the deviations from the expected value

provides an idea of how far above or below the expected value, the actual value is likely to be

Thanks for your patience and cooperation.

<<Voter Identification FY06-07_Bonnie.xls>>

Carla Shelton
Finance Analyst
915 L Street, Suite 1280
Sacramento, CA 95814
(916) 445-3274 ext.3091 (Office)
(916) 327-0225 (Fax)
email Carla.Shelton@dof.ca.gov

2006

Voter Identification Procedures
Unit Cost Rate

County	Productive Hourly Rate	ICRP	Benefits	Hourly Rate
Kern: Various Election Staff	16.15	156.85%	62.37%	$67.34
Kern: Various Election Staff	15.21	156.85%	62.37%	$63.43
Kern: Various Election Staff	13.95	156.85%	62.37%	$58.19
Kern: Various Election Staff	15.36	156.85%	62.37%	$64.06
Kern: Various Election Staff	21.33	156.85%	62.37%	$88.97
Kern: Various Election Staff	16.15	156.85%	62.37%	$67.34
Kern: Various Election Staff	12.46	156.85%	62.37%	$51.95
Kern: Various Election Staff	15.21	156.85%	62.37%	$63.43
Kern: Various Election Staff	21.33	156.85%	62.37%	$88.97
Kern: Various Election Staff	20.92	156.85%	62.37%	$87.26
Los Angeles: Permanent	15.90	106.08%	55.83%	$51.07
Los Angeles: Temporary	11.05	106.08%	4.08%	$23.71
Orange County: Office Specialist	23.08	93.48%	43.73%	$64.18
Orange County: Data Entry Specialist	22.61	93.48%	43.73%	$62.88
Orange County: EH Office Asst.	14.13	93.48%	1.57%	$27.77
Orange County: Data Entry Sup.	24.61	93.48%	43.73%	$68.44
Orange County: EH Data Entry Tech	14.78	93.48%	1.57%	$29.05
Orange County: EH Info. Systems Tech	25.66	93.48%	1.57%	$50.43
San Diego: Permanent	23.82	67.98%	45.64%	$58.27
San Diego: Permanent	24.27	67.98%	45.64%	$59.38
San Diego: Temp	11.18	67.98%	8.69%	$20.41
Sacramento: Supervisor	26.16	145.92%	47.23%	$94.72
Sacramento: Assistant	19.19	145.92%	52.34%	$71.89
Sacramento: Clerk	19.19	145.92%	52.34%	$71.89
San Bernardino: Ofc Asst III	23.73	349.63%	0.00%	106.70
San Bernardino: Ofc Spclst	29.13	349.63%	0.00%	130.98
Santa Clara: OSIII	31.94	102.58%	53.00%	$99.00
Santa Clara: OSII	26.46	102.58%	53.00%	$82.01
Santa Clara: Election Proc. Supervisor	38.66	102.58%	53.00%	$119.83
Ventura County: Extra Help	12.01	115.00%	2.80%	$26.55
Ventura County: Extra Help	15.13	115.00%	2.77%	$33.43
Ventura County: Extra Help	11.45	115.00%	2.82%	$25.30
Ventura County: Extra Help	11.72	115.00%	2.71%	$25.88
Ventura County: Extra Help	11.44	115.00%	2.83%	$25.30
Ventura County: Extra Help	17.45	115.00%	2.80%	$38.57
Ventura County: Fulltime	23.53	115.00%	35.32%	$68.46
Ventura County: Fulltime	21.94	115.00%	31.69%	$62.12
Ventura County: Fulltime	24.72	115.00%	27.35%	$67.69
Ventura County: Fulltime	37.72	115.00%	27.17%	$103.13
				63.33

	Time	Cost per PB	Avg. Cost
63.33	1.8	**$1.90**	**$1.74**
	1.5	**$1.58**	
			Std. Dev.
			0.22

Exhibit J

15

Ter Keurst, Bonnie - ACR

From: Ter Keurst, Bonnie - ACR
Sent: Friday, August 15, 2008 4:50 PM
To: 'Castaneda, Carla'; Shelton, Carla
Subject: RE: Voter Identification
Attachments: Voter Id-DOF 8-13-08 FY06-07.xls

Hi:
I have the workpapers almost ready to go – I just want to make sure that they are understandable when I send them. Right now, there are lots of numbers on several worksheets. Just to give you an idea of what I was referring to in our phone conversation, I have attached the worksheet that was sent to me. In the second column, I configured Kern and Ventura, based on salaries that looked very close. Then, in the third column I did averages for each County. The fourth column is the Weighted hourly wages from the time study. For the fourth column calc, I used the average time of 2.03 from the time study and the 1.5 that was used as the low end. I will send the other workpapers next week. We can talk after vacations and jury duty.

Bonnie Ter Keurst
Manager, Reimbursable Projects
County of San Bernardino
(909) 386-8850

From: Castaneda, Carla [mailto:Carla.Castaneda@dof.ca.gov]
Sent: Wednesday, August 13, 2008 10:18 AM
To: Shelton, Carla
Cc: Ter Keurst, Bonnie - ACR
Subject: Voter Identification

Carla,
Bonnie will try to get us an updated copy of the Voter Identification survey before Friday. She pointed out that our reasonableness check was heavily weighted by Kern and Ventura. I explained that we were just looking for reasonableness and that this review was to verify the reasonableness of the range of estimated costs determined by the comprehensive survey and that we proposed $1.74 based on our site visit time estimates since that was also within the original range of cost estimates. Adjusting for the weights, our rate would be a little higher, possibly in the $1.80 range. I think we can use the more comprehensive survey for submission to the Commission but our smaller review of the 2006 reimbursement claims will only be used internally. We can start preparing the letter for the Commission with Bonnie, and finalize the documents for adoption (Joint RRM & Statewide Estimate of Costs) after final review of the comprehensive survey. Bonnie will confirm that the CACEO intends to respond on behalf of the counties supporting the RRM once we finalize the number.

Thanks.

Exhibit K

(16)

Ter Keurst, Bonnie - ACR

From: Ter Keurst, Bonnie - ACR
Sent: Tuesday, September 09, 2008 4:26 PM
To: 'Castaneda, Carla'; Shelton, Carla
Cc: Ochi, Howard - ACR
Subject: Voter ID
Attachments: Voter Id-DOF 8-13-08 FY06-07.xls; Bonnie's Scenarios 1.xls

Hello!

I have attached the workpaper that I sent about three weeks ago as well as the updated workpapers from the results of the time study. What I have added in the "Scenarios" is a comparison of 1) the time study average salary rate using the calculated median time of 1.88, 2) the rate as recorded by your offices averaged by county and 3) the our proposed rate of $1.80.

I have been working with the numbers to somehow say with finality that this is the only way to look at it, but the reality is that there are a lot of numbers and we can manipulate them in any number of ways to make a case……so I went back to the reasonableness tests – testing against the numbers we received from the 2006 surveys. I removed anything that could possibly indicate a miscommunication of the survey questions and looked at an equitable middle point based on the mandate as we discussed.

Let me know what you think we might need additionally. Also, I wanted to touch base on the next steps, as far as writing the request to the Commission. I will be in the office tomorrow morning prior to 10:00 and both tomorrow and Thursday afternoon, or Friday all day. If you're swamped and this week doesn't work, I'll try to touch base next week.
Thanks

Bonnie Ter Keurst
Manager, Reimbursable Projects
County of San Bernardino
(909) 386-8850

Exhibit L

Voter Identification Signature Verification Mandate
Unit Cost Rate Based on
Actual Claiming Information of Election Mandate

County	Productive Hourly Rate	ICRP	Benefits	[1]Finance Hourly Rate		Average Per County	[2] Time Study Statistics WP
Kern: Various Election Staff	16.15	156.85%	62.37%	$67.34			
Kern: Various Election Staff	15.21	156.85%	62.37%	$63.43			
Kern: Various Election Staff	13.95	156.85%	62.37%	$58.19			
Kern: Various Election Staff	15.36	156.85%	62.37%	$64.06			
Kern: Various Election Staff	21.33	156.85%	62.37%	$88.97	$88.40		
Kern: Various Election Staff	16.15	156.85%	62.37%	$67.34			
Kern: Various Election Staff	12.46	156.85%	62.37%	$51.95	$55.07		
Kern: Various Election Staff	15.21	156.85%	62.37%	$63.43	$65.12		
Kern: Various Election Staff	21.33	156.85%	62.37%	$88.97			
Kern: Various Election Staff	20.92	156.85%	62.37%	$87.26		$70.09	74.11
Los Angeles: Permanent	15.90	106.08%	55.83%	$51.07	$51.07		
Los Angeles: Temporary	11.05	106.08%	4.08%	$23.71	$23.71	$37.39	53.51
Orange County: Office Specialist	23.08	93.48%	43.73%	$64.18	$64.18		
Orange County: Data Entry Specialist	22.61	93.48%	43.73%	$62.88	$62.88		
Orange County: EH Office Asst.	14.13	93.48%	1.57%	$27.77	$27.77		
Orange County: Data Entry Sup.	24.61	93.48%	43.73%	$68.44	$68.44		
Orange County: EH Data Entry Tech	14.78	93.48%	1.57%	$29.05	$29.05		
Orange County: EH Info. Systems Tech	25.66	93.48%	1.57%	$50.43	$50.43	$50.46	
San Diego: Permanent	23.82	67.98%	45.64%	$58.27	$58.27		
San Diego: Permanent	24.27	67.98%	45.64%	$59.38	$59.38		
San Diego: Temp	11.18	67.98%	8.69%	$20.41	$20.41	$46.02	
Sacramento: Supervisor	26.16	145.92%	47.23%	$94.72	$94.72		
Sacramento: Assistant	19.19	145.92%	52.34%	$71.89	$71.89		
Sacramento: Clerk	19.19	145.92%	52.34%	$71.89	$71.89	$79.50	46.93
San Bernardino: Ofc Asst III	23.73	349.63%	0.00%	106.70	106.70		
San Bernardino: Ofc Spclst	29.13	349.63%	0.00%	130.98	130.98	$118.84	43.82
Santa Clara: OSIII	31.94	102.58%	53.00%	$99.00	$99.00		
Santa Clara: OSII	26.46	102.58%	53.00%	$82.01	$82.01		
Santa Clara: Election Proc. Supervisor	38.66	102.58%	53.00%	$119.83	$119.83	$100.28	43.33
Ventura County: Extra Help	12.01	115.00%	2.80%	$26.55			
Ventura County: Extra Help	15.13	115.00%	2.77%	$33.43			
Ventura County: Extra Help	11.45	115.00%	2.82%	$25.30			
Ventura County: Extra Help	11.72	115.00%	2.71%	$25.88	$27.29		
Ventura County: Extra Help	11.44	115.00%	2.83%	$25.30			
Ventura County: Extra Help	17.45	115.00%	2.80%	$38.57	$38.57		
Ventura County: Fulltime	23.53	115.00%	35.32%	$68.46			
Ventura County: Fulltime	21.94	115.00%	31.69%	$62.12			
Ventura County: Fulltime	24.72	115.00%	27.35%	$67.69	$66.09		
Ventura County: Fulltime	37.72	115.00%	27.17%	$103.13	$103.13	$47.64	
Solano							156.82
Stanislaus							37.66
Yolo							35.95
39 line items				**$2,469.95**	**$1,736.28**	**$550.22**	**$492.13**
			AVG	**63.33**	**66.78**	**68.78**	**$61.52**

Assumptions:

1. Finance's estimates based on all classifications as provided on claim forms.

	TIME	Cost per PB	Avg Cost
63.33	1.80	1.90	1.74
	1.5	1.58	
			Std Dev
			0.22

2. Claimant added time study hourly rate for the specified counties.

	TIME	Cost per PB	Avg Cost
66.78	1.80	2.00	1.84
	1.5	1.67	
			Std Dev
			0.24

	TIME	Cost per PB	Avg Cost
68.78	1.80	2.06	1.89
	1.5	1.72	
			Std Dev
			0.24

	TIME	Cost per PB	Avg Cost
61.52	2.03	2.08	1.81
	1.5	1.54	
			Std Dev
			0.38

Exhibit M

SB90 Voter Identification Procedures

Statutes of 2000, Chapter 260

Time Study

Unit Cost Calculation - County of San Bernardino

	Average Time Spent Per Ballot (minutes)	Labor Hourly Rate ($)	ICRP %	Loaded Hourly Rate ($)	**Average Cost per Provisional Ballot ($)**	Total Provisional Ballots Cast	% of Ballots Applied per Pass	Total Ballots Applied per Pass	**Total Provisional Ballot Cost**
Pass 1 - T	0.58	$13.77	0.00%	$ 13.77	**$0.13**	20,258	100%	20,258	**$ 2,700.69**
Pass 2 - R	1.68	$20.40	349.63%	91.72	**$2.56**	20,258	22%	4,404	**11,284.71**
Total									**$ 13,985.40**

% of minute						
.58*	20258-4404=	15854	9195.32			
(1.68+.58)*		4404	9953.04			
		20258	19148.36	19148.36/20258	0.945225	equals 57 seconds per ballot
.13*	20258-4404=	15854	2061.02			
(2.56+.13)*		4404	11846.76			
	0	20258	13907.78	13907.78/20258	0.686533	cost per ballot

Salary Comparison	Total # of Provisionals	Total Election Turnout	Total Voters Registered	ICRP	Temporary Help Salary Cost per hour	Weighted Salary Cost	Weighted Together	ASSUMPTION: ICRP on SALARY AND BENEFIT Notes:
Kern	5730	154365	282829	156.00%	14.91	82.03	74.11	Both Groups weighted average; Kern did overhead calc on salaries only (not benefits)
Los Angeles	176866	2183998	3951957	92.99%		53.51		LA provided Overhead rate; ***Not representative sample
Sacramento	9008	357297	611954	45.92%		46.93		1st pass done by Election Asst - $41.93, 2nd pass is a review by Supervisor - $56.02 - time is combined and weighted
San Bernardino	20258	376614	723661	349.63%	13.77	91.72	43.82	1st pass-Temp employees are classified as serv & supplies; 2nd pass is loaded rate and ICRP 1st pass is temporary help at 13.77 per hr; 2nd pass is OAII, OA III, & PSE
Santa Clara	23640	457692	689052	76.47%		43.33		No 2-step process done; they use extra help staff, but they are employees and have benefits
Stanislaus	4311	101691	213769	49.00%		37.66		
Yolo	1832	53969	90706	21.00%		35.95		No ICRP rate given - used Overhead dollars given
Solano	4514	110083	168577	114.72%		156.82		***Not representative sample

Exhibit N

SB90 Voter Identification Procedures

Statutes of 2000, Chapter 260

Time Study Summary

Unit Time Calculation

	Agency Name	Department Name	Contact Name	Phone Number	PASS 1 Total Provisional Ballots Time Studied	PASS 1 Total Time Spent Time Studying (minutes)	PASS 1 **Average Time Spent Per Ballot (minutes)**	PASS 2 Total Provisional Ballots Time Studied	PASS 2 Total Time Spent Time Studying (minutes)	PASS 2 **Average Time Spent Per Ballot (minutes)**	Weighted Time Spent Per Ballot	Time in Seconds
1)	County of Kern	County Elections	Sandy Brockman		164	235.0	**1.43**				1.4300	85.80
2)	County of Los Angeles	Registrar-Recorder/Cnty Clk			5	5.0	**1.00**	3	22.0	**7.33**	1.3550	81.30
3)	County of Sacramento	Registrar of Voters	Alice Jarboe		391	584.5	**1.49**	391	321.9	**0.82**	2.3200	139.20
4)	County of San Bernardino	Registrar of Voters	Bonnie Ter Keurst	(909) 386-8850	560	325.3	**0.58**	318	533.0	**1.68**	0.9452	56.71
5)	County of Santa Clara	Registrar of Voters	Carol Prado	(408) 282-3012	23,640	81,444.0	**3.45**				3.4500	207.00
6)	County of Solano	Registrar of Voters	Lindsey McWilliams		6	37.1	**6.18**				6.1800	370.80
7)	County of Stanislaus	Elections Division	Cyndi Helton	(209) 525-5200	45	70.0	**1.56**	264	345.8	**1.31**	2.6700	160.20
8)	County of Yolo	County Clerk-Elections	Lori Meirowsky	(530) 666-8122	63	60.5	**0.96**				0.9600	57.60

SB90 Voter Identification Procedures

Statutes of 2000, Chapter 260

Time Study Summary

Unit Cost Calculation

	Agency Name	Department Name	Contact Name	Phone Number	PASS 1 Average Cost per Provisional Ballot ($)	PASS 2 Average Cost per Provisional Ballot ($)	**Weighted Average Cost per Provisional Ballot ($)**
1)	County of Kern	County Elections	Sandy Brockman	(661) 868-3717	$1.77	$0.00	$1.77
2)	County of Los Angeles	Registrar/Recorder-Co Clerk	Brandy Jakobsen	(562) 462-3186	$0.89	$7.26	$1.21
3)	County of Sacramento	Registrar of Voters	Alice Jarboe	(916) 875-6255	$1.05	$0.77	$1.81
4)	County of San Bernardino	Registrar of Voters	Bonnie Ter Keurst	(909) 386-8850	$0.13	$2.56	$0.69
5)	County of Santa Clara	Registrar of Voters	Carol Prado	(408) 282-3012	$2.49	$0.00	$2.49
6)	County of Solano	Registrar of Voters	Lindsey McWilliams		$16.15	$0.00	$16.15
7)	County of Stanislaus	Elections Division	Cyndi Helton	(209) 525-5200	$0.98	$0.82	$1.68
8)	County of Yolo	County Clerk-Elections	Lori Meirowsky	(530) 666-8122	$0.58	$0.00	$0.58
			AVERAGE COST PER AGENCY		**$3.01**	**$1.43**	**$3.30**

*No breakdown of pass 1 & 2 - so used number of hours worked to establish allocation for wgtd avg cost

Sacramento
*Sacramento has a two-step process for every provisional. Each piece was time-studied and the averages of each piece were combined for time

Santa Clara
*Has only 1 pass - done by two different groups - extra help employees that have benefits (so not temps) and regular staff; if there are issues, a supervisor will review, but it was not part of the time study and it was indicated that this was a minimal time

Stanislaus
*Based on workpaper - indirect costs of 49%

Exhibit O

STATISTICS

Agency Name	Total Provisionals	Total Election Turnout	Total Voters Registered	ICRP	Temp Help Cost	Salary Cost Wgtd pr hr-#1	Salary Cost Wgtd pr hr-#2	Salary Cost Wgtd per hr-#3	Salary Cost Wgtd per hr-#4
County of Kern	5,730	154,365	282,829	156.00% [1]	14.91	82.03	74.11	74.11	74.11
County of Los Angeles	176,866	2,183,998	3,951,957	92.99% [2]		53.51	53.51	53.51	
County of Sacramento	9,008	357,297	611,954	45.92%		46.93	46.93	46.93	46.93
County of San Bernardino	20,258	376,614	723,661	349.63% [3]	13.77	91.72	43.82	43.82	43.82
County of Santa Clara	23,640	457,692	689,052	76.47%		43.33	43.33	43.33	43.33
County of Solano	4,514	110,083	168,577	114.72%		156.82	156.82		
County of Stanislaus	4,311	101,691	213,769	49.00% [4]		37.66	37.66	37.66	37.66
County of Yolo	1,832	53,969	90,706	21.00% [5]		35.95	35.95		35.95
	246,159				AVERAGE:	68.49	61.52	49.89	46.97
					MID POINT:	96.39	96.39	55.89	55.03
					MEDIAN:	50.22	45.38	45.38	43.58

ASSUMPTION: ICRP calculated on salary and benefits

1 Kern — Lists overhead/not ICRP; the temps & reg were weighted together, for salary cost would be $74.11

2 Los Angeles — Based on very limited sample and and estimated '5% of total' done as manual/microfilm process; 92.988% is identified as overhead

3 San Bernardino — If the temps & reg were weighted together, salary cost would be $43.82; On P&Gs, SB temp help is in services and supplies

4 Stanislaus — Indirect costs of 49%

5 Yolo — Overhead-not ICRP

#1 All

#2 Adjusted to include all labor costs

#3 Remove high and low

#4 Remove limited samples

Exhibit P

SB90 Voter Identification Procedures
Statutes of 2000, Chapter 260
Time Study Summary
Unit Time Calculation

Agency Name	Department Name	Contact Name	Phone Number	PASS 1 Total Provisional Ballots Time Studied	PASS 1 Total Time Spent Time Studying (minutes)	PASS 1 Average Time Spent Per Ballot (minutes)	PASS 2 Total Provisional Ballots Time Studied	PASS 2 Total Time Spent Time Studying (minutes)	PASS 2 ***** Average Time Spent Per Ballot (minutes)	Weighted Time Spent Per Ballot-#1	Weighted Time Spent Per Ballot-#2	Weighted Time Spent Per Ballot-#3	Weighted Time Spent Per Ballot-#4
County of Kern	County Elections	Sandy Brockman		164	235.0	1.43					1.4300	1.4300	1.4300
County of Sacramento	Registrar of Voters	Alice Jarboe	(916) 875-6255	391	584.5	1.49	391	321.9	0.82		2.3200	2.3200	2.3200
County of San Bernardino	Registrar of Voters	Bonnie Ter Keurst	(909) 386-8850	560	325.3	0.58	318	533.0	1.68		0.9452		0.9452
County of Santa Clara	Registrar of Voters	Carol Prado	(408) 282-3012	23,640	81,444.0	3.45					3.4500	3.4500	3.4500
County of Stanislaus	Elections Division	Cyndi Helton	(209) 525-5200	45	70.0	1.56	264	345.8	1.31		2.6700	2.6700	2.6700
County of Yolo	County Clerk-Elections	Lori Meirowsky	(530) 666-8122	63	60.5	0.96					0.9600	0.9600	0.9600
		AVERAGE TIME PER AGENCY				1.58			0.63				
County of Los Angeles	Registrar/Recorder-Co Clerk	Brandy Jakobsen	(562) 462-3186	5	5	1	3	22	7.33		1.3550	1.3550	
County of Solano	Registrar of Voters	Lindsey McWilliams		6	37.1	6.18					6.1800		
										AVERAGE:	2.41	2.03	1.96
										MIDPOINT:	3.56	2.21	2.20
										MEDIAN:	1.88	1.88	1.88

#1 N/A
#2 All-Adjusted to include all labor costs
#3 Remove high and low
#4 Remove limited samples
***** Pass 2 average is divided by all 6 counties

POSSIBILITY 1:
# of Provisional Ballots X Individual County Calculated Hourly Cost (divided by 60) X Fixed Wgtd Time

#1-AVERAGE	Ballots	Cost	#1 - N/A	#2	#3	#4
1) County of Kern	5730	74.11		17,083.50	14,373.23	13,889.84
2) County of Los Angeles	176886	53.51		380,779.84	320,369.71	309,595.19
3) County of Sacramento	9008	46.93		17,006.87	14,308.76	13,827.53
4) County of San Bernardin	20258	43.82		35,712.02	30,046.37	29,035.86
5) County of Santa Clara	23640	43.33		41,208.02	34,670.43	33,504.41
6) County of Solano	4514	156.82		28,477.94	23,959.96	23,154.15
7) County of Stanislaus	4311	37.66		6,531.36	5,495.17	5,310.36
8) County of Yolo	1832	35.95		2,649.54	2,229.19	2,154.22

#2-MIDPOINT	Ballots	Cost	#1 - N/A	#2	#3	#4
1) County of Kern	5730	74.11		25,214.32	15,605.90	15,553.52
2) County of Los Angeles	176886	53.51		562,010.24	347,844.99	346,677.62
3) County of Sacramento	9008	46.93		25,101.22	15,535.89	15,483.76
4) County of San Bernardin	20258	43.82		52,709.00	32,623.18	32,513.70
5) County of Santa Clara	23640	43.33		60,820.78	37,643.80	37,517.47
6) County of Solano	4514	156.82		42,031.88	26,014.79	25,927.49
7) County of Stanislaus	4311	37.66		9,639.94	5,966.45	5,946.42
8) County of Yolo	1832	35.95		3,910.57	2,420.37	2,412.25

#3-MEAN	Ballots	Cost	#1 - N/A	#2	#3	#4
1) County of Kern	5730	74.11		13,270.32	13,270.32	13,270.32
2) County of Los Angeles	176886	53.51		295,786.56	295,786.56	295,786.56
3) County of Sacramento	9008	46.93		13,210.80	13,210.80	13,210.80
4) County of San Bernardin	20258	43.82		27,740.80	27,740.80	27,740.80
5) County of Santa Clara	23640	43.33		32,010.04	32,010.04	32,010.04
6) County of Solano	4514	156.82		22,121.42	22,121.42	22,121.42
7) County of Stanislaus	4311	37.66		5,073.51	5,073.51	5,073.51
8) County of Yolo	1832	35.95		2,058.14	2,058.14	2,058.14

Exhibit Q

NOVEMBER 2006 COUNTY SURVEY

POSSIBILITY 1: FIXED WGTD TIME

		B	C		2008 Time Study				Same 2008 Study		Same 2008 Study	
					UNIT TIME COMPARISON MEDIAN		UNIT TIME COMPARISON		UNIT TIME COMPARISON		UNIT TIME COMPARISON AVERAGE	
County	Total # Provisional Envelopes	Time per ballot In Minutes	Cost per Ballot	% of Election Charged to Other Districts	1.88 minutes 1.88-B	Wgtd	1.5 minutes 1.50-B	Wgtd	1.88 minutes 1.88-B	REMOVE LARGE VARIANCES	2.03 2.03-B	REMOVE LARGE VARIANCES
Alameda	18,186		$ 0.71	N/A								
Alpine	1	0.25	$ 0.50	0.00%	1.63	1.63	1.25	1.25	1.63	1.63	1.78	1.78
Amador	148	3.00	$ 1.70	40.00%	(1.12)	(165.76)	(1.50)	(222.00)	(1.12)	(165.76)	(0.97)	(143.56)
Butte	1,707		$ 9.91	73.00%								
Calaveras	205	1.00	$ 0.68	N/A	0.88	180.40	0.50	102.50	0.88	180.40	1.03	211.15
Colusa	35	5.00	$ 9.42	N/A	(3.12)	(109.20)	(3.50)	(122.50)	(3.12)	(109.20)	(2.97)	(103.95)
Contra Costa	10,776	7.50	$ 2.87	47.00%	(5.62)	(60561.12)						
Del Norte	39	5.00	$ 3.08	N/A	(3.12)	(121.68)	(3.50)	(136.50)	(3.12)	(121.68)	(2.97)	(115.83)
El Dorado	779	1.50	$ 0.41	N/A	0.38	296.02	0.00	0.00	0.38	296.02	0.53	412.87
Fresno	6,359	1.00	$ 1.30	30.00%	0.88	5595.92	0.50	3,179.50	0.88	5,595.92	1.03	6549.77
Glenn	58	3.00	$ 2.73	N/A	(1.12)	(64.96)	(1.50)	(87.00)	(1.12)	(64.96)	(0.97)	(56.26)
Humboldt	678	0.50	$ 8.51	N/A	1.38	935.64	1.00	678.00	1.38	935.64	1.53	1037.34
Imperial	946	2.00	$ 1.81	37.00%	(0.12)	(113.52)	(0.50)	(473.00)	(0.12)	(113.52)	0.03	28.38
Inyo												
Kern	2,935	5.00	$ 7.24	N/A	(3.12)	(9157.20)	(3.50)	(10,272.50)	(3.12)	(9,157.20)	(2.97)	(8716.95)
Kings	760	20.00	$ 10.31	35.00%	(18.12)	(13771.20)						
Lake												
Lassen	47	10.00	$ 3.00	N/A	(8.12)	(381.64)						
Los Angeles	110,915	0.25	$ 4.15	41.00%	1.63	180791.45						
Madera	749	0.08	$ 3.98	48.00%	1.80	1348.20	1.42	1,063.58	1.80	1,348.20	1.95	1460.55
Marin	3,118	1.00	$ 0.42	33.00%	0.88	2743.84	0.50	1,559.00	0.88	2,743.84	1.03	3211.54
Mariposa	132	4.00	$ 0.72	N/A	(2.12)	(279.84)	(2.50)	(330.00)	(2.12)	(279.84)	(1.97)	(260.04)
Mendocino	659	1.09	$ 4.75	48.00%	0.79	520.61	0.41	270.19	0.79	520.61	0.94	619.46
Merced	556	2.00	$ 0.62	20.00%	(0.12)	(66.72)	(0.50)	(278.00)	(0.12)	(66.72)	0.03	16.68
Modoc	10	2.00	$ 0.50	10.00%	(0.12)	(1.20)	(0.50)	(5.00)	(0.12)	(1.20)	0.03	0.30
Mono	53											
Monterey	2,852	2.00	$ 0.50	36.00%	(0.12)	(342.24)	(0.50)	(1,426.00)	(0.12)	(342.24)	0.03	85.56
Napa	351	1.75	$ 0.75	43.00%	0.13	45.63	(0.25)	(87.75)	0.13	45.63	0.28	98.28
Nevada	918	1.00	$ 1.00	N/A	0.88	807.84	0.50	459.00	0.88	807.84	1.03	945.54
Orange	22,788	4.00	$ 4.24	53.00%	(2.12)	(48310.56)	(2.50)	(56,970.00)	(2.12)	(48,310.56)	(1.97)	(44892.36)
Placer	1,997	4.50	$ 1.55	74.00%	(2.62)	(5232.14)	(3.00)	(5,991.00)	(2.62)	(5,232.14)	(2.47)	(4932.59)
Plumas	137	4.00	$ 5.25	24.00%	(2.12)	(290.44)	(2.50)	(342.50)	(2.12)	(290.44)	(1.97)	(269.89)
Riverside	14,443	3.37	$ 1.16	26.00%	(1.49)	(21520.07)	(1.87)	(27,008.41)	(1.49)	(21,520.07)	(1.34)	(19353.62)
Sacramento												
San Benito	254	1.00		N/A	0.88	223.52	0.50	127.00	0.88	223.52	1.03	261.62
San Bernardino	10,016	0.58	$ 0.45	16.20%	1.30	13020.80	0.92	9,214.72	1.30	13,020.80	1.45	14523.20
San Diego	26,564	0.50	$ 2.75	35.00%	1.38	36658.32	1.00	26,564.00	1.38	36,658.32	1.53	40642.92
San Francisco	10,915	6.12	$ 3.69	16.67%	(4.24)	(46279.60)	(4.62)	(50,427.30)	(4.24)	(46,279.60)	(4.09)	(44642.35)
San Joaquin	4,325	15.00	$ 6.66	N/A	(13.12)	(56744.00)						
San Luis Obispo	2,019	1.00	$ 6.71	60.00%	0.88	1776.72	0.50	1,009.50	0.88	1,776.72	1.03	2079.57
San Mateo	7,575	1.20	$ 0.93	46.00%	0.68	5151.00	0.30	2,272.50	0.68	5,151.00	0.83	6287.25
Santa Barbara	3,126	5.00	$ 6.57	13.00%	(3.12)	(9753.12)	(3.50)	(10,941.00)	(3.12)	(9,753.12)	(2.97)	(9284.22)
Santa Clara	12,017	3.92	$ 4.08	26.00%	(2.04)	(24514.68)	(2.42)	(29,081.14)	(2.04)	(24,514.68)	(1.89)	(22712.13)
Santa Cruz	3,220	0.50	$ 0.13	47.80%	1.38	4443.60	1.00	3,220.00	1.38	4,443.60	1.53	4926.60
Shasta	852	5.08	$ 2.25	5.00%	(3.20)	(2726.40)	(3.58)	(3,050.16)	(3.20)	(2,726.40)	(3.05)	(2598.60)
Sierra												
Siskiyou	196	10.53	$ 5.85	N/A	(8.65)	(1695.40)						

Solano	2,230	10.00	$	10.00	14.00%	(8.12)	(18107.60	[redacted]						
Sonoma	2,569	2.00	$	1.10	N/A	(0.12)	(308.28)	(0.50)	(1,284.50)	(0.12)	(308.28)	0.03	77.07
Stanislaus	2,943	2.00	$	2.17	N/A	(0.12)	(353.16)	(0.50)	(1,471.50)	(0.12)	(353.16)	0.03	88.29
Sutter	712	1.00	$	0.46	N/A	0.88	626.56	0.50	356.00	0.88	626.56	1.03	733.36
Tehama	232	3.00	$	2.00	25.00%	(1.12)	(259.84)	(1.50)	(348.00)	(1.12)	(259.84)	(0.97)	(225.04)
Trinity													
Tulare	2,136	2.00	$	1.93	68.00%	(0.12)	(256.32)	(0.50)	(1,068.00)	(0.12)	(256.32)	0.03	64.08
Tuolumne	328	1.00	$	0.33	N/A	0.88	288.64	0.50	164.00	0.88	288.64	1.03	337.84
Ventura	6,137	0.05	$	1.84	26.80%	1.83	11230.71	1.45	8,898.65	1.83	11,230.71	1.98	12151.26
Yolo	1,880	0.08	$	3.25	25.45%	1.80	3384.00	1.42	2,669.60	1.80	3,384.00	1.95	3666.00
Yuba	294	1.00	$	23.40	31.00%	0.88	258.72	0.50	147.00	0.88	258.72	1.03	302.82
TOTALS:	303,877					(74.35)	(51,158.12)	(30.57)	(139,467.77)	(14.23)	(80,688.61)	(7.78)	(57486.31)

No survey received
Incomplete data received
[redacted]moved/LA Co removed also

Based on November 2006 All - State Survey
Unit Time Calc 1.5 - suggested by Department of Finance
1.88 - median based on time study (Unit Time Workpaper)
2.03 - average (without high and low)(Unit Time Workpaper)

8 incomplete data/
or no response
22 positive
28 negative

15 outly or no response
20 positive
23 negative

15 outly or no response
21 positive
22 negative

15 outly or no response
28 positive
15 negative

NOVEMBER 2006 COUNTY SURVEY

POSSIBILITY 2: FIXED COST PER BALLOT

	B	C												
County	Total # Provisional Envelopes	Time per ballot In Minutes	Cost per Ballot	% of Election Charged to Other Districts	2008 TIME STUDY COST COMPARISON MEDIAN $1.73 1.73-C	Wgtd	Same 2008 Study Cost Comparison Median $1.73	Wgtd 1.73-C	Same 2008 Study Cost Comparison Proposal 2.13	Wgtd 2.13-C	Total # Provisional Envelopes	Same 2008 Study Cost Comparison Proposal 1.80	Wgtd 1.80-C	
Alameda	18,186		$ 0.71	N/A	1.02	18549.72	1.02	18549.72	1.42	25824.12	18,186	1.09	19,822.74	
Alpine	1	0.25	$ 0.50	0.00%	1.23	1.23	1.23	1.23	1.63	1.63	1	1.30	1.30	
Amador	148	3.00	$ 1.70	40.00%	0.03	4.44	0.03	4.44	0.43	63.64	148	0.10	14.80	
Butte	1,707		$ 9.91	73.00%	(8.18)	(13963.26)						(8.11)	(13,843.77)	
Calaveras	205	1.00	$ 0.68	N/A	1.05	215.25	1.05	215.25	1.45	297.25	205	1.12	229.60	
Colusa	35	5.00	$ 9.42	N/A	(7.69)	(269.15)						(7.62)	(266.70)	
Contra Costa	10,776	7.50	$ 2.87	47.00%	(1.14)	(12284.64)	(1.14)	(12284.64)	(0.74)	(7974.24)	10,776	(1.07)	(11,530.32)	
Del Norte	39	5.00	$ 3.08	N/A	(1.35)	(52.65)	(1.35)	(52.65)	(0.95)	(37.05)	39	(1.28)	(49.92)	
El Dorado	779	1.50	$ 0.41	N/A	1.32	1028.28	1.32	1028.28	1.72	1339.88	779	1.39	1,082.81	
Fresno	6,359	1.00	$ 1.30	30.00%	0.43	2734.37	0.43	2734.37	0.83	5277.97	6,359	0.50	3,179.50	
Glenn	58	3.00	$ 2.73	N/A	(1.00)	(58.00)	(1.00)	(58.00)	(0.60)	(34.80)	58	(0.93)	(53.94)	
Humboldt	678	0.50	$ 8.51	N/A	(6.78)	(4596.84)						(6.71)	(4,549.38)	
Imperial	946	2.00	$ 1.81	37.00%	(0.08)	(75.68)	(0.08)	(75.68)	0.32	302.72	946	(0.01)	(9.46)	
Inyo														
Kern	2,935	5.00	$ 7.24	N/A	(5.51)	(16171.85)						0.03	88.05	Used 08 Amt of 1.78
Kings	760	20.00	$ 10.31	35.00%	(8.58)	(6520.80)						(8.51)	(6,467.60)	
Lake														
Lassen	47	10.00	$ 3.00	N/A	(1.27)	(59.69)	(1.27)	(59.69)	(0.87)	(40.89)	47	(1.20)	(56.40)	
Los Angeles	110,915	0.25	$ 4.15	41.00%	(2.42)	(268414.30)					110,915	0.59	65,439.85	Used 08 Amt of 1.21
Madera	749	0.08	$ 3.98	48.00%	(2.25)	(1685.25)	(2.25)	(1685.25)	(1.85)	(1385.65)	749	(2.18)	(1,632.82)	
Marin	3,118	1.00	$ 0.42	33.00%	1.31	4084.58	1.31	4084.58	1.71	5331.78	3,118	1.38	4,302.84	
Mariposa	132	4.00	$ 0.72	N/A	1.01	133.32	1.01	133.32	1.41	186.12	132	1.08	142.56	
Mendocino	659	1.09	$ 4.75	48.00%	(3.02)	(1990.18)	(3.02)	(1990.18)	(2.62)	(1726.58)	659	(2.95)	(1,944.05)	
Merced	556	2.00	$ 0.62	20.00%	1.11	617.16	1.11	617.16	1.51	839.56	556	1.18	656.08	
Modoc	10	2.00	$ 0.50	10.00%	1.23	12.30	1.23	12.30	1.63	16.30	10	1.30	13.00	
Mono	53										53			
Monterey	2,852	2.00	$ 0.50	36.00%	1.23	3507.96	1.23	3507.96	1.63	4648.76	2,852	1.30	3,707.60	
Napa	351	1.75	$ 0.75	43.00%	0.98	343.98	0.98	343.98	1.38	484.38	351	1.05	368.55	
Nevada	918	1.00	$ 1.00	N/A	0.73	670.14	0.73	670.14	1.13	1037.34	918	0.80	734.40	
Orange	22,788	4.00	$ 4.24	53.00%	(2.51)	(57197.88)	(2.51)	(57197.88)	(2.11)	(48082.68)	22,788			Lg Ballot Count/high '06 cost so remove
Placer	1,997	4.50	$ 1.55	74.00%	0.18	359.46	0.18	359.46	0.58	1158.26	1,997	0.25	499.25	
Plumas	137	4.00	$ 5.25	24.00%	(3.52)	(482.24)	(3.52)	(482.24)	(3.12)	(427.44)	137	(3.45)	(472.65)	
Riverside	14,443	3.37	$ 1.16	26.00%	0.57	8232.51	0.57	8232.51	0.97	14009.71	14,443	0.64	9,243.52	
Sacramento												(0.01)	(57.90)	5790 Pro Ballots provided/Used '08 rate
San Benito	254	1.00		N/A										
San Bernardino	10,016	0.58	$ 0.45	16.20%	1.28	12820.48	1.28	12820.48	1.68	16826.88	10,016	1.11	11,117.76	Used 08 Amt
San Diego	26,564	0.50	$ 2.75	35.00%	(1.02)	(27095.28)	(1.02)	(27095.28)	(0.62)	(16469.68)	26,564	(0.95)	(25,235.80)	
San Francisco	10,915	6.12	$ 3.69	16.67%	(1.96)	(21393.40)	(1.96)	(21393.40)	(1.56)	(17027.40)	10,915	(1.89)	(20,629.35)	
San Joaquin	4,325	15.00	$ 6.66	N/A	(4.93)	(21322.25)	(4.93)	(21322.25)	(4.53)	(19592.25)	4,325	(4.86)	(21,019.50)	
San Luis Obispo	2,019	1.00	$ 6.71	60.00%	(4.98)	(10054.62)	(4.98)	(10054.62)	(4.58)	(9247.02)	2,019	(4.91)	(9,913.29)	
San Mateo	7,575	1.20	$ 0.93	46.00%	0.80	6060.00	0.80	6060.00	1.20	9090.00	7,575	0.87	6,590.25	
Santa Barbara	3,126	5.00	$ 6.57	13.00%	(4.84)	(15129.84)	(4.84)	(15129.84)	(4.44)	(13879.44)	3,126	(4.77)	(14,911.02)	
Santa Clara	12,017	3.92	$ 4.08	26.00%	(2.35)	(28239.95)	(2.35)	(28239.95)	(1.95)	(23433.15)	12,017	0.07	841.19	Used 08 Amt provided by Co of 1.73
Santa Cruz	3,220	0.50	$ 0.13	47.80%	1.61	5168.10	1.61	5168.10	2.01	6456.10	3,220	1.68	5,393.50	
Shasta	852	5.08	$ 2.25	5.00%	(0.52)	(443.04)	(0.52)	(443.04)	(0.12)	(102.24)	852	(0.45)	(383.40)	
Sierra														
Siskiyou	196	10.53	$ 5.85	N/A	(4.12)	(807.52)	(4.12)	(807.52)	(3.72)	(729.12)	196	(4.05)	(793.80)	

Total # Provisional Envelopes	Same 2008 Study Cost Comparison Proposal 1.80	Wgtd 1.80-C
18,186	1.09	19,822.74
1	1.30	1.30
148	0.10	14.80
205	1.12	229.60
10,776	(1.07)	(11,530.32)
39	(1.28)	(49.92)
779	1.39	1,082.81
6,359	0.50	3,179.50
58	(0.93)	(53.94)
946	(0.01)	(9.46)
	0.03	88.05
47	(1.20)	(56.40)
110,915	0.59	65,439.85
749	(2.18)	(1,632.82)
3,118	1.38	4,302.84
132	1.08	142.56
659	(2.95)	(1,944.05)
556	1.18	656.08
10	1.30	13.00
53		
2,852	1.30	3,707.60
351	1.05	368.55
918	0.80	734.40
22,788		
1,997	0.25	499.25
137	(3.45)	(472.65)
14,443	0.64	9,243.52
	(0.01)	(57.90)
10,016	1.11	11,117.76
26,564	(0.95)	(25,235.80)
10,915	(1.89)	(20,629.35)
4,325	(4.86)	(21,019.50)
2,019	(4.91)	(9,913.29)
7,575	0.87	6,590.25
3,126	(4.77)	(14,911.02)
12,017	0.07	841.19
3,220	1.68	5,393.50
852	(0.45)	(383.40)
196	(4.05)	(793.80)

Total # Provisional Envelopes	Cost Comparison Proposal 1.80	Wgtd 1.80-C
18,186	1.09	19,822.74
1	1.30	1.30
148	0.10	14.80
205	1.12	229.60
10,776	(1.07)	(11,530.32)
39	(1.28)	(49.92)
779	1.39	1,082.81
6,359	0.50	3,179.50
58	(0.93)	(53.94)
946	(0.01)	(9.46)
	0.03	88.05
47	(1.20)	(56.40)
110,915		
749		
3,118	1.38	4,302.84
132	1.08	142.56
659		
556	1.18	656.08
10	1.30	13.00
53		
2,852	1.30	3,707.60
351	1.05	368.55
918	0.80	734.40
22,788		
1,997	0.25	499.25
137		
14,443	0.64	9,243.52
	(0.01)	(57.90)
10,016	1.11	11,117.76
26,564	(0.95)	(25,235.80)
10,915		
4,325		
2,019		
7,575	0.87	6,590.25
3,126		
12,017	0.07	841.19
3,220	1.68	5,393.50
852	(0.45)	(383.40)
196		

Solano	2,230	10.00	$ 10.00	14.00%	(8.27)	(18442.10	[redacted]					(8.20)	(18,286.00)	
Sonoma	2,569	2.00	$ 1.10	N/A	0.63	1618.47	0.63	1618.47	2,569	1.03	2646.07	2,569	0.70	1,798.30	
Stanislaus	2,943	2.00	$ 2.17	N/A	(0.44)	(1294.92)	(0.44)	(1294.92)	2,943	(0.04)	(117.72)	2,943	0.12	353.16	Used 08 Amt
Sutter	712	1.00	$ 0.46	N/A	1.27	904.24	1.27	904.24	712	1.67	1189.04	712	1.34	954.08	
Tehama	232	3.00	$ 2.00	25.00%	(0.27)	(62.64)	(0.27)	(62.64)	232	0.13	30.16	232	(0.20)	(46.40)	
Trinity															
Tulare	2,136	2.00	$ 1.93	68.00%	(0.20)	(427.20)	(0.20)	(427.20)	2,136	0.20	427.20	2,136	(0.13)	(277.68)	
Tuolumne	328	1.00	$ 0.33	N/A	1.40	459.20	1.40	459.20	328	1.80	590.40	328	1.47	482.16	
Ventura	6,137	0.05	$ 1.84	26.80%	(0.11)	(662.80)	(0.11)	(662.80)	6,137	0.29	1792.00	6,137	(0.04)	(233.21)	
Yolo	1,880	0.08	$ 3.25	25.45%	(1.52)	(2857.60)	(1.52)	(2857.60)	1,880	(1.12)	(2105.60)	1,880	1.22	2,293.60	Used 08 Amt of .58
Yuba	294	1.00	$ 23.40	31.00%	(21.67)	(6370.98	[redacted]					(21.60)	(6,350.40)	
TOTALS:	303,877				(92.08)	(470901.36)	(22.98)	(136152.08)	294,984	(5.78)	(62545.68)	294,984	(72.40)	(19,664.31)	

No survey received
Incomplete data received
[redacted]emoved

14 outly or no response
22 positive
22 negative

14 outly or no response
26 positive
18 negative

*Orange Co appears to skew results due to large count and large time element

8 adj responses (See above notes)
6 no response
20 positive
24 negative

2,569	0.70	1,798.30
2,943	0.12	353.16
712	1.34	954.08
232	(0.20)	(46.40)
2,136	(0.13)	(277.68)
328	1.47	482.16
6,137	(0.04)	(233.21)
1,880	1.22	2,293.60
294,984	(11.65)	30,100

4 no response
26 positive
19 negative
[redacted]
2 incomplete info

7 adj responses (See above notes)

2,569	0.70	1,798.30
2,943	0.12	353.16
712	1.34	954.08
232	(0.20)	(46.40)
2,136	(0.13)	(277.68)
328	1.47	482.16
6,137	(0.04)	(233.21)
1,880	1.22	2,293.60
294,984	16.82	35,976

4 no response
25 positive
11 negative
[redacted].80 positive or negative
2 incomplete info
1-LA

6 adj responses (See above notes)
[redacted]

Exhibit R

Exhibit S

Version 1-11/2006 All Counties	Total # Provisional Envelopes	SB Co Calc[1] Per Hr-$61.52 Time-1.88	DOF Calc[2] Per Hr-$68.78 Time-1.50	Proposal $1.80 per ballot
Alameda	18,186	35,055.82	31,270.83	32,734.80
Alpine	1	1.93	1.72	1.80
Amador	148	285.29	254.49	266.40
Butte	1,707	3,290.46	2,935.19	3,072.60
Calaveras	205	395.16	352.50	369.00
Colusa	35	67.47	60.18	63.00
Contra Costa	10,776	20,772.10	18,529.33	19,396.80
Del Norte	39	75.18	67.06	70.20
El Dorado	779	1,501.62	1,339.49	1,402.20
Fresno	6,359	12,257.78	10,934.30	11,446.20
Glenn	58	111.80	99.73	104.40
Humboldt	678	1,306.93	1,165.82	1,220.40
Imperial	946	1,823.53	1,626.65	1,702.80
Inyo				
Kern	2,935	5,657.58	5,046.73	5,283.00
Kings	760	1,465.00	1,306.82	1,368.00
Lake				
Lassen	47	90.60	80.82	84.60
Los Angeles	110,915	213,802.71	190,718.34	199,647.00
Madera	749	1,443.79	1,287.91	1,348.20
Marin	3,118	6,010.34	5,361.40	5,612.40
Mariposa	132	254.45	226.97	237.60
Mendocino	659	1,270.31	1,133.15	1,186.20
Merced	556	1,071.76	956.04	1,000.80
Modoc	10	19.28	17.20	18.00
Mono	53	102.16	91.13	95.40
Monterey	2,852	5,497.59	4,904.01	5,133.60
Napa	351	676.60	603.54	631.80
Nevada	918	1,769.56	1,578.50	1,652.40
Orange	22,788	43,926.76	39,183.97	41,018.40
Placer	1,997	3,849.47	3,433.84	3,594.60
Plumas	137	264.08	235.57	246.60
Riverside	14,443	27,840.71	24,834.74	25,997.40
Sacramento				
San Benito	254	489.62	436.75	457.20
San Bernardino	10,016	19,307.11	17,222.51	18,028.80
San Diego	26,564	51,205.47	45,676.80	47,815.20
San Francisco	10,915	21,040.05	18,768.34	19,647.00
San Joaquin	4,325	8,336.99	7,436.84	7,785.00
San Luis Obispo	2,019	3,891.88	3,471.67	3,634.20
San Mateo	7,575	14,601.77	13,025.21	13,635.00
Santa Barbara	3,126	6,025.76	5,375.16	5,626.80
Santa Clara	12,017	23,164.29	20,663.23	21,630.60
Santa Cruz	3,220	6,206.96	5,536.79	5,796.00
Shasta	852	1,642.34	1,465.01	1,533.60
Sierra				
Siskiyou	196	377.81	337.02	352.80
Solano	2,230	4,298.61	3,834.49	4,014.00
Sonoma	2,569	4,952.07	4,417.40	4,624.20
Stanislaus	2,943	5,673.01	5,060.49	5,297.40
Sutter	712	1,372.47	1,224.28	1,281.60
Tehama	232	447.21	398.92	417.60
Trinity				
Tulare	2,136	4,117.41	3,672.85	3,844.80
Tuolumne	328	632.26	564.00	590.40
Ventura	6,137	11,829.84	10,552.57	11,046.60
Yolo	1,880	3,623.94	3,232.66	3,384.00
Yuba	294	566.72	505.53	529.20
TOTALS:	303,877	585,761.41	522,516.50	546,978.60

[1]Used Time Study average salary cost; used the median time element (Statistics and Unit Time Calculation Work

[2]Used County Averages so "Study" elements would be the same (Unit Cost Workpaper)

PROOF 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 3130 Kilgore Road, Suite 400, Rancho Cordova, CA 95670.

On May 28, 2010, I served:

Letter dated December 22, 2009:

Withdrawal of Request for Reasonable Reimbursement Methodology
Voter Identification Procedures (03-TC-23)
County of San Bernardino, Claimant
Statutes of 2000, Chapter 260
Elections Code Section 14310

and

CLAIMANT'S REVISED
PROPOSED PARAMETERS AND GUIDELINES

Elections Code Section 14310
Statutes 2000, Chapter 260 (SB 414)

Voter Identification Procedures

03-TC-23

County of San Bernardino, Claimant

and

CLAIMANT'S REVISED
PROPOSED PARAMETERS AND GUIDELINES

Elections Code Section 14310
Statutes 2000, Chapter 260 (SB 414)

Voter Identification Procedures

03-TC-23

by placing a true copy thereof in an envelope addressed to each of the persons listed on the mailing list attached hereto, and by sealing and depositing said envelope in the United States mail at Rancho Cordova, California, with postage thereon fully prepaid.

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 this 28th day of May, 2010, at Rancho Cordova, California.

Declarant

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

Ms. Hasmik Yaghobyan
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Mr. Glen Everroad, Revenue Manager
City of Newport Beach
P. O. Box 1768
Newport Beach, CA 92659-1768

Ms. Janice Lumsden
Secretary of State's Office
1500 11th St.
Sacramento, CA 95814

Mr. Jeff Carosone
Department of Finance
915 L Street, 8th Floor
Sacramento, CA 95814

Mr. Donna Ferebee
Department of Finance
915 L Street,11th Floor
Sacramento, CA 95814

Ms. Susan Genacou
Department of Finance
915 L Street, Suite 1190
Sacramento, CA 95814

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

Ms. Ginny Brummels
State Controller's Office
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Ms. Angie Teng
State Controller's Office
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Ms. Jill Kanemasu
State Controller's Office
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

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

Ms. Jolene Tollenaar
MGT of America
2001 P Street
Suite 200
Sacramento, CA 95811

Exhibit F

JOHN CHIANG
California State Controller
Division of Accounting and Reporting

July 8, 2010

Ms. Nancy Patton
Assistant Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

RE: **Revised Proposed Parameters and Guidelines (P's & G's) and proposed Reasonable Reimbursement Methodology (RRM)**
Voter Identification Procedures (03-TC-23)
Elections Code Section 14310,
Statutes 2000, Chapter 260

Dear Ms. Patton:

The State Controller's Office (SCO) has reviewed the proposed P's & G's and RRM for the Voter Identification Procedures mandate program and has identified several items that need further clarification within the P's & G's.

The RRM as defined in Government Code (GC) section 17518.5 calls for a formula to be developed based upon a representative sample of eligible claimants and actual costs for those claimants. The proposed P's & G's section V. Claim Preparation and Submission A. and B. provide for eligible claimants to either file for costs based upon a RRM rate or to file their actual costs. Since the RRM rate was developed using a large number of representative eligible claimants the SCO recommends that reimbursement be limited to the RRM rate of $1.80 for each provisional absentee ballot processed by the eligible claimant. Eligible claimants should be limited in filing actual costs for one-time activities only since the RRM rate does not include these one-time activities for the first initial year of incurring costs.

The exhibits provided to support the proposed RRM rate of $1.80 reference actual costs, provisional absentee ballot data and surveys for various fiscal years. While the SCO supports the RRM proposed rate the P's & G's do not specifically state the base year of the RRM rate to be

adjusted annually by the Implicit Price Deflator. The base fiscal year for the RRM rate needs to be specifically stated in section V. A. 2. Claim Preparation and Submission of the P's & G's.

Please contact Jay Lal at (916) 324-0256, if you have any questions.

Sincerely,

Jill Kanemasu

JILL KANEMASU, Chief
Bureau of Payments

JK/JL/glb

Exhibit G

DEPARTMENT OF FINANCE

ARNOLD SCHWARZENEGGER, GOVERNOR

915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

July 23, 2010

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

Dear Ms. Higashi:

The Department of Finance (Finance) has reviewed the revised proposed parameters and guidelines (Ps&Gs) and reasonable reimbursement methodology (RRM) submitted by San Bernardino County (claimant) for Claim No. CSM-03-TC-23 "Voter Identification Procedure."

As mentioned in the proposed Ps&Gs, our collaborative effort over the past few years to jointly develop an RRM with the claimant has been unsuccessful. Finance believes the unit time calculations are not representative of the actual signature verification processing time because we estimate the process, inclusive of a second pass, to verify a provisional ballot signature with the signature on the voter's registration affidavit, takes an average of approximately 30 seconds. The claimant, however, proposes an RRM based on a unit time calculation of 1.88 minutes. Our belief is based on our site visits to two local election offices where we observed their signature verification process for provisional ballots. This processing time is also comparable to the RRM rate of 36 seconds as proposed by Bonnie Ter Keurst in her declaration on page 1.

Finance, however, notes that the proposed unit processing time includes additional activities related to managerial reviews for provisional ballot signatures requiring more analysis or researching tasks, e.g., determining if a voter submitted an absentee ballot, prior to the signature verification. These activities are not reasonably necessary to carry out the mandate. As a result, Finance believes that the proposed unit rate of 1.88 minutes does not accurately reflect the signature verification processing time. It also should be noted that the processing time is less than 30 seconds, on average, for local election offices that have automated systems to directly verify the provisional ballot signature.

Finance concludes that an RRM rate would be an efficient way to streamline the reimbursement process; however, we would not support an RRM that is based on unit calculations that are not reasonable based on RRM requirements of Government Code Sections 17518.5 and 17557 subdivision (f), which requires the RRM to balance accuracy with simplicity.

As required by the Commission's regulations, a "Proof of Service" has been enclosed indicating that the parties included on the mailing list which accompanied your June 8, 2010 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 Shelton, Associate Finance Budget Analyst at (916) 445-8913.

Sincerely,

Nona Martinez

NONA MARTINEZ
Assistant Program Budget Manager

Enclosure

Enclosure A

DECLARATION OF CARLA SHELTON
DEPARTMENT OF FINANCE
CLAIM NO. CSM-03-TC-23

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

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

7-23-10
at Sacramento, CA

Carla Shelton

PROOF OF SERVICE

Test Claim Name: Voter Identification Procedure
Test Claim Number: CSM-03-TC-23

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 July 23, 2010, 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, as addressed on the attachment.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 23, 2010 at Sacramento, California.

Tamara Johnson

Commission on State Mandates

Original List Date: 10/8/2003
Last Updated: 3/22/2010
List Print Date: 07/08/2010
Claim Number: 03-TC-23
Issue: Voter Identification Procedures

Mailing Information: Draft Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Ms. Angie Teng
State Controller's Office (B-08)
Division of Accounting and Reporting
3301 C Street, Suite 700
Sacramento, CA 95816

Tel: (916) 323-0706
Fax:

Ms. Hasmik Yaghobyan
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

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Fax: (213) 617-8106

Ms. Jill Kanemasu
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Sacramento, CA 95816

Tel: (916) 322-9891
Fax:

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. Bonnie Ter Keurst
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 West Hospitality Lane
San Bernardino, CA 92415-0018

Claimant
Tel: (909) 386-8850
Fax: (909) 386-8830

Mr. Allan Burdick
MAXIMUS
3130 Kilgore Road, Suite 400
Rancho Cordova, CA 95670

Tel: (916) 471-5538
Fax: (916) 366-4838

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

Tel: (916) 368-9244
Fax: (916) 368-5723

Mr. Leonard Kaye Los Angeles County Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: Fax:	(213) 974-9791 (213) 617-8106
Ms. Janice Lumsden Secretary of State's Office (D-15) 1500 11th Street Sacramento, CA 95814	Tel: Fax:	(916) 653-2328 (916) 653-4795
Mr. Jeff Carosone Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Tel: Fax:	(916) 445-8913
Ms. Donna Ferebee Department of Finance (A-15) 915 L Street, 11th Floor Sacramento, CA 95814	Tel: Fax:	(916) 445-3274 (916) 323-9584
Ms. Ginny Brummels State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 500 Sacramento, CA 95816	Tel: Fax:	(916) 324-0256 (916) 323-6527
Ms. Jolene Tollenaar MGT of America 2001 P Street, Suite 200 Sacramento, CA 95811	Tel: Fax:	(916) 443-9136 (916) 443-1766
Ms. Susan Geanacou Department of Finance (A-15) 915 L Street, Suite 1280 Sacramento, CA 95814	Tel: Fax:	(916) 445-3274 (916) 449-5252
Mr. Glen Everroad City of Newport Beach 3300 Newport Blvd. P. O. Box 1768 Newport Beach, CA 92659-1768	Tel: Fax:	(949) 644-3127 (949) 644-3339
Ms. Juliana F. Gmur MAXIMUS 2380 Houston Ave Clovis, CA 93611	Tel: Fax:	(916) 485-8102 (916) 485-0111

STATE OF CALIFORNIA
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 12, 2011

Mr. Keith Petersen	Ms. Diana McDonough	Ms. Juliana Gmur
SixTen and Associates	Fagen Friedman & Fulfrost LLP	MAXIMUS
P.O. Box 340430	70 Washington Street, Suite 205	2380 Houston Ave
Sacramento, CA 95834-0430	Oakland, CA 94607	Clovis, CA 93611

And Interested Parties and Affected State Agencies (see mailing list)

RE: **Request for Comments**
Regarding Reasonable Reimbursement Methodologies
in Relation to the Following Claims:

Behavioral Intervention Plans, CSM 4464
San Diego Unified School District, San Joaquin County Office of Education and Butte County Office of Education, Claimants

Habitual Truants, 09-PGA-01, 01-PGA-06 (CSM-4487 and CSM-4487A)
San Jose Unified School District, Requestors

Voter Identification Procedures, 03-TC-23
County of San Bernardino, Claimant

Dear Mr. Petersen, Ms. McDonough, and Ms. Gmur:

Thank you for your participation on July 27, 2011 at the prehearing conference conducted by the Commission on State Mandates (Commission) to discuss reasonable reimbursement methodologies (RRMs) as they relate to the above-named matters, and to future requests for RRMs. Staff sought input regarding how "cost efficient," as that term is used in Government Code section 17518.5, should be applied to proposed RRMs. The participants in the prehearing conference provided helpful input on this issue and into the draft staff analysis on the proposed parameters and guidelines amendment for the *Habitual Truants* program. The draft staff analysis was issued on June 9, 2011. Subsequent to the prehearing, Commission staff reviewed the draft staff analysis based on the input received and now seeks briefing on the following questions:

1. Government Code section 17518.5(a) states: "Reasonable reimbursement methodology" means a formula for reimbursing local agencies and school districts for costs mandated by the state, as defined in Section 17514." Section 17514 states: "'costs mandated by the state' means any increased costs which a local agency or school district is required to incur" to fulfill the requirements of a state mandate.

   The California Constitution and section 17514 require that each local agency be reimbursed for its mandated costs. An RRM is a tool to facilitate the reimbursement process. Staff believes it is constitutionally permissible to develop an RRM unit cost that reasonably reimburses each local agency even if

some local agencies receive more and some local agencies receive less than the RRM unit cost. The Commission recently found in the *Municipal Stormwater* program that the RRM unit cost of $6.74 was reasonable even though the unit costs used to develop that figure ranged from a low of $2.02 to a high of $14.46. The Commission implicitly found that $6.74 was a constitutionally permissible figure even though one claimant whose figures were used to calculate the RRM figure had actual costs of $14.46. Under the RRM, that claimant would be entitled to less than half of its actual costs.

Question: At some point is the range of figures used to develop the unit cost so wide that it violates the constitutional requirement that local agencies be reimbursed for their mandate-related costs?

2. Government Code section 17518.5(c) states: "A reasonable reimbursement methodology shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner."

   Question 1: How should "cost-efficient" be defined?

   Question 2: What does this section require be cost-efficient? Stated another way, what does a requestor need to show to demonstrate that its proposed RRM unit cost meets the requirement of section 17518(c)?

We invite all parties, interested parties, and interested persons to submit comments on these questions or any related issues by Wednesday, **September 2, 2011**.

Please contact me at (916) 323-3562 if you have questions.

Sincerely,

Drew Bohan
Executive Director

Exhibit I

Fagen Friedman & Fulfrost LLP

70 Washington Street, Suite 205
Oakland, California 94607
Main: 510-550-8200
Fax: 510-550-8211
www.fagenfriedman.com

Diana McDonough
Direct Dial: 510-550-8208
dmcdonough@fagenfriedman.com

December 20, 2011

Ms. Nancy Patton
Acting Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: **Co-Claimants' Response to the Commission on State Mandates' August 12, 2011 Request for Comments**
Behavioral Intervention Plans, CSM 4464
Chapter 959, Statutes of 1990
Education Code Section 56523
Title 5, California Code of Regulations section 3001 and 3052

Dear Ms. Patton:

This letter is in response to the Commission on State Mandates' ("Commission") correspondence dated August 12, 2011, in which the Commission invited Behavioral Intervention Plans Claimants San Diego Unified School District, San Joaquin County Office of Education, and Butte County Office of Education (collectively, "Co-Claimants") to submit comments to three questions related to reasonable reimbursement methodologies ("RRM") under Government Code section 17518.5. Co-Claimants respectfully request that this response also be included in the record of CSM 4464. We respond to each question in turn.

Question 1: *At some point is the range of figures used to develop the unit cost so wide that it violates the constitutional requirement that local agencies be reimbursed for their mandate-related costs?*

The Constitution requires that the State reimburse local agencies for their mandated costs. The Legislature has enacted a scheme to implement this constitutional provision which includes empowering the Commission to adopt an RRM when it adopts parameters and guidelines for reimbursement. If the Commission adopts an RRM, it is required to consult with the affected

Received
December 20, 2011
Commission on
State Mandates

parties to consider an RRM that balances accuracy with simplicity. The RRM must be based on representative cost information and consider variation in costs to implement the mandate in a cost efficient manner. If those requirements are met, the resulting RRM is presumed constitutional.

1. The Constitution requires reimbursement of state mandates. Under the California Constitution, local agencies *must* be reimbursed for their mandate-related costs. Article XIII B, section 6, subdivision (a) of the California Constitution 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 . . .[.]" In *California School Boards Association v. State*, the California Court of Appeal recently considered this provision, stating, "This reimbursement obligation was 'enshrined in the Constitution . . . to provide local entities with the assurance that state mandates would not place additional burdens on their increasingly limited revenue resources.'" (*California Sch. Boards Assn. v. State* (2011) 192 Cal.App.4th 770, 785 (*CSBA*), citing *Lucia Mar Unified Sch. Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6, 244; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1282.)

2. The Legislature created a statutory scheme to implement the constitutional requirement of mandate reimbursement and courts presume that scheme is consistent with the Constitution. In 1984, the Legislature enacted Government Code sections 17500 and following to implement the constitutional requirement of reimbursing local agencies and school districts for state mandates.

> * * *
>
> 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. 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 Constitution. (Gov. Code, § 17500.)

The action of the Legislature in creating this scheme is presumed to be constitutional and to date, no court has found to the contrary:

> [A] court must presume the Legislature acts consistent with the Constitution when enacting legislation, and we must adopt an interpretation that upholds the statute's constitutionality, if the interpretation is consistent with the statutory language and purpose. (*CSBA*, *supra*, 192 Cal.App.4th at 795.)

Received
December 20, 2011
Commission on
State Mandates

In *CSBA*, the California Court of Appeal considered section 6 of Article XIII B and one of the statutes enacted to implement it. (*CSBA, supra*, 192 Cal.App.4th 770.) There the Court of Appeal held that the State's practice of nominally funding state mandates with the intention to defer full payment with interest to a later, unspecified date, does not satisfy the applicable constitutional and statutory provisions. (*Id.* at 790.) Rather the court found that "section 17561, subdivision (a)'s statement that 'all' costs must be reimbursed by the State is a clear statutory directive requiring full payment once a mandate is determined by the Commission . . . An interpretation of section 17561 that would allow partial payments would render the word 'all' superfluous." (*Id.* at 789.) In reaching this decision, the court gave weight to the presumption discussed above – namely that the "court must presume that the Legislature acts consistent with the Constitution when enacting legislation" – "and uphold[] the statute's constitutionality, if the interpretation is consistent with the statutory language and purpose." (*Id.* at 795.)

3. The Legislature's authorization of use of an RRM with minimal requirements is presumed to be constitutional. The Legislature has chosen to permit reimbursement through use of an RRM with minimal requirements. An RRM, 1) is a formula, 2) is based on representative cost information, 3) considers variation in costs, and 4) balances accuracy with simplicity, as follows:

--1) The RRM is "a formula for reimbursing local agencies and school districts for costs mandated by the state, as defined in Section 17514." (Gov. Code, § 17518.5, subd.(a).)

--2) An RRM "shall be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or other projections of local costs." (Gov. Code, § 17518.5, subd.(b).)

--3) An RRM "shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner." (Gov. Code, § 17518.5, subd.(c).)

--4) The Commission "shall consult with the Department of Finance, the affected state agency, the Controller, the fiscal and policy committees of the Assembly and Senate, the Legislative Analyst, and the claimants to consider a reasonable reimbursement methodology that balances accuracy with simplicity." (Gov. Code, §17557, subd.(f).)

This minimal list of requirements makes it clear that the Legislature has authorized standardized reimbursement for a broad range of costs based on the particular mandate and the particular sources of cost information available. As long as the statutory requirements listed above are met there is no range of figures so wide as to violate constitutional requirements. In fact, no doubt with an eye towards expediting the process, "[W]henever possible" an RRM "shall be based on

Received
December 20, 2011
Commission on
State Mandates

general allocation formulas, uniform cost allowances, and other approximations of local costs . . . rather than detailed documentation of actual local costs." (Gov. Code, § 17518.5, subd.(d).)

By allowing local agencies to use RRMs, the Legislature contemplates that some local agencies will receive more than their actual costs, and some local agencies will receive less. As the Commission's August 12, 2011 letter notes, the Commission has already determined an RRM reasonably reimburses each local agency even if, when applied, some local agencies receive more and some local agencies receive less than the actual costs incurred. Specifically, in Municipal Stormwater and Urban Runoffs, the Commission found $6.74 was a reasonable level of reimbursement under an RRM even though actual costs ranged from $2.02 to $14.46. Applying the approved RRM, some agencies were entitled to over three times their actual costs while others received less than half their actual costs.

Does a standardized reimbursement level, an RRM, contradict the statutory mandate discussed by the Court of Appeal above that "all costs" be reimbursed by the state? We believe the answer is no. Rather the RRM is to be interpreted consistent with the rules of statutory construction which require harmonization of all parts of a legislative scheme to achieve the overall purpose – here the expeditious reimbursement of local agencies and school districts for mandated costs. As the Court of Appeal quoted with approval in *CSBA*:

> "The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. (CSBA, supra, 192 Cal.App.4th at 795, citing *Los Angeles Unified Sch. Dist. v. County of Los Angeles* (2010) 181 Cal App.4th 414, 423.)

One good faith method of harmonization is to adopt an RRM that will reimburse the estimated total costs of all school districts and agencies statewide to implement the mandate in a cost efficient manner although it will not necessarily reimburse the actual costs of each individual entity.

4. The initial enactment of the RRM language and its subsequent amendment evidence the Legislature's conclusion that levels of mandate reimbursement may range widely and still be constitutional. Prior to 2004, RRMs did not exist. In 2004, the Legislature amended Section 17557 subdivision (b) to substitute "reasonable reimbursement methodology" for "allocation

Received
December 20, 2011
Commission on
State Mandates

formula" or "uniform allowance."[1] Amended Section 17557, subdivision (b) reads: "In adopting parameters and guidelines, the commission may adopt a reasonable reimbursement methodology." At the same time, Section 17518.5 was added to the Government Code, which required RRMs to meet certain conditions, including the following: "The total amount to be reimbursed statewide is *equivalent* to total estimated local agency and school district costs to implement the mandate in a cost-efficient manner;" and "For *50 percent or more* of eligible local agency and school district claimants, the amount reimbursed is estimated to *fully offset their projected costs* to implement the mandate in a cost-efficient manner." (Gov. Code, § 17518.5, subd.(a)(1)&(2) (2004), *emphasis added.*)

The 50% requirement makes it clear that in 2004 the Legislature had authorized reimbursement that would be quite different from actual costs for claimants – allowing for the possibility that 50% of claimants would be over-reimbursed and 50% would be under-reimbursed. However, in 2007 both of these requirements were eliminated and replaced by subdivisions (b) and (c).

Since 2007, the current requirements for RRMs are considerably less specific and more flexible than the former requirements. Now, there is *no* requirement that a minimum percentage of claimants' projected costs be fully offset or that the total amount to be reimbursed statewide covers the total of local estimated costs. Since 2007, Section 17518.5 requires only that RRMs "be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or other projections of local costs," and that the RRM "consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner." (Gov. Code, § 17518.5, subds.(b)&(c) (2007).) In other words, the statute expressly contemplates variation and leaves open the possibility for a potentially large degree of variation in the costs offset.

Not only does Section 17518.5 subdivision (c) intentionally leave open the possibility for cost variation underlying the RRM, it also only requires that the RRM *consider* the variation in costs. The Legislature's amendment of Section 17518.5 to impose less stringent requirements coupled with the fact that variation of costs is assumed in the section's language, demonstrates legislative intent to allow RRMs even when the underlying costs reflect significant variation. Cost variation

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[1] We believe the term "reasonable reimbursement methodology" should be given special attention. "Reasonable reimbursement methodology" is frequently interchanged with "unit cost" which we believe is inconsistent with current law. An RRM is a "formula" and while it may include a unit cost, it suggests a system that is much more general and flexible than one based on "unit cost." (Gov. Code, § 17518.5, subd.(a).)

is not a bar to the use of RRMs nor is there any provision requiring that cost variation be within certain limits. As set out in Co-Claimants' Rebuttal to Finance's Comments, variation is only relevant to determine what a reasonable *level* of reimbursement is for an RRM – presumably one at or near the average, as Co-Claimants propose in the BIP context – not *whether* the use of an RRM is appropriate in the first place.[2]

5. The Legislature's timing in enacting the statute which authorizes RRMs shows its intent to apply RRMs to claims that require extensive retroactive reimbursement. As noted above, in 2004, the Legislature amended Section 17557 subdivision (b) to substitute "reasonable reimbursement methodology" for "allocation formula" or "uniform allowance." This amendment closely followed, and was likely spurred by, the 2003 change in law which limited test claims to mandates going back only three years and prompted a large number of filings in 2002 and 2003. (See Commission on State Mandates Backlog Reduction Plan, p.2, May 25, 2011, excerpts attached hereto as Exhibit A.) As a result local agencies and school districts filed 51 test claims in 2002 and 23 test claims in 2003 to preserve claims for mandates going as far back as 1975. (*Id.*) These larger and more complicated test claims contributed to the Commission's backlog, the effects of which are still felt today. Out of the Commission's backlog of 51 test claims (as of May 2011), 12 are from 2002 and 12 are from 2003. (*Id.*) The introduction of RRMs into the mandate process simplified the onerous task of reimbursement for large claims involving many years of retroactivity. The fact that the Legislature enacted the process just when such claims were filed suggests that it saw the RRM as a tool in those cases.

Why does an RRM make particular sense in cases where the claim goes back a number of years? In such a case, local agencies and districts do not have records to show actual costs. However, an RRM, based on costs incurred in a recent year, can be developed with accuracy. Without an RRM, local agencies and school districts would be forced to forgo reimbursement, to base claims on pure speculation or undertake a burdensome, likely fruitless, effort to substantiate claims. In such a case, an RRM, which may be based on a wide range of costs but meets the statutory requirements, furthers the constitutional intent of reimbursing school districts and local agencies for state-imposed mandates in a rational way.

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[2] Co-Claimants incorporate by reference their October 14, 2011 Rebuttal to Finance's Comments (hereafter "Rebuttal").

Received
December 20, 2011
Commission on
State Mandates

Question 2: *How should "cost-efficient" be defined?*

"A reasonable reimbursement methodology shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost efficient manner." (Gov. Code, § 17518.5(c).) The Legislature did not define "cost-efficient." The Commission has the power to determine what "cost-efficient" means. As the agency charged with interpreting and implementing the statutes and regulations governing state mandates and RRMs, the Commission's interpretation of "cost-efficient" "is entitled to consideration and respect by the courts." (*Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 6, 7.)

Since the Legislature stated that an RRM shall consider the "variation in costs" "to implement the mandate in a cost efficient manner," we can conclude that it believed variation in costs provides information regarding what is cost efficient. Considering variation, we believe, means that the Legislature concluded that a mandate implemented at a middle cost, not at a high cost and not at a low cost, was a mandate implemented with cost efficiency. This approach allows for mandate implementation in an adequate, but not extravagant, manner. If the state reimbursed at the average cost level it would be meeting its constitutional obligation.

Question 3: *What does this section require be cost-efficient? Stated another way, what does a requestor need to show to demonstrate that its proposed RRM unit cost meets the requirement of section 17518.5(c)?*

Government Code section 17518.5, subdivision (c) states: "A reasonable reimbursement methodology shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner." The express language of the statute assumes that "cost-efficient" implementation for one local agency will vary from "cost-efficient" implementation for another. As we do not believe there can be one definition for "cost-efficient" with respect to mandate implementation, it follows that there is no single way for a requestor to show that its proposed RRM meets the requirement of Section 17518.5(c).

However, we believe one straightforward manner to use variation to ensure cost-efficiency is to base an RRM on an average weighted by ADA. With this approach, 1) the average cost per item in a given district or agency is multiplied by the number of students, or other relevant multiplier, 2) the products of these calculations are totaled, and 3) the sum is divided by the total number of students (or other relevant multiplier) to reach the RRM. In this manner the RRM is neither set at the top, nor the bottom. Thus the highest cost districts are reimbursed below their costs requiring them to be more efficient if possible and the lowest cost districts are reimbursed above their costs encouraging their fuller implementation of the mandate.

Received
December 20, 2011
Commission on
State Mandates

We hope that this response is helpful to the Commission. If we can provide any further briefing or information please do not hesitate to contact us.

Sincerely,

FAGEN FRIEDMAN & FULFROST, LLP

Diana McDonough

Melanie Seymour

Attachment

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December 20, 2011
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EXHIBIT A

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December 20, 2011
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Commission on State Mandates
Backlog Reduction Plan

A Comprehensive Plan Prepared by Staff
to Complete All Pending Claims

May 25, 2011

I. Executive Summary

As of May 25, 2011, the Commission on State Mandates (Commission) has a backlog of 51 test claims and 163 incorrect reduction claims. The Commission has pledged to develop a strategy to reduce the backlog of incorrect reduction claims. This document sets forth staff's plan to reduce the backlog of both test claims and incorrect reduction claims. The plan describes several tools Commission staff plan to employ to reduce the backlog as expeditiously as possible. The plan contemplates presenting all of the most complicated test claims (the 2002 and 2003 claims) to the Commission for decision by the end of fiscal year 2011-2012, and all backlogged test claims by 2014. Of the 163 pending incorrect reduction claims, 102 involve just two programs. Commission staff believe by working closely with the State Controller's Office and the claimant community, the backlog of IRCs could also be eliminated by 2014.

II. Overview

Local agencies and school districts are authorized by law to file test claims with the Commission alleging that a statute or executive order imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. If the Commission finds that there is a reimbursable state-mandated program, the Commission is required to determine the amount to be subvened by adopting parameters and guidelines for the program. The State Controller's Office (Controller) then prepares and issues claiming instructions to local agencies and school districts to notify them of the right to file reimbursement claims for the fiscal years eligible for reimbursement.

Local agencies and school districts may then file reimbursement claims with the Controller for the reimbursement of state-mandated costs. The Controller is authorized to reduce reimbursement claims it deems excessive or unreasonable. If the Controller reduces a reimbursement claim, a local agency or school district may file an incorrect reduction claim (IRC) with the Commission alleging that the Controller incorrectly reduced the claim. The Commission is required to hear these claims and determine if they were incorrectly reduced.

Despite having a small staff of only about 11 employees, the Commission over the last decade has completed a substantial amount of work. Between fiscal years 2003-2003 and 2009-2010, the Commission decided a total of 146 test claims, reconsidered another 17 test claims, adopted or set aside184 parameters and guidelines (and parameters and guidelines amendments), adopted 55 statewide cost estimates, and decided 86 incorrect reduction claims. In addition, Commission staff during this time worked on numerous litigation matters and on a host of special projects such as the mandate reform process and the audits performed by the Bureau of State Audits.

Nevertheless, over time, a backlog of claims has accumulated. Preparing staff analyses for test claims and IRCs is the most time-consuming activity for Commission staff and is the primary area the Commission needs to focus on in order to reduce the backlog. The oldest test claims were filed in 2002 and 2003. Collectively, those claims are much larger and more complicated than claims from any subsequent year because in 2003 the law was amended to only allow claimants to allege mandates going back three years. Prior to this amendment, claimants could allege mandates going all the way back to 1975. This amendment caused local agencies and school districts to file 51 test claims for 2002 and 23 for 2003. These test claims allege that nearly 500 statutes and 400 regulatory sections and executive orders are mandated programs. As of May25, 2011, 12 test claims from 2002 and 12 from 2003 are still pending with the Commission.

The Commission also has 163 pending IRCs. In October 2009, the Bureau of State Audits published a report (BSA 2009 Report[1]) regarding the Commission on State Mandates. The BSA paid particular attention to IRCs and recommended that the Commission accelerate its efforts to complete IRCs. The report stated:

> Until the incorrect reduction claims are resolved, the Controller may continue to make similar field-audit reductions that are reversed later by the Commission. Conversely, if the Commission ultimately finds the Controller's reductions to be correct, local entities will have continued to submit inappropriate claims until the time the Commission makes its decision. Either way, speedier resolution of outstanding incorrect reduction claims would allow the Controller to conduct audits with an awareness of the Commission's decisions and to incorporate those results into its audit findings and outreach efforts. (BSA 2009 Report, p. 40.)

In its September 15, 2010 Report[2] to the Director of the Department of Finance, the Commission stated that it would prepare a plan to reduce and ultimately eliminate the backlog of IRCs. Because the Commission has limited staff resources, if staff shifts its efforts from test claims to IRCs, the time it will take to reduce the test claim backlog will increase, and vice versa. Accordingly, Commission staff decided to assemble a plan to comprehensively address the problem by focusing both on IRCs and test claims. This document represents that plan, and is divided into three sections. The first section describes the nature of the backlog, with tables that illustrate the types of claims before the Commission. The second section describes the challenges Commission staff faces in trying to reduce this backlog. The third section articulates Commission staff's plan to reduce and ultimately eliminate the backlog.

III. Backlog of Claims

The Commission's pending caseload consists of matters filed by claimants and state agencies, including test claims, incorrect reduction claims, parameters and guidelines and proposed

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[1] The full title of the report is *State Mandates: Operational and Structural Changes Have Yielded Limited Improvements in Expediting Processes and in Controlling Costs and Liabilities, October 2009, Report 2009-501.* It can be found at http://www.bsa.ca.gov/pdfs/reports/2009-501.pdf

[2] This document can be found at http://www.csm.ca.gov/docs/091510b.pdf

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
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E-mail: csminfo@csm.ca.gov

February 3, 2012

Ms. Juliana Gmur
MAXIMUS
2380 Houston Avenue
Clovis, CA 93611

Ms. Diana McDonough
Fagen Friedman &Fulfrost LLP
70 Washington Street, Suite 205
Oakland, CA 94607

Mr. Keith Petersen
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Mr. Leonard Kaye
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Mr. Ed Jewik
County of Los Angeles
auditor-Controller's Office
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Los Angeles, CA 90012

And Interested Parties and Affected State Agencies (see mailing list)

RE: **Draft Staff Analysis, Proposed Parameters and Guidelines, Schedule for Comments, and Notice of Hearing**
Proposed Parameters and Guidelines and Reasonable Reimbursement Methodology
Voter Identification Procedures, 03-TC-23
Elections Code Section 14310, Statutes 2000, Chapter 260
County of San Bernardino, Claimant

Dear Ms. Gmur, Ms. McDonough, Mr. Petersen, Mr. Kaye, and Mr. Jewik:

Enclosed are the draft staff analysis and proposed parameters and guidelines for the *Voter Identification Procedures* program for your review. I am sending this analysis to each of you and requesting that you review it because it analyzes evidence required pursuant to Government Code section 17518.5 that will also relate to your pending proposed reasonable reimbursement methodologies.

Comment Period

Any party or interested person may file written comments on the draft staff analysis and proposed parameters and guidelines by **February 23, 2012.** You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Please see http://www.csm.ca.gov/dropbox.shtml on the Commission's website for instructions on electronic filing. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01(c)(1) of the Commission's regulations.

Hearing

This matter is tentatively set for hearing on **Friday. March 23, 2012,** at 11:00 a.m., State Capitol, Room 447, Sacramento, California. The final staff analysis will be issued on or about March 9, 2012. Please let us know in advance if you or a representative of your agency will

testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01(c)(2) of the Commission's regulations.

Please contact Camille Shelton at (916) 323-3562 if you have any questions.

Sincerely,

Nancy Patton
Acting Executive Director

JOHN CHIANG
California State Controller
Division of Accounting and Reporting

February 21, 2012

Ms. Nancy Patton
Acting Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Proposed Parameters and Guidelines
Voter Identification Procedures, 03-TC-23
Elections Code Section 14310(c)(1)
Statutes 2000, Chapter 260
County of San Bernardino, Claimant

Dear Ms. Patton:

We have reviewed the proposed parameters and guidelines drafted by your office. Below are our comments and recommendations. Proposed additions are underlined and deletions are indicated with strikethrough as follows:

I. SUMMARY OF THE MANDATE

Page 21

On October 4, 2006, the Commission on State Mandates (Commission) adopted a statement of decision finding that the test claim statute mandates a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for performing the following specific new activity as part of statutorily-required elections:

The Commission further found ~~concluded~~ that in a case where a local government…

COMMENT: Please add section 6 for correct reference and remove "concluded".

II. ELIGIBLE CLAIMANTS

Page 21

Any city, county, ~~and~~ or city and county that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement ~~of those costs~~.

COMMENT: Please change "and" to "or" and delete "of those costs".

IV. REIMBURSABLE ACTIVITIES

Page 22

Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, time sheets, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, and declarations.

COMMENT: Please add "and" and "time sheets". Time sheets should be included as a source document.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Page 27

Any ~~offsets~~ offsetting revenues the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed.

COMMENT: Please change "offsets" to "offsetting revenues" for consistency.

Should you have any questions regarding the above, please contact Carlos Garcia at (916) 323-0766, or e-mail to cegarcia@sco.ca.gov.

Sincerely,

JAY LAL, Manager
Local Reimbursements Section

Exhibit L

RECEIVED
February 23, 2012
Commission on
State Mandates

DEPARTMENT OF FINANCE
EDMUND G. BROWN JR. • GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

February 23, 2012

Ms. Nancy Patton
Acting Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Patton:

Draft Staff Analysis on Proposed Parameters and Guidelines (03-TC-23) "Voter Identification Procedures – San Bernardino County."

The Department of Finance (Finance) has reviewed the draft staff analysis of the proposed Parameters and Guidelines (Ps&Gs) for the Voter Identification Procedures mandate submitted by San Bernardino County (claimant). Finance concurs with the Commission staff recommendation to deny the proposed unit cost reasonable reimbursement methodology and to adopt Ps&Gs based on the actual cost incurred by the claimant that is specific to the single reimbursable activity identified in the statement of decision.

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

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

Sincerely,

Nona Martinez

NONA MARTINEZ
Assistant Program Budget Manager

Enclosure

Enclosure A

DECLARATION OF JEFF CAROSONE
DEPARTMENT OF FINANCE
CLAIM NO. 03-TC-23

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

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

2-23-12
at Sacramento, CA

Jeff Carosone
Jeff Carosone

Exhibit M

RECEIVED
February 23, 2012
Commission on
State Mandates

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Diana McDonough
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February 23, 2012

Nancy Patton
Acting Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Comments to Draft Staff Analysis and Proposed Parameters and Guidelines
Voter Identification Procedures 03-TC-23

Dear Ms. Patton:

Behavioral Intervention Plans (CSM 4464) Claimants San Diego Unified School District, San Joaquin County Office of Education, and Butte County Office of Education (collectively, "BIP Claimants") hereby submit comments to the Commission on State Mandates' February 3, 2012 draft staff analysis and proposed parameters and guidelines (hereafter, "DSA") regarding Voter Identification Procedures (03-TC-23) (hereafter, "VIP").

BIP Claimants have not reviewed the declarations and spreadsheets which are the subject of the DSA regarding the RRM for VIP and therefore do not speak authoritatively as to how staff's analysis should apply in the VIP case. However, the DSA is troubling regarding RRMs in general because: 1) the emphasis and focus on *actual* costs incurred exceeds the statutory and regulatory standards allowing "projections" and "other approximations" of costs based on surveys and letters of support "rather than detailed documentation of actual costs"; 2) an evidentiary standard that would require each and every survey respondent to submit statements under oath of actual costs incurred is inconsistent with principals of fundamental fairness; 3) the rigid evidentiary standard proposed impedes the Commission's mission of implementing the constitutional requirement that local agencies be reimbursed for costs mandated by the State.

BIP Claimants also request guidance regarding the evidence required to support a finding that an RRM reasonably represents an agency's actual costs, as well as an opportunity to amend filings to provide conforming evidence.

1. An RRM is required to reasonably represent actual costs.

The RRM statutes which staff are applying are replete with references to "approximations," "projections of local costs," and "accuracy balanced with simplicity." These references all support the view that the Legislature specifically intended to base reasonable reimbursement methodologies on items such as surveys, and not on sworn statements of actual costs, as the DSA suggests. The actual statutory wording runs counter to the DSA's exacting interpretation.

The DSA states, "The proposed unit cost must ... result in a reasonable representation of the actual costs incurred by any eligible claimant to comply with the mandated program." (DSA, p.16.) In focusing on "actual costs" to the exclusion of other relevant language – that is, "reasonably represents" – the DSA holds claimants to a higher standard than that required by Government Code section 17518.5. In so doing, the DSA has opted for the Legislature's interest – continuing to require mandates which it does not fund – rather than the Constitution's interest of seeing that costs are actually paid for.

Although an RRM must reasonably represent actual costs, what in fact constitutes an agency's "actual cost" may be ascertained by approximations and other projections. Indeed, the Legislature's own language – that an RRM balance accuracy with simplicity – means that it anticipated and authorized reimbursement that was not for "actual" costs. (Gov. Code, §17557(f).) Government Code section 17518.5 only requires that the RRM be "based on cost information from a representative sample...or projections of other local costs," and further provides that "whenever possible," the RRM "shall be based on general allocation formulas, uniform cost allowances, and other approximations of local costs...rather than detailed documentation of actual costs." (Gov. Code, §17518.5, emphasis added.)

One of Section 17518.5's implementing regulations confirms that an RRM may be based on something less than evidence of *actual* costs: "An interested party may submit cost information or other cost projections that can be the basis of a reasonable reimbursement methodology, and letters in support of a draft reasonable reimbursement methodology...[.]" 2 C.C.R. §1183.13(b)(2). This same regulation also contemplates the use of surveys to gather data to "develop a formula." 2 C.C.R. §1183.13(b)(3). Both the statutes and the regulation cited would be nullities if the Commission requires local agencies to first determine *actual* costs before proposing an RRM.

In requiring a determination of actual costs before determining what constitutes a reasonable representation of mandated costs, the DSA ignores the very reason the Legislature enacted Government Code section 17518.5 – "to reduce local costs to file claims, reduce state costs to process and audit claims, and reduce disputes regarding mandate claims and appeals to the Commission regarding State Controller claim reductions." (DSA, p.12, citing "State-Local Working Group Proposal to Improve the Mandate Process," Legislative Analyst's Office, June 21, 2007, p.3.) Requiring evidence of *actual* costs rather than reasonable representations of actual costs – determined by approximations or projections – would have the opposite effect of reducing local and state costs related to the filing of claims.

2. **The standard which the DSA announces - that survey evidence shall not be admissible to support an RRM unless each agency participating in the survey submitted its information under oath - is inconsistent with fundamental fairness.**

There is nothing in the Commission's regulations to give notice to claimants that submissions regarding the RRM must be based on sworn statements of costs. Notice is an essential component of fairness, particularly here where the Commission's interpretation is so different from the statutory wording and from the LAO discussions which the Commission itself cites. At this late date, claimants are woefully prejudiced if held to such a standard.

We believe public agencies have spent increasingly scarce resources developing and executing detailed surveys of costs to support reasonable reimbursement methodologies. Many of these surveys, including the survey completed by the BIP claimants over five years ago and which took months to complete and analyze, cannot be replicated. It may also prove very difficult to locate survey respondents after the fact to request declarations under penalty of perjury – some individuals may no longer work for the same agency or they may have retired or moved out of state. Thus in our view if the Commission plans to require documentation of actual costs under oath to support RRMs, it should propose a regulation to that effect and apply the rule only prospectively.

3. **The DSA's narrow interpretation of permissible evidence impedes, rather than facilitates, the Commission's mission.**

The Commission's mission -- its constitutional mandate -- is to see that the state reimburses each local agency and school district for all costs mandated by the state. The more labored and exacting the Commission's decisions are, the longer this process takes and the more likely it is that local agencies will never be reimbursed at all. The purpose of the RRM was to expedite reimbursement of expenses to local agencies. Evidentiary determinations which the Commission makes should be reached with an eye to accomplishing that goal, unless inconsistent with law.

Here the DSA requires evidence under oath contrary to a plain reading of the statute because the staff fears that courts will overturn an RRM based on a lesser standard. In defense the staff cites a number of recent lawsuits where the courts overturned Commission decisions because the decision was not based on appropriate evidence. (p. 18, note 30.) The only reported case cited, *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, does not apply to an RRM, a statute which specifically authorizes "information from associations, projections of local costs, and "approximations of local costs..., rather than detailed documentation of actual costs...." The Commission risks challenge whenever it acts. It would seem preferable to err in an effort to implement the statute rather than in one to impede it.

Conclusion

The duty of the Commission is to make difficult decisions and to move along the business of the government. Imposing standards that exceed statutes and regulations does precisely the opposite. The VIP DSA sends a strong message that reimbursement for claimants who have been waiting for years, sometimes decades, to be reimbursed for costs mandated by the state, will continue to remain elusive.

Therefore, BIP Claimants respectfully request further guidance from the Commission regarding the evidence required for a finding that an RRM reasonably represents actual costs, as well as an opportunity to amend its filings to provide declarations or otherwise conform to the newly-announced evidentiary standard.

Sincerely,

FAGEN FRIEDMAN & FULFROST, LLP

Diana McDonough /mds
Diana McDonough

Melanie D. Seymour
Melanie D. Seymour

DKM/MDS:MDS
00334.00100/333823.1

192 Cal.App.4th 770, 121 Cal.Rptr.3d 696, 265 Ed. Law Rep. 347, 11 Cal. Daily Op. Serv. 1923, 2011 Daily Journal D.A.R. 2308
(Cite as: 192 Cal.App.4th 770, 121 Cal.Rptr.3d 696)

H

Court of Appeal, Fourth District, Division 1, California.
CALIFORNIA SCHOOL BOARDS ASSOCIATION et al., Plaintiffs and Appellants,
v.
STATE of California et al., Defendants and Appellants.

No. D055659.
Feb. 9, 2011.
Rehearing Denied Mar. 8, 2011.
Review Denied May 18, 2011.

Background: School districts brought action against state for declaratory, injunctive, and writ relief challenging mandates imposed on districts by California Legislature with only nominal funding, and requested reimbursement. The Superior Court, San Diego County, No. 37-2007-00082249-CU-WM-CTL,Charles R. Hayes, J., granted the requested relief, except that it refused to order reimbursement or to permit further discovery on that issue. Districts and state appealed.

Holdings: The Court of Appeal, Haller, J., held that:
(1) state's practice of only nominally funding mandates imposed on school districts did not satisfy state constitution; but
(2) adequate remedy at law precluded mandamus relief for state's failure to satisfy constitution;
(3) Legislature's funding of mandates imposed upon local agencies is discretionary;
(4) writ of mandate directing Legislature to fund mandates violated separation of powers doctrine; and
(5) denying districts' request to compel state to reimburse funds was proper.

Affirmed in part and reversed in part.

West Headnotes

[1] Schools 345 19(1)

345 Schools
345II Public Schools
345II(A) Establishment, School Lands and Funds, and Regulation in General
345k16 School Funds
345k19 Apportionment and Disposition
345k19(1) k. In general. Most Cited Cases

State's practice of appropriating only a nominal amount to fund mandates imposed on school districts and deferring the remaining payment did not satisfy the constitutional provision requiring the state to fund state mandates imposed upon local agencies, even though the state made payments on the outstanding debt, where the state did not fix a date for full payment. West's Ann.Cal. Const. Art. 13B, § 6(a).

[2] States 360 111

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

Purpose of constitutional provision requiring the state to fund state mandates imposed upon local agencies 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 the state constitution imposes. West's Ann.Cal. Const. Art. 13B, § 6.

[3] States 360 111

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

Under the constitutional provision requiring the state to fund state mandates imposed upon local agencies, if the State wants to require local school districts to provide new programs or services, it is free to do so, but not by requiring local entities to use their own revenues to pay for the programs. West's Ann.Cal. Const. Art. 13B, § 6.

192 Cal.App.4th 770, 121 Cal.Rptr.3d 696, 265 Ed. Law Rep. 347, 11 Cal. Daily Op. Serv. 1923, 2011 Daily Journal D.A.R. 2308
(Cite as: 192 Cal.App.4th 770, 121 Cal.Rptr.3d 696)

[4] States 360 111

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

Purpose of constitutional provision requiring the state to fund mandates imposed upon local agencies is to require each branch of government to live within its means, and to prohibit the state from circumventing this restriction by forcing local agencies such as school districts to bear the state's costs, even for a limited time period. West's Ann.Cal. Const. Art. 13B, § 6.

[5] Statutes 361 220

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k220 k. Legislative construction. Most Cited Cases

A court should not accept later expressed legislative intent if the intent is inconsistent with the plain meaning of the prior act or its legislative history.

[6] Constitutional Law 92 2451

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2451 k. Interpretation of constitution in general. Most Cited Cases

Constitutional Law 92 2457

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2457 k. Interpretation of statutes. Most Cited Cases

The interpretation of a statute or a constitutional provision is an exercise of the judicial power the Constitution assigns to the courts.

[7] States 360 111

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

The statute requiring that "all" costs of state mandates imposed upon local agencies must be reimbursed by the state requires full payment once a mandate is determined by the Commission on State Mandates and any appeals process has been completed. West's Ann.Cal. Const. Art. 13B, § 6; West's Ann.Cal.Gov.Code § 17561(a).

[8] States 360 111

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

Statute allowing State Controller to adjust payments to fund state mandates imposed upon local agencies to correct for any prior underpayments does not authorize the state to make only nominal payments for a mandate. West's Ann.Cal. Const. Art. 13B, § 6; West's Ann.Cal.Gov.Code § 17561(d)(2)(C).

[9] States 360 111

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

The statute providing that an initial reimbursement claim for state mandates imposed upon local agencies "shall include accrued interest if the payment is being made more than 365 days after adoption of the statewide cost estimate for an initial claim" does not provide the Legislature with the authority to implement a policy under which it pays only a nominal amount of a mandated claim. West's Ann.Cal. Const. Art. 13B, § 6; West's Ann.Cal.Gov.Code § 17561.5.

[10] Statutes 361 176

192 Cal.App.4th 770, 121 Cal.Rptr.3d 696, 265 Ed. Law Rep. 347, 11 Cal. Daily Op. Serv. 1923, 2011 Daily Journal D.A.R. 2308
(Cite as: 192 Cal.App.4th 770, 121 Cal.Rptr.3d 696)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k176 k. Judicial authority and duty. Most Cited Cases

The proper interpretation of a statute is a particularly appropriate subject for judicial resolution.

[11] Declaratory Judgment 118A 201

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak201 k. Officers and official acts in general. Most Cited Cases

Judicial economy strongly supports the use of declaratory relief to avoid duplicative actions to challenge an agency's statutory interpretation or alleged policies.

[12] Declaratory Judgment 118A 41

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak41 k. Existence and effect in general. Most Cited Cases

The remedy of declarative relief is cumulative and does not restrict any other remedy.

[13] Declaratory Judgment 118A 41

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak41 k. Existence and effect in general. Most Cited Cases

The fact that another remedy is available is an insufficient ground for refusing declaratory relief.

[14] Declaratory Judgment 118A 65

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(D) Actual or Justiciable Controversy
118Ak65 k. Moot, abstract or hypothetical questions. Most Cited Cases

Declaratory Judgment 118A 83

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(A) Rights in General
118Ak83 k. Nonliability. Most Cited Cases

Declaratory relief is generally available to settle the parties' rights with respect to future actions, and not to correct conduct that occurred in the past.

[15] Declaratory Judgment 118A 210

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak210 k. Schools and school districts. Most Cited Cases

Declaratory relief was a proper remedy for school districts' dispute with state over whether state's practice of paying only a nominal amount for mandated programs while deferring the balance of the cost constituted a failure to provide a subvention of funds for the mandates as required by the state constitution, as there was an actual controversy between the parties regarding the interpretation of the state constitution and a statute, pertaining to the use of deferred mandate payments. West's Ann.Cal. Const. Art. 13B, § 6; West's Ann.Cal.Gov.Code § 17561.

[16] States 360 111

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

If the Legislature identifies a statutory program in the Budget Act as a mandate for which no funding is provided in that fiscal year and specifically relieves school districts of the requirement that they implement the program, the remedy is self-executing in the sense that it does not require any affirmative action by the school district, i.e., if the Legislature makes this specific "nonfunding" designation, each school district is permitted to make its own determination not to im-

plement the mandate. West's Ann.Cal.Gov.Code § 17581.5 (2009).

[17] States 360 111

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

If the Legislature does not fund a determined mandate imposed on a local agency and does not specifically designate the mandate as one for which no funding will be provided, the local agency or school district must perform the mandate, unless it affirmatively obtains relief under the statute authorizing a local agency to file a declaratory relief action to declare an unfunded mandate unenforceable and enjoin its enforcement for that fiscal year. West's Ann.Cal.Gov.Code §§ 17581, 17612(c); § 17581.5 (2009).

[18] States 360 111

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

The remedy under the statute authorizing a local agency to file a declaratory relief action to declare an unfunded mandate unenforceable and enjoin its enforcement for that fiscal year is not self-executing, and requires the local entity to affirmatively seek judicial relief to be excused from the mandate. West's Ann.Cal.Gov.Code § 17612(c).

[19] States 360 111

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

The remedy under the statute authorizing a local agency to file a declaratory relief action to declare an unfunded mandate unenforceable and enjoin its enforcement for that fiscal year affords relief prospectively, and not as to funds previously paid out by a local agency to satisfy a state mandate. West's Ann.Cal.Gov.Code § 17612(c).

[20] Mandamus 250 3(1)

250 Mandamus
250I Nature and Grounds in General
250k3 Existence and Adequacy of Other Remedy in General
250k3(1) k. In general. Most Cited Cases

Statute authorizing a local agency such as a school district to file a declaratory relief action to declare an unfunded mandate unenforceable and enjoin its enforcement for that fiscal year provided an adequate remedy at law for state's failure to satisfy state constitution in paying only a nominal amount to school districts for mandated programs while deferring the balance of the cost, and thus mandamus relief was not appropriate. West's Ann.Cal. Const. Art. 13B, § 6; West's Ann.Cal.Gov.Code § 17612(c).
See Cal. Jur. 3d, Municipalities, § 557; Cal. Jur. 3d, Schools, § 8; Cal. Jur. 3d, State of California, § 106; 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 148; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 119 et seq.

[21] Constitutional Law 92 990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In general. Most Cited Cases

A court must presume the Legislature acts consistent with the Constitution when enacting legislation, and must adopt an interpretation that upholds the statute's constitutionality, if the interpretation is consistent with the statutory language and purpose.

[22] States 360 111

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

Under the statute authorizing a local agency to file a declaratory relief action to declare an unfunded

mandate unenforceable and enjoin its enforcement for that fiscal year, a party is permitted to seek relief for nominal funding as well as a complete lack of funding for a determined state mandate. West's Ann.Cal. Const. Art. 13B, § 6; West's Ann.Cal.Gov.Code § 17612(c).

[23] States 360 111

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

In the statute authorizing a local agency to file a declaratory relief action to declare an unfunded mandate unenforceable and enjoin its enforcement for that fiscal year, the word "deletes" does not refer to the physical act of entirely deleting an item from a budget bill, but refers more generally to the deletion of all or part of the administratively-determined cost from the amount required to be appropriated to the local entity. West's Ann.Cal.Gov.Code § 17612(c).

[24] Appeal and Error 30 768

30 Appeal and Error
30XII Briefs
30k768 k. Scope and effect. Most Cited Cases

A footnote of school districts' appellate brief mentioning the issue in passing was insufficient to present the argument on appeal that the requirement that local entities bring an action every year to seek relief from unfunded mandates was an unreasonable restriction on districts' rights under the constitutional provision prohibiting the Legislature from imposing unfunded mandates on local government, where districts did not cross-appeal from the portion of the trial court's order rejecting this argument. West's Ann.Cal. Const. Art. 13B, § 6; West's Ann.Cal.Gov.Code § 17612(c).

[25] Appeal and Error 30 881.1

30 Appeal and Error
30XVI Review
30XVI(C) Parties Entitled to Allege Error
30k881 Estoppel to Allege Error
30k881.1 k. In general. Most Cited Cases

State's prior agreement to make future payment in full for nominally funded mandates imposed on school district, and its prior position that districts were required to comply with these mandates, would preclude state from arguing that school districts waived claims for reimbursement for prior unpaid mandates by previously failing to seek relief under the statute authorizing a local agency to file a declaratory relief action to declare an unfunded mandate unenforceable and enjoin its enforcement for that fiscal year. West's Ann.Cal. Const. Art. 13B, § 6; West's Ann.Cal.Gov.Code § 17612(c).

[26] States 360 111

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

Under the constitutional provision stating that the state must fund mandates imposed upon local agencies, the Legislature had discretion not to fund such mandates and to require local agencies to seek relief from the mandates, and thus a writ of mandate requiring the Legislature either to fund or suspend such mandates was improperly issued because it compelled a discretionary, not a ministerial, act. West's Ann.Cal. Const. Art. 13B, § 6(a); West's Ann.Cal.Gov.Code § 17612(c); § 17581.5 (2009).

[27] Mandamus 250 12

250 Mandamus
250I Nature and Grounds in General
250k12 k. Nature of acts to be commanded. Most Cited Cases

To obtain writ relief, the petitioner must show the respondent has a clear, present, and ministerial duty to act in a particular way.

[28] Mandamus 250 12

250 Mandamus
250I Nature and Grounds in General
250k12 k. Nature of acts to be commanded. Most Cited Cases

192 Cal.App.4th 770, 121 Cal.Rptr.3d 696, 265 Ed. Law Rep. 347, 11 Cal. Daily Op. Serv. 1923, 2011 Daily Journal D.A.R. 2308
(Cite as: 192 Cal.App.4th 770, 121 Cal.Rptr.3d 696)

A ministerial duty, as required for writ of mandate, is one that is required to be performed in a prescribed manner under the mandate of legal authority without the exercise of discretion or judgment.

[29] Mandamus 250 12

250 Mandamus
250I Nature and Grounds in General
250k12 k. Nature of acts to be commanded. Most Cited Cases

A writ of mandate should not compel action by the Legislature unless the duty to do the thing asked for is plain and unmixed with discretionary power or the exercise of judgment.

[30] States 360 121

360 States
360IV Fiscal Management, Public Debt, and Securities
360k121 k. Administration of finances in general. Most Cited Cases

Under the statute requiring the Legislature to place the cost of determined mandates imposed on local agencies in the annual Budget Bill, doing so was discretionary rather than ministerial, and thus a writ of mandate requiring the Legislature to do so was improperly issued, since placing items in the Budget Bill was a legislative power. West's Ann.Cal.Gov.Code § 17561(b).

[31] States 360 121

360 States
360IV Fiscal Management, Public Debt, and Securities
360k121 k. Administration of finances in general. Most Cited Cases

The formulation of a budget bill, including the items to be placed in the bill, is inherently a discretionary and a legislative power.

[32] States 360 121

360 States
360IV Fiscal Management, Public Debt, and Securities
360k121 k. Administration of finances in general. Most Cited Cases

The budget determination is limited by the Legislature's own discretion, and beyond the interference of courts.

[33] Constitutional Law 92 2525

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2525 k. Taxation and public finance. Most Cited Cases

Mandamus 250 100

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k100 k. Appropriation or other disposition of public money. Most Cited Cases

States 360 111

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

States 360 121

360 States
360IV Fiscal Management, Public Debt, and Securities
360k121 k. Administration of finances in general. Most Cited Cases

Writ of mandate directing the Legislature either to fund or suspend state mandates imposed upon local agencies, and to place the cost of determined mandates imposed on local agencies in the annual Budget Bill, violated California's separation of powers doctrine.

West's Ann.Cal. Const. Art. 13B, § 6(a); West's Ann.Cal.Gov.Code § 17561(b).

[34] Constitutional Law 92 2525

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2525 k. Taxation and public finance. Most Cited Cases

Constitutional Law 92 2560

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)3 Encroachment on Executive
92k2542 Particular Issues and Applications
92k2560 k. Taxation and public finance. Most Cited Cases

States 360 121

360 States
360IV Fiscal Management, Public Debt, and Securities
360k121 k. Administration of finances in general. Most Cited Cases

The enactment of a budget bill is fundamentally a legislative act, entrusted to the Legislature and the Governor and not the judiciary.

[35] Constitutional Law 92 2470

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2470 k. In general. Most Cited Cases

The California Constitution's separation of powers doctrine forbids the judiciary from issuing writs that direct the Legislature to take specific action, including to appropriate funds and pass legislation.

[36] Constitutional Law 92 2525

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2525 k. Taxation and public finance. Most Cited Cases

Under separation of powers principles, a court is prohibited from using its writ power to require an appropriation even if the Legislature is statutorily required to appropriate certain funds.

[37] Constitutional Law 92 2470

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2470 k. In general. Most Cited Cases

The judicial department has no power to revise even the most arbitrary and unfair action of the legislative department, or of either house thereof, taken in pursuance of the power committed exclusively to that department by the constitution.

[38] Constitutional Law 92 2525

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2525 k. Taxation and public finance. Most Cited Cases

Under the California Constitution, the separation of powers doctrine prohibits a court from compelling the Legislature to appropriate funds or to pay funds not yet appropriated.

[39] Constitutional Law 92 2525

192 Cal.App.4th 770, 121 Cal.Rptr.3d 696, 265 Ed. Law Rep. 347, 11 Cal. Daily Op. Serv. 1923, 2011 Daily Journal D.A.R. 2308
(Cite as: 192 Cal.App.4th 770, 121 Cal.Rptr.3d 696)

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2525 k. Taxation and public finance. Most Cited Cases

States 360 130

360 States
360IV Fiscal Management, Public Debt, and Securities
360k129 Appropriations
360k130 k. Necessity. Most Cited Cases

The rule that the separation of powers doctrine prohibits a court from compelling the Legislature to appropriate funds or to pay funds not yet appropriated is subject to a narrow exception when a court orders appropriate expenditures from already existing funds and the funds are reasonably available for the expenditures in question, which means that the purposes for which those funds were appropriated are generally related to the nature of costs incurred, but this exception must be strictly construed and is inapplicable if the existing funds have been appropriated for other purposes.

[40] Mandamus 250 100

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k100 k. Appropriation or other disposition of public money. Most Cited Cases

A trial court has broad discretion to determine whether a mandamus remedy requiring a particular payment from an existing fund is warranted under the totality of the circumstances.

[41] States 360 111

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

Trial court acted within its discretion in denying school districts' request to compel state to reimburse funds spent on mandates imposed by state and only nominally funded, where districts sought more than $900 million in funds from state, the state was experiencing an extreme budget crisis, districts cited only the Proposition 98 reversion fund as an account that could possibly contain funds reasonably related to the nature of costs incurred, appropriations for the budget year at issue were placed in a chartered bill following the Governor's signature on the Budget Act, and districts did not come forward with any predicate facts showing a reasonable basis to believe sufficient funds existed and that the funds would meet the criteria of the exception. West's Ann.Cal. Const. Art. 13B, § 6.

[42] States 360 111

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

Trial court did not abuse its discretion in declining to permit school districts to engage in a wide-ranging discovery investigation in an attempt to identify state funds to pay over $900 million for prior mandates subject to a funding requirement under state constitution, before denying districts' request for an order compelling the state to reimburse such funds, where the state was experiencing an extreme budget crisis with a budget deficit estimated to be more than $20 billion; any money a court would direct to the school districts would reduce funds available for other obligations and implicate funding priorities and policy making decisions. West's Ann.Cal. Const. Art. 13B, § 6.

[43] Evidence 157 29

157 Evidence
157I Judicial Notice
157k27 Laws of the State
157k29 k. Public statutes. Most Cited Cases

Court of Appeal would not take judicial notice of documents containing recently enacted statutes which apparently reflected additional deferred mandates, in school districts' cross-appeal challenging trial court's

192 Cal.App.4th 770, 121 Cal.Rptr.3d 696, 265 Ed. Law Rep. 347, 11 Cal. Daily Op. Serv. 1923, 2011 Daily Journal D.A.R. 2308
(Cite as: 192 Cal.App.4th 770, 121 Cal.Rptr.3d 696)

denial of their request to compel state to reimburse funds spent on mandates imposed by state and only nominally funded, where the documents were not presented to the trial court. West's Ann.Cal. Const. Art. 13B, § 6.

[44] Evidence 157 33

157 Evidence
157I Judicial Notice
157k27 Laws of the State
157k33 k. Legislative proceedings and journals. Most Cited Cases

Court of Appeal would not take judicial notice of reports by the Legislature Analyst's Office prepared after the judgment was entered in the trial court, in school districts' cross-appeal challenging trial court's denial of their request to compel state to reimburse funds spent on mandates imposed by state and only nominally funded. West's Ann.Cal. Const. Art. 13B, § 6.

[45] Appeal and Error 30 837(9)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k837 Matters or Evidence Considered in Determining Question
30k837(9) k. Matters occurring after judgment. Most Cited Cases

Generally, when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.

****701** Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Jonathan K. Renner, Assistant Attorney General, Zackery P. Morazzini and Ross C. Moody, Deputy Attorneys General, for Defendants and Appellants State of California, Department of Finance and State Controller's Office.

Olson, Hagel & Fishburn, Deborah B. Caplan, N. Eugene Hill and Matthew R. Cody for Plaintiffs and Appellants.

HALLER, J.

***778** When the Legislature enacts a law requiring a local school district to implement a new program or a higher level of service, the California Constitution requires the State of California (State) to pay the cost of the mandate and prohibits the State from transferring the cost to the school district. During the past decade, the Legislature has enacted numerous statutes requiring school districts to implement many ****702** new programs and services. ***779** However, because of budget difficulties, the State has not paid the full cost of these programs and services. Instead, it has sought to satisfy the constitutional requirement by paying a nominal amount for each mandate and deferring the remaining costs to an indefinite time.

In 2007, the California School Boards Association and several school districts (collectively School Districts) brought a lawsuit against the State and two of its officers, challenging this practice of deferring, rather than paying in full, the cost of the state-imposed mandates.[FN1] The School Districts sought several forms of relief, including: (1) declaratory relief that this practice was unconstitutional; (2) injunctive relief prohibiting the State from engaging in this practice in the future; and (3) an order requiring the State to reimburse the School Districts for more than $900 million in unpaid costs incurred in complying with prior mandates. The State countered that its practice was authorized under the California Constitution and implementing statutes, and the court was barred by the separation of powers doctrine and equitable principles from ordering the requested relief.

FN1. The plaintiffs are: California School Boards Association, Education Legal Alliance, San Diego County Office of Education, San Diego Unified School District, Clovis Unified School District, Riverside Unified School District, and San Jose Unified School District. The individual defendants are: Michael Genest, in his capacity as director of the California Department of Finance, and John Chiang in his capacity as State Controller. We refer to defendants collectively as State.

After reviewing the parties' documentary evidence and conducting a hearing, the trial court found the State's deferral practice violated the California Constitution and several applicable statutes. (See Cal.

Const., art. XIII B, § 6; Gov.Code, §§ 17500 et seq.) [FN2] The court further found the School Districts were entitled to declaratory and injunctive relief and issued a writ commanding the State in the future to fully fund School District mandated programs (as found by the Commission on State Mandates) or to affirmatively excuse the School Districts from these mandates under section 17581.5. However, the court declined to order the State to reimburse the School Districts for costs previously incurred to comply with prior mandates, concluding this order would violate separation of powers principles. Both sets of parties appeal.

FN2. Undesignated statutory references are to the Government Code. All article references are to the California Constitution.

On the State's appeal, we conclude the court properly granted declaratory relief interpreting the applicable constitutional and statutory provisions to mean that the State's payment of a nominal amount for a mandate imposed on a local school district, with an intention to pay the remaining cost at an unspecified time, does not comply with article XIII B, section 6 and the implementing statutes. However, we determine the court erred in ordering ***780** injunctive relief because: (1) the ordered relief was inconsistent with the statutory scheme; (2) the writ required the performance of a discretionary, rather than a ministerial, duty; and (3) equitable relief was unwarranted because the School Districts have an adequate legal remedy for future violations under section 17612, subdivision (c).

With respect to the School Districts' cross-appeal, we determine the court did not abuse its discretion in refusing to order the State to pay the almost $1 billion in previously deferred costs or to permit the School Districts to conduct further discovery on the reimbursement issue.

****703** SUMMARY OF LAW GOVERNING SCHOOL DISTRICT STATE MANDATES

Before 1978, local governments received a substantial portion of their financing through property taxes. In 1978, the voters adopted Proposition 13, adding article XIII A to the California Constitution, which imposed strict limits on the government's power to impose property taxes. The next year, the voters adopted Proposition 4, adding article XIII B, which imposed corresponding limits on governmental power to spend for public purposes. (See *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 80–81, 61 Cal.Rptr.2d 134, 931 P.2d 312; *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 905, 58 Cal.Rptr.3d 762.)

One key component of article XIII B's spending limitations is contained in section 6, which states: "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...." (Art. XIII B, § 6, subd. (a).) The intent underlying this section was 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. [Citations.]" (*County of San Diego v. State of California, supra*, 15 Cal.4th at p. 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.)

In 1984, the Legislature enacted a comprehensive statutory and administrative scheme for implementing article XIII B, section 6. (§ 17500 et seq.; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331–333, 285 Cal.Rptr. 66, 814 P.2d 1308; *County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 588, 79 Cal.Rptr.3d 489 (*County of San Diego*).) In so doing, the Legislature created the Commission on State Mandates (Commission) to resolve questions as to whether a statute imposes "state-mandated costs on a local agency within the meaning of section 6." ***781** (*County of San Diego v. State of California, supra*, 15 Cal.4th at p. 81, 61 Cal.Rptr.2d 134, 931 P.2d 312; §§ 17525, 17533 et seq.) Under this regulatory scheme, when the Legislature enacts a statute imposing obligations on a local agency or a school district without providing additional funding, the local entity may file a test claim with the Commission, which, after a public hearing, must determine whether the statute requires a new program or increased level of service. (*County of San Diego v. State of California, supra*, 15 Cal.4th at p. 81, 61 Cal.Rptr.2d 134, 931 P.2d 312; §§ 17551, 17555.) If the Commission determines the statute meets this criteria, the Commission must determine the cost of the mandated program or service and then notify specified legislative entities and executive officers of this decision. (§§ 17557, 17555.) A local agency or school district may challenge the Commission's findings by administrative mandate

proceedings. (§ 17559; Code Civ. Proc., § 1094.5.)

Once this administrative/judicial process is exhausted and a statute is determined to impose state-mandated costs, the Legislature is required to appropriate funds to reimburse the local entity for these costs. (§§ 17561, subd. (a), 17612, subd. (a).) "If the Legislature refuses to appropriate money for [the] reimbursable mandate, the local agency [or school district] may file 'an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement' " under ****704**section 17612, subdivision (c). (*County of San Diego v. State of California, supra*, 15 Cal.4th at p. 82, 61 Cal.Rptr.2d 134, 931 P.2d 312.)

Section 17612, subdivision (c) (formerly subdivision (b)) initially provided the exclusive method for a local entity to seek relief from an unfunded mandate. However, in 1990, the Legislature added section 17581, which provides an alternative to the judicial proceeding under section 17612. It provides that a local agency is relieved of the obligation to implement an unfunded mandate if the Legislature specifically identifies the mandate and declines to fund it in the annual Budget Act. (§ 17581, subd. (a); see *Tri–County Special Educ. Local Plan Area v. County of Tuolumne* (2004) 123 Cal.App.4th 563, 571–572, 19 Cal.Rptr.3d 884 (*Tri–County*).) The Legislature later added section 17581.5, which creates similar (but more limited) relief for certain unfunded mandates imposed on school districts.

Section 17552 declares that these statutory provisions "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...."

FACTUAL AND PROCEDURAL BACKGROUND

In November 2007, the School Districts filed a lawsuit in San Diego County Superior Court alleging the State has refused to comply with its ***782** obligation to provide reimbursement under article XIII B, section 6 for costs "mandated by the State" after the Commission has determined the existence and costs of the mandates. The State filed an answer denying these claims. The court set a briefing schedule and a hearing date in May 2008.

In their moving papers, the School Districts presented evidence showing that since 2002, the Legislature has engaged in a routine practice of appropriating $1,000 for each mandate imposed on the School Districts, rather than appropriating the full amount of the program costs. Specifically, for the 2007–2008 fiscal year, the Commission found 38 separate programs or services require reimbursement as unfunded mandates under article XIII B, section 6. In each case, the State did not appeal or the appeal was decided adversely to the State. The State then appropriated $1,000 for each of the 38 programs. These mandates included items such as: annual parent notification, pupil health screening, criminal background checks, AIDS prevention instruction, immunization records, teacher incentive program, and pupil promotion and retention. The School Districts presented evidence that as compared with this $38,000 appropriated funding, the total statewide cost estimates for the programs in the 2007–2008 fiscal year exceeded $160 million. Further, the $1,000 appropriation per program equates to about $1 for each California school district for the entire fiscal year.

The School Districts also presented evidence showing the State refers to this funding method as " 'deferred' " mandate payments or an "Education Credit Card," which the Legislative Analyst's Office states "means that [full] funding will be provided at some unspecified future time." Although the State acknowledges it does not provide full funding for state-mandated programs on an annual basis, the State maintains the deferral practice complied with Article XIII B, section 6, and thus the School Districts are "required to perform the mandated activities." A Legislative Analyst Office report states that the "credit card [method] represents a way the state has maintained [mandated] program[s] while cutting expenditures during slow economic times," and "represents ****705** amounts the state owes to K–14 education for costs that were not fully funded during the fiscal year in which services were provided."

The evidence showed the total amount of unpaid school mandate funding is estimated to reach $435 million (without interest) by the end of the 2007–2008 fiscal year. For example, the accumulated deficiency for the "Standardized Testing and Reporting" mandate was more than $200 million. The approximate amount of costs for incurred unreimbursed programs and services include: $30 million for the San Diego Unified School District; $14 million for the Clovis Unified School District, and $12 million for the San Jose

Unified School District. The Governor's proposed budget for the ***783** 2008–2009 fiscal year continued the deferral practice, allocating only $1,000 for each of 38 mandates instead of the estimated $180 million required to fund these mandates.

The School Districts argued the deferred funding method violates article XIII B, section 6, and the implementing statutory scheme. They requested the court to issue a writ: (1) ordering the State to comply with its statutory obligations to identify each mandate in the annual budget bill "and to either appropriate funds to cover the costs of [the] mandate or to suspend the obligation to provide the mandated service or program"; (2) ordering the State to reimburse the School Districts for all costs previously incurred in providing state-mandated programs and services from existing state accounts; and (3) declaring certain mandate statutes unconstitutional to the extent they do not require the State to pay the full cost of the State's mandated programs and services or impose an undue restriction on the enforcement of the constitutional right to reimbursement.

In opposition, the State acknowledged the existence of its deferral practice, but argued the $1,000 funding was proper because neither the California Constitution nor the applicable statutes require the mandates be paid "immediately," particularly because the State has agreed to pay interest on any delayed payments. According to the State, "[school] districts that have performed under the mandates are guaranteed to receive payment for properly submitted claims." The State additionally argued that writ relief was not appropriate because the allegations do not show the State has failed to perform a ministerial duty and the School Districts have a statutory remedy in section 17612, subdivision (c). The State also argued the separation of powers doctrine prohibited the court from entering a judgment against the State for mandate amounts owed from previous years.

After briefing and the submission of evidence was completed, this court filed its decision in *County of San Diego, supra*, 164 Cal.App.4th 580, 79 Cal.Rptr.3d 489, in which we reversed a superior court judgment requiring the State to appropriate funds over a 15–year period to pay San Diego and Orange Counties for amounts owed for their previously incurred mandate costs. (*Id.* at pp. 592, 593–597, 79 Cal.Rptr.3d 489.) We held the court's order compelling the appropriation violated the separation of powers doctrine, and the order was unnecessary because the Legislature had enacted a specific statute pertaining to outstanding mandate debt owed to counties. (*Id.* at pp. 594, 595–596, 79 Cal.Rptr.3d 489.) We additionally held the court did not abuse its discretion in refusing to order the State to pay this debt from existing fund accounts. (*Id.* at pp. 597–603, 79 Cal.Rptr.3d 489.)

The trial court then permitted the parties to file supplemental briefs on the impact****706** of *County of San Diego* on the issues before the court. After the ***784** additional briefing and a hearing, the trial court issued a written decision, finding the State's practice of deferring payment to the School Districts violated the language and intent of Article XIII B, section 6, and the statutory scheme enacted to implement the constitutional provision. The trial court found the evidence showed "virtually all" school districts had suffered "adverse effects" from the State's failure to timely provide mandate funding, and quoted from a 2006–2007 Governor's Budget Analysis showing the State estimated it owes the school districts " 'approximately $1.2 billion for unpaid mandate costs through 2005–2006.' "

The trial court additionally concluded the legal remedy contained in section 17612, subdivision (c) was not available to the School Districts to challenge the nominal funding practice because this statutory remedy applies only if the Legislature completely "deletes" the mandate funding from the Budget Act. The court found that by providing a nominal amount for each mandate, "the Legislature has effectively circumvented [School Districts] from exercising their statutory remedy" under section 17612, subdivision (c), and thus the School Districts "have no adequate available legal remedy but for this writ of mandate."

However, relying on *County of San Diego, supra*, 164 Cal.App.4th 580, 79 Cal.Rptr.3d 489, the trial court refused to order the State to pay amounts owed to the School Districts for prior mandates. As detailed below, the court found it was barred by the separation of powers doctrine from issuing this order, and that the exception for ordering payment from existing funds was inapplicable. The court also denied the School Districts' request to conduct further discovery on this issue.

192 Cal.App.4th 770, 121 Cal.Rptr.3d 696, 265 Ed. Law Rep. 347, 11 Cal. Daily Op. Serv. 1923, 2011 Daily Journal D.A.R. 2308

The court then issued a lengthy judgment and a writ of mandate. With respect to the ordered declaratory relief, Paragraph 7 of the judgment reads: "The Court finds that an actual controversy exists between petitioners and respondents as to the nature of the requirement imposed upon the State by article XIII B, section 6 of the California Constitution and the statutory scheme set forth at Gov.Code §§ 17500 et seq. that makes declaratory relief under Code of Civil Procedure § 1060 appropriate. The Court hereby finds and declares that the State's failure to include the full costs of all mandates as determined by the [Commission] in the Budget Act, and its practice of appropriating $1,000 and deferring the balance of the costs of those mandates, constitutes a failure to provide a subvention of funds for the mandates as required by article XIII B, section 6 and violates the constitutional rights conferred by that provision and the specific procedures set forth at Gov.Code §§ 17500 et seq."

The writ of mandate states in relevant part: "[T]he [State and its officers] *are commanded to:* [¶] 1. Ensure that the costs of each mandate determined to ***785** be reimbursable by the Commission on State Mandates, including interest, shall be included in the Governor's proposed budget as required by Government Code sections 17500 et seq. and in particular sections 17561 and 17612 unless specifically identified and suspended pursuant to Government Code [section] 17581.5. [¶] 2. [The State and its officers] are enjoined from appropriating an amount for any mandate to [the School Districts] less than the amount determined to be reimbursable by the Commission on State Mandates. Said [parties] shall not defer any balance of any mandated program and shall include the full amount determined to be reimbursable in the Governor's proposed budget unless ****707** suspended pursuant to Government Code section 17581.5." (Italics added.) The court ordered the State to file a return in the superior court certifying its compliance with the writ.

Both sets of parties appeal.

DISCUSSION

I. *Deferred Mandate Payment Is Not Equivalent to a Funded Mandate*

[1] Before addressing the parties' specific contentions raised on appeal and cross-appeal, it is necessary to resolve the fundamental legal dispute underlying each of the parties' contentions: whether the State complies with its constitutional and statutory obligations to fund a mandate imposed on the School Districts by appropriating a nominal ($1,000) amount for the mandated program, with the intention to pay the remainder with interest at an unspecified time. As explained below, we agree with the trial court's determination that a deferred appropriation is not a funded mandate within the meaning of article XIII B, section 6, and the implementing statutory provisions.

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 [defined to include school districts], the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service [with exceptions not applicable here]...." (Art. XIII B, § 6, subd. (a).) Subvention means " 'a grant of financial aid or assistance, or a subsidy.' " (*County of San Diego, supra*, 164 Cal.App.4th at p. 588, fn. 4, 79 Cal.Rptr.3d 489.)

[2] This reimbursement obligation was "enshrined in the Constitution ... to provide local entities with the assurance that state mandates would not place additional burdens on their increasingly limited revenue resources." ***786**(*Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6, 244 Cal.Rptr. 677, 750 P.2d 318; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1282, 101 Cal.Rptr.2d 784.) "Section 6 recognizes that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments. [Citation.] 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.* [Citations.] With certain exceptions, section 6 '[e]ssentially' requires the state 'to pay for any new government programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. [Citation.]' " (*County of San Diego v. State of California, supra*, 15 Cal.4th at p. 81, 61 Cal.Rptr.2d 134, 931 P.2d 312; accord *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1188–1189, 2 Cal.Rptr.3d 419; *County of Sonoma v. Commission on State Mandates, supra*, 84 Cal.App.4th at p. 1282, 101 Cal.Rptr.2d 784; *Redevelopment Agency v. Commission on State*

Mandates (1997) 55 Cal.App.4th 976, 985, 64 Cal.Rptr.2d 270.)

The implementing statutes are consistent with this intent. Section 17561 is the primary code section that sets forth the State's duties once a mandate is determined by the Commission. Section 17561, subdivision (a) states: "The state *shall* reimburse each local agency and school district for *all* 'costs mandated by the ****708** state,' as defined in Section 17514 [[[[FN3] and for legislatively determined mandates in accordance with Section 17573 [FN4]." (Italics added.) Section 17561, subdivision (b)(1)(A) states: "For the initial fiscal year during which costs are incurred ... [¶] ... [a]ny statute mandating these costs *shall* provide an appropriation therefor." (Italics added.) Section 17561, subdivision (b)(2) states: "In subsequent fiscal years appropriations for these costs *shall* be included in the annual Governor's Budget and in the accompanying Budget bill...." (Italics added.) Section 17561, subdivision (c) provides: "The amount appropriated to reimburse local agencies and school districts for costs mandated by the state *shall* be appropriated to the Controller for disbursement." (Italics added.)

> FN3. Section 17514 defines " 'costs mandated by the state' " to "mean [ ] 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 [specified] executive order ..., 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."

> FN4. Section 17573 provides for a legislative settlement process as an alternative to the more lengthy Commission process for mandate determinations.

In this case, the Commission found 38 separate school district programs or services require reimbursement as unfunded mandates under article XIII B, section 6, and in each case, the State did not appeal or the appeal was decided adversely to the State. Many of these programs were found to cost more than ***787** $1 million. However, instead of appropriating the full amount determined by the Commission to be the total cost of each program, the State appropriated $1,000 for each program, approximately $1 per school district for each mandated program.

[3] This practice violates the language and intent of the constitutional and statutory provisions. By attempting to pay for the new programs with a "credit card" with no fixed date for full payment, the State is shifting the actual costs of these mandates to the local school districts. The fact that the State takes the position (without any specific legislation to this effect) that it intends to pay the full cost with interest does not eliminate the cost burden. Unless it is excused from implementing the program, each school district will have a *current* cost for the program or increased level of service. Under article XIII B, section 6, if the State wants to require the local school districts to provide new programs or services, it is free to do so, but not by requiring the local entities to use their own revenues to pay for the programs.

[4] The State concedes the intent underlying the constitutional and statutory provisions was to prevent cost-shifting to the local governments, but argues that payment at some later, undefined time, is consistent with this intent, as long as interest is eventually paid to the School Districts. However, this argument is inconsistent with the fundamental purpose of article XIII B, section 6, which was to require each branch of government to live within its means, and to prohibit the entity having superior authority (the State) from circumventing this restriction by forcing local agencies such as School Districts to bear the State's costs, even for a limited time period. By imposing on local school districts the financial obligation to provide state-mandated programs on an indeterminate and open-ended basis, the State is requiring school districts to use their own revenues to fund programs or services imposed by the state. Under this deferral ****709** practice, the State has exercised its authority to order many new programs and services, but has declined to pay for them until some indefinite time in the future. This essentially is a compelled loan and directly contradicts the language and the intent of article XIII B, section 6, and the implementing statutes.

We reject the State's arguments in support of a contrary conclusion.

First, the State notes that article XIII B, section 6, as originally enacted, did not contain an express temporal requirement for mandate payments, but in 2004 voters (through Proposition 1A) adopted

amendments requiring appropriations in "the full payable amount." [FN5] These amendments expressly applied ***788** only to "a city, county, city and county, or special district," and not to school districts. (Art. XIII B, § 6, subd. (b), par. (4).) The State claims that Proposition 1A was placed on the ballot as a result of a political compromise between local governments and the State arising from local government budget difficulties caused by the State's practice of deferring mandate payments to these entities. The State thus contends the "very fact that cities and counties had to go to the ballot and obtain specific limits on the timing of payments for mandates confirms that section 6 had no temporal requirement at all prior to Proposition 1A." The State further asserts that if the School Districts want the same benefits, they will need to negotiate a similar political compromise with the State.

> FN5. Under the amendments, beginning in the 2005–2006 fiscal year, the Legislature must generally appropriate the "full" amount of the mandate or suspend the operation of the mandate for the fiscal year. (Art. XIII B, § 6, subd. (b), par. (1).) The amendment further provided that for a mandate incurred prior to the 2004–2005 fiscal year, the amounts "may be paid over a term of years, as prescribed by law." (Art. XIII B, § 6, subd. (b), par. (2).) This "prescribed by law" term for repayment of amounts owed by the cities and counties is now a 15–year period, as set forth in section 17617.

These arguments are unpersuasive. There is nothing in the language of Proposition 1A, or in the ballot materials presented to the voters, showing the State did not already have the obligation to fully fund the mandates when they were imposed. The Proposition 1A compromise added several new features to the local-state mandate relationship, including a specific constitutional provision making clear that the deferral practice (with respect to cities and counties) would no longer be tolerated and adding a requirement that the Legislature provide a specific time period for the State to reimburse these local entities for the prior mandate debt. (Art. XIII B, § 6, subd. (b), pars. (1), (2).) This compromise does not mean the deferral practice was authorized under the prior law, and did not involve any type of concession that the practice was previously legally authorized.

[5][6] Moreover, even assuming there was an indication that the parties to the compromise, or the voters in adopting Proposition 1A, believed the prior law allowed the State to defer payments, this belief is not binding on a court. (See *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922–923, 44 Cal.Rptr.3d 223, 135 P.3d 637.) A court should not accept later expressed legislative intent if the intent is inconsistent with the plain meaning of the prior act or its legislative history. (*Id.* at p. 922, 44 Cal.Rptr.3d 223, 135 P.3d 637.) The interpretation of a statute or a constitutional provision " 'is an exercise of the judicial power the Constitution assigns to the courts.' [Citation.]" (*Ibid.*; see *Murray v. Oceanside Unified School Dist.* (2000) 79 Cal.App.4th 1338, 1348, 95 Cal.Rptr.2d 28.)

****710** [7] The State also contends the court erred in determining the deferral method was improper because the constitutional and statutory provisions do not specifically "say that the reimbursement must be made in full in a single payment, or within one year." However, the fact that a "payment in full" ***789** phrase was not used does not mean the Legislature intended to permit a deferral of funds. As discussed, article XIII B, section 6's language and underlying intent impose the timeliness requirement for the reimbursement obligation without the need to use these precise words. Likewise, section 17561, subdivision (a)'s statement that "all" costs must be reimbursed by the State is a clear statutory directive requiring full payment once a mandate is determined by the Commission (and any appeals process has been completed). An interpretation of section 17561 that would allow partial payments would render the word "all" superfluous.

[8] The State next contends that section 17561, subdivision (d)(2)(C), which allows the State Controller to adjust the mandate payments to correct for any prior underpayments, "expressly contemplates that the initial payment may not be payment in full." [FN6] However, section 17561, subdivision (d)(2)(C) pertains to the Controller's audit function, allowing the Controller to correct inaccurate fund disbursements after auditing the local entity's supporting records. This administrative power to adjust payments is not equivalent to stating that the Legislature has the authority to provide a nominal payment for a mandate.

> FN6. Section 17561, subdivision (d)(2)(C) states: "The Controller shall adjust the pay-

> ment to correct for any underpayments or overpayments that occurred in previous fiscal years."

The State also relies on the Controller's statutory authority to issue " 'prorated' " payments. Section 17567 states that the Controller must "prorate claims" if "the amount appropriated for reimbursement purposes pursuant to Section 17561 is not sufficient to pay all of the claims approved by the Controller." This code section does not provide the Legislature with the legal authority to provide insufficient funding for mandates. To the contrary, section 17567 specifically states that "[i]n the event that the Controller finds it necessary to prorate claims as provided by this section, the Controller shall *immediately* report this action to [specified executive and legislative entities and officers] *in order to assure appropriations of these funds in the Budget Act.*" (§ 17567, italics added.)

[9] We similarly reject the State's reliance on section 17561.5, which provides that an initial reimbursement claim "shall include accrued interest ... if the payment is being made more than 365 days after adoption of the statewide cost estimate for an initial claim...." This required interest payment does not provide the Legislature with the authority to implement a policy under which it pays only a nominal amount of a mandated claim. Rather it provides for interest payments where the actual costs are less than those estimated as costs during the Commission process.

We also find unconvincing the State's discussion of the fact that in the 2006–2007 fiscal year it made payments on the outstanding mandate debt and ***790** that these "payments demonstrate that the Constitutional right to reimbursement is being honored through the practice of deferred payments." As the Legislative Analyst Office noted, the State repaid *some* outstanding claims while at the same time deferring more claims in the subsequent year. A single reimbursement payment does not show the mandates are being timely funded.

****711** We thus conclude the Legislature's practice of nominal funding of state mandates with the intention to pay the mandate in full with interest at an unspecified time does not constitute a funded mandate under the applicable constitutional and statutory provisions.

II. *Parties' Appellate Challenges to Judgment and Writ*

Having determined the deferral practice is improper, we now consider the parties' specific appellate challenges to the trial court's determinations regarding the relief requested by the School Districts.

A. *Court's Grant of Declaratory Relief*

[10][11][12][13][14] "Declaratory relief is an equitable remedy, which is available to an interested person in a case 'of actual controversy relating to the legal rights and duties of the respective parties....' (Code Civ. Proc., § 1060....)" (*In re Claudia E.* (2008) 163 Cal.App.4th 627, 633, 77 Cal.Rptr.3d 722.) " 'The purpose of a declaratory judgment is to "serve some practical end in quieting or stabilizing an uncertain or disputed jural relation." ' [Citation.] 'Another purpose is to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation [citation].' [Citation.] The proper interpretation of a statute is a particularly appropriate subject for judicial resolution. [Citations.] Additionally, judicial economy strongly supports the use of declaratory relief to avoid duplicative actions to challenge an agency's statutory interpretation or alleged policies. [Citation.] [¶] The remedy of declarative relief is cumulative and does not restrict any other remedy...." *(Ibid.)* Thus, the fact that "another remedy is available is an insufficient ground for refusing declaratory relief." *(Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 433, 121 Cal.Rptr.2d 844, 49 P.3d 194.) Moreover, declaratory relief is generally available to settle the parties' rights with respect to future actions, and not to correct conduct that occurred in the past.

[15] In Paragraph 7 of the judgment, the court declared that the State's practice of paying only a nominal amount for a mandated program while deferring the balance of the cost "constitutes a failure to provide a subvention of funds for the mandates as required by article XIII B, section 6 and violates the constitutional rights conferred by that provision and the specific procedures ***791** set forth at [sections] 17500 et seq." This form of declaratory relief was proper, as there was an actual controversy between the parties regarding the interpretation of article XIII B, section 6 and section 17561, pertaining to the use of deferred mandate payments. The declaration will prevent further issues arising from the conflicting

interpretations, and was an effective remedy to settle the parties' rights in the future regarding the meaning of the provisions. The State has not challenged these conclusions.

Although on appeal the State focuses primarily (if not exclusively) on challenging the injunctive relief ordered by the court, it indirectly challenges the portion of the judgment granting declaratory relief based on the State's assertions that a deferred mandate is a funded mandate that must be implemented by the School Districts. For the reasons explained above, we have rejected this argument. The State does not proffer any other basis for finding the court's granting declaratory relief (as set forth in Paragraph 7) was improper. We thus affirm the portion of the judgment providing this declaratory relief.

B. *Court's Grant of Injunctive Relief*

1. *Overview*

In the writ of mandate, the court "commanded" the State and its officers to engage****712** in several affirmative tasks relating to the budget process and prohibited these defendants from deferring any mandates unless it "identified and suspended" the mandate under section 17581.5. Specifically, the court ordered the State to "[e]nsure that the costs of each mandate determined to be reimbursable by the Commission ... *shall* be included in the Governor's proposed budget as required by ... sections 17561 and 17612 *unless specifically identified and suspended pursuant to [section] 17581.5*." (Italics added.) The court additionally "enjoined" the State "from appropriating an amount for any mandate to [the School Districts] less than the amount determined to be reimbursable by the Commission" and stated the State "shall not defer any balance of any mandated program and shall include the full amount determined to be reimbursable in the Governor's proposed budget *unless suspended pursuant to [section] 17581.5*." (Italics added.)

The State contends the court had no authority to order these forms of mandamus relief because: (1) the School Districts have an adequate remedy at law; (2) the court's order concerned discretionary, rather than ministerial, duties; and (3) the court's actions violate separation of powers principles. We agree with these arguments. Given the specific statutory procedures for addressing an unfunded mandate, the court erred in issuing the writ because the School Districts have an adequate remedy at law; the writ improperly ***792** restricts the State's discretionary authority; and the writ improperly interferes with budgetary powers committed exclusively to the legislative and executive branches.

To explain these conclusions, we first detail the existing statutory remedies applicable when the Legislature has failed or refused to fund an administratively-determined state mandate. We then describe the basis for our legal determinations that the writ was an unauthorized use of the court's mandamus powers.

2. *Statutory Remedies for Failure to Fund Determined Mandates*

Under the statutory scheme, the Commission must promptly notify specified legislative and executive bodies of its determination on a test claim (§ 17555), and must submit a biannual report to the Legislature identifying the mandates found and the cost of the mandates (§ 17600). "Upon receipt of the report submitted by the [C]ommission ..., funding *shall* be provided in the subsequent Budget Act for costs incurred in prior years." (§ 17612, subd. (a), italics added.) If the Legislature does not comply with this duty, the statutes provide two potential remedial procedures. (§§ 17612, subd. (a), 17581, 17581.5.) These remedies are directed at excusing a local school district from performing the mandate, rather than affirmatively compelling the Legislature to appropriate funds for the mandate.

[16] First, under section 17581.5, the Legislature can avoid paying the mandate costs if it identifies the statutory program in the Budget Act as a mandate for which no funding is provided in that fiscal year and specifically relieves the school district of the requirement that it implement the program. [FN7] (See also § 17581 [similar remedy applicable to local agencies].) With respect to school districts, this action is ****713** permitted only pertaining to certain categories of mandates. (§ 17581.5, subd. (c).) If this procedure is properly invoked with respect to a statutory mandate, the remedy is self-executing in the sense that it does not require any affirmative action by the school district, i.e., if the Legislature makes this specific "nonfunding" designation, each school district ***793** is "permitted to make its own determination not to implement the mandate." (*Tri–County, supra*, 123 Cal.App.4th at p. 572, 19 Cal.Rptr.3d 884 [interpreting § 17581].)

> FN7. Section 17581.5, subdivision (a) provides: "A school district shall not be required to implement or give effect to the statutes, or a portion of the statutes ... during any fiscal year and for the period immediately following that fiscal year for which the Budget Act has not been enacted ... if all of the following apply: [¶] (1) The statute ... has been determined by the Legislature, the commission, or any court to mandate a new program or higher level of service requiring reimbursement of school districts pursuant to Section 6 of Article XIII B.... [¶] (2) The statute ... specifically has been identified by the Legislature in the Budget Act for the fiscal year as being one for which reimbursement is not provided for that fiscal year...."

[17] Second, if the Legislature does not fund a determined mandate and does not specifically designate the mandate as one for which no funding will be provided under sections 17581 or 17851.5, the local agency or school district *must* perform the mandate, unless it *affirmatively obtains relief under section 17612, subdivision (c).* (See *Tri–County, supra*, 123 Cal.App.4th at pp. 573–574, 19 Cal.Rptr.3d 884.) Section 17612, subdivision (c) states: "If the Legislature deletes from the annual Budget Act funding for a mandate, the local agency or school district may file in the Superior Court of the County of Sacramento an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement for that fiscal year."

[18][19] Unlike the remedy in sections 17581 and 17581.5, the remedy under section 17612, subdivision (c) is not self-executing and requires the local entity to affirmatively seek judicial relief to be excused from the mandate. (*Tri–County, supra*, 123 Cal.App.4th at p. 573, 19 Cal.Rptr.3d 884; see *Kinlaw v. State of California, supra*, 54 Cal.3d at p. 333, 285 Cal.Rptr. 66, 814 P.2d 1308; *Berkeley Unified School Dist. v. State of California* (1995) 33 Cal.App.4th 350, 358–359, 39 Cal.Rptr.2d 326.) This remedy affords relief prospectively, and not as to funds previously paid out by a local agency to satisfy a state mandate. (See *Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d at p. 833, fn. 3, 244 Cal.Rptr. 677, 750 P.2d 318.)

Thus, "[a] Commission determination that a cost results from an unfunded state mandate does not necessarily mean the Legislature will pay for it. If the Legislature does not pay [or excuse the school district under section 17581.5], with a favorable Commission determination in hand, an entity may seek a court order [under section 17612, subdivision (c)] that it no longer has to obey the mandate...." (*Grossmont Union High School Dist. v. State Dept. of Education* (2008) 169 Cal.App.4th 869, 877, 86 Cal.Rptr.3d 890 (*Grossmont Union*).) "The intent of the Legislature ... could not be more clear: until and unless a court or the Legislature itself has relieved a local government of a statutory mandate, the local government must perform the duties imposed by the mandate [even if the mandate is not funded]." (*Tri–County, supra*, 123 Cal.App.4th at p. 573, 19 Cal.Rptr.3d 884.) In establishing this procedure by which local governments may seek relief from an unfunded program, "the Legislature has ensured an orderly procedure for resolving these issues, eschewing the local government anarchy that would result from recognizing a county's ability sua sponte to declare itself relieved of the statutory mandate." (*Ibid.*)

***794** 3. *Writ Was Improper Because School Districts Have an Adequate Remedy at Law*

[20] To warrant relief in the form of a writ of mandate requiring a party to take ****714** (or not to take) certain actions in the future, the petitioner must demonstrate there is no adequate legal remedy. (See *Transdyn/Cresci JV v. City and County of San Francisco* (1999) 72 Cal.App.4th 746, 752, 85 Cal.Rptr.2d 512.) We determine the School Districts had an adequate remedy at law under section 17612, subdivision (c) for any future attempts by the State to defer mandate payments.

The trial court found the School Districts did not have an adequate legal remedy with respect to future nominally funded mandates because section 17612, subdivision (c) applies only when the Legislature completely removes a particular mandate from a budget bill, and this judicial procedure cannot be used if the Legislature provides some (although nominal) funding. Based on this interpretation, the trial court found the State had essentially created a "Catch–22" situation for the School Districts—they could not refuse to comply with the mandate and they could not seek to be relieved of the obligation to implement the mandate under the established statutory procedures.

192 Cal.App.4th 770, 121 Cal.Rptr.3d 696, 265 Ed. Law Rep. 347, 11 Cal. Daily Op. Serv. 1923, 2011 Daily Journal D.A.R. 2308

On appeal, the State argues the court's statutory interpretation was erroneous. The State asserts that if the Legislature provides only nominal funding for a reimbursable mandate, the School Districts are "free to seek a declaration of that fact under section 17612, subdivision (c) and receive a judicial declaration that it need not comply with that mandate for a year." In support, the State cites to our recent *County of San Diego* decision in which we stated in footnote 28 that although "the Counties are denied the judicial remedy they seek in this case, it is important to note that the statutory scheme implementing article XIII B, section 6, does not leave local agencies remediless for the Legislature's failure to fund state mandates.... When the Legislature provides only nominal funding for a mandate, as was the case with many of the mandates at issue here, the local agency's remedy is to file an action under section 17612, subdivision (c), to declare the mandate unenforceable and to enjoin its enforcement for that fiscal year." (*County of San Diego, supra*, 164 Cal.App.4th at p. 613, fn. 28, 79 Cal.Rptr.3d 489.)

In response, the School Districts argue that these statements were "*dicta* " and urge this court to reach a different conclusion in this case. However, they do not present any evidence that a school district (or any other entity) has ever been precluded from obtaining section 17612, subdivision (c) relief from ***795** a deferred and nominally funded mandate. They also acknowledge there are no reported decisions holding that such relief is unavailable. [FN8]

> FN8. They cite only to language in *Berkeley Unified School Dist. v. State of California, supra*, 33 Cal.App.4th at page 360, 39 Cal.Rptr.2d 326, in which the court observed that the Legislature's deletion of funding from a claims bill triggers the statutory period for filing an action under section 17612, subdivision (c). Because the *Berkeley Unified* court was not addressing the issue presented here, we find the court's observations to be unhelpful to our analysis.

[21] After reexamining the statutory language, we adhere to our prior interpretation of this statute. Section 17612, subdivision (c) states: "*If* the Legislature *deletes* from the annual Budget Act funding for a mandate, the local agency or school district may file in the Superior Court of the County of Sacramento an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement for that fiscal year." (Italics added.) In interpreting this code section, "our primary task is to determine the intent of the Legislature so as to effectuate the purpose ****715** of the law. [Citation.] In determining legislative intent, we look first to the statutory language itself. [Citation]." (*Los Angeles Unified School District v. County of Los Angeles* (2010) 181 Cal.App.4th 414, 423, 104 Cal.Rptr.3d 590.) " ' "The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." [Citation.]' " (*Ibid.*; see *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115, 755 P.2d 299; *Woodland Park Management, LLC v. City of East Palo Alto Rent Stabilization Bd.* (2010) 181 Cal.App.4th 915, 923, 104 Cal.Rptr.3d 673.) Moreover, a court must presume the Legislature acts consistent with the Constitution when enacting legislation, and we must adopt an interpretation that upholds the statute's constitutionality, if the interpretation is consistent with the statutory language and purpose. (See *In re Kay* (1970) 1 Cal.3d 930, 942, 83 Cal.Rptr. 686, 464 P.2d 142; *Wilson v. State Bd. of Education* (1999) 75 Cal.App.4th 1125, 1145, 89 Cal.Rptr.2d 745.)

[22][23] Under these principles, the proper interpretation of section 17612, subdivision (c) is that a party is permitted to seek relief for nominal funding as well as a complete lack of funding for a determined state mandate. Although section 17612, subdivision (c) contains the word "deletes," when viewed in context, this term does not refer to the physical act of entirely deleting an item from a budget bill, but refers more generally to the deletion of all or part of the administratively-determined cost from the amount required to be appropriated to the local entity. After the adoption of article XIII B, the Legislature enacted comprehensive procedures for resolution of claims arising out of section 6. "The Legislature did so because the absence of a uniform procedure had resulted in inconsistent ***796** rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process." (*Kinlaw v. State of California, supra*, 54 Cal.3d at p. 331, 285 Cal.Rptr. 66, 814 P.2d 1308.) As part of this legislative scheme, the Legislature created an administrative process for resolving

issues regarding the existence and costs of mandates, *and* a judicial process for obtaining relief from unfunded mandates. This judicial process involved a method for local entities to challenge unfunded mandates (after a determination by the Commission) by filing an action seeking a declaration in Sacramento County Superior Court that the entity was excused from implementing the mandate. The essence of this new procedure was to consolidate all such actions in one venue and place the burden on local entities to seek judicial relief if the State failed to abide by its obligations to fund a particular mandate.

It would be inconsistent with this judicial remedy and the state Constitution to interpret section 17612, subdivision (c) as providing a right to seek relief only if there is "no" funding for a mandate, as opposed to nominal funding. As noted, the $1,000 funding required the School Districts to use their own funds to provide programs mandated by the State. This is virtually the same harm as providing no funding for a particular program, and is directly contrary to the constitutional mandate contained in article XIII B, section 6. If we were to interpret the remedial provision in section 17612, subdivision (c) as limited to legislative decisions to provide zero funding, we would be concluding that the statutory scheme does not provide a remedy for a school district to avoid an ****716** unfunded mandate. This result could not have been contemplated by the drafters of the statutory scheme, who were seeking to effectuate (and not defeat) the voters' intent underlying the constitutional provision.

[24] We thus reaffirm our conclusion in *County of San Diego* that where an appropriation is the functional equivalent of deleting funding, a local entity (including a school district) has a right to seek a declaration of that fact under section 17612, subdivision (c) and receive a judicial declaration that it need not comply with the mandate for one year.[FN9] Because the School Districts have this legal remedy, it was improper for the court to issue an injunction controlling the State's future actions in these matters.

FN9. In the proceedings below, School Districts argued the requirement that an entity bring an action *every year* to seek relief under section 17612, subdivision (c) for an unfunded mandate was an unreasonable restriction on its constitutional rights under article XIII B, section 6. The court rejected this facial challenge, but stated its ruling was without prejudice to the petitioners bringing an " 'as-applied' " challenge to the annual requirement. School Districts did not cross-appeal from this portion of the order. Thus, the issue is not before us on this appeal. Although they mention the issue in passing in a footnote of their appellate brief, this footnote was insufficient to present the issue on appeal.

[25] ***797** In reaching this conclusion, we recognize that the State's prior position that it was permitted to require the School Districts to implement the State-mandated programs despite the nominal funding appears inconsistent with the State's current interpretation of section 17612, subdivision (c) that the School Districts have a right to seek a court order declaring the mandate to be unenforceable. However, this inconsistency has now been resolved. We have affirmed the trial court's grant of declaratory relief that the State violates article XIII B, section 6 and the implementing statutes by requiring a school district to implement a program under a deferred payment practice. And we have held (consistent with the State's current position) that if the State violates these provisions in the future, the School Districts will have a right to obtain relief from a required implementation of the program under section 17612, subdivision (c).[FN10]

FN10. We note the State would be precluded from arguing that the School Districts waived claims for *prior* unpaid mandates by previously failing to seek relief under section 17612, subdivision (c). The State's prior agreement to pay for these costs, and its prior position that these mandates were required, is inconsistent with a claim that the School Districts previously waived their right to reimbursement for those costs by not invoking the statutory remedy. However, in the future, if the School Districts wish to be relieved of an obligation when there is only nominal funding, they will be required to seek relief under section 17612, subdivision (c) in the Sacramento County Superior Court.

4. *Writ Interferes with Discretionary Functions and Separation of Powers Doctrine*

[26] We additionally conclude the writ was im-

properly issued because it compels a discretionary, not a ministerial, act.

[27][28][29] To obtain writ relief, the petitioner must show the respondent has "a clear, present, and ministerial duty to act in a particular way." (*County of San Diego, supra*, 164 Cal.App.4th at p. 593, 79 Cal.Rptr.3d 489.) "A ministerial duty is one that is required to be performed in a prescribed manner under the mandate of legal authority without the exercise of discretion or judgment." (*Ibid.*) Thus, a writ of mandate should not compel action by the Legislature unless " 'the duty to do the thing asked for is plain and *unmixed with discretionary power or the exercise of* *****717*** *judgment.*' " (*Id.* at p. 596, 79 Cal.Rptr.3d 489.) On its face, the issued writ interferes directly with the Legislature's discretionary functions by requiring the Legislature to appropriate funds for certain local school district programs and services. The determination as to how and whether to spend public funds is within the Legislature's broad discretion.

The School Districts argue that the writ implicates only ministerial powers because it does not "tell[ ] the Legislature which programs it must retain or forego, nor does it order the Legislature to fund any program" and instead ***798** merely compels the state to comply with existing law and to make the choice given to it by the existing statutory scheme.

However, the writ expressly orders the Legislature to include School District mandate items in the annual Budget Bill, and then to fully fund each mandate *or* to "suspend" the mandate pursuant to section 17581.5. This choice is not mandated by the statutes or the Constitution. Under the statutory scheme, the Legislature has the discretion to choose not to fund a mandate. If this occurs, the Legislature may specifically identify the program in a Budget Act and suspend the requirement for one year. (§ 17581.5; see fn. 7, *ante.*) But the Legislature is not required to provide this relief. If the Legislature does not do so, it is then a school district's obligation to seek affirmative relief in the Sacramento County Superior Court to excuse compliance with the mandate for one year. (§ 17612, subd. (c); see *Tri–County, supra*, 123 Cal.App.4th at p. 572, 19 Cal.Rptr.3d 884.) This process is consistent with article XIII B, section 6, which prohibits the State from requiring local entities to perform unfunded state mandates, but does not compel the State to provide funding if it does not wish to require a particular program.

In issuing the writ, the court disregarded this fundamental structure of the judicial mandate relief procedures, and specifically ordered the Legislature to perform one of two acts: fully fund a mandate or affirmatively excuse compliance under section 17581.5. Because the Legislature has the statutory discretion to make other choices (not fund and require the local entity to seek affirmative relief from the mandate), the court's order pertained to a discretionary duty and thus was beyond the court's mandamus authority.

[30] The School Districts alternatively argue that we should, at a minimum, uphold the portion of the writ requiring the Legislature to place the cost of a determined mandate in the annual Budget Bill because this is expressly required by the statutes. (See § 17561, subd. (b).) The School Districts claim the identification of the mandates and their costs is essentially a ministerial task designed to provide public notice and information about mandate determinations made by the Commission.

[31][32] This argument is unavailing. There is nothing ministerial about placing items in a budget bill. The formulation of a budget bill, including the items to be placed in the bill, is inherently a discretionary and a legislative power. (See *In re Madera Irrigation District* (1891) 92 Cal. 296, 310, 28 P. 272.) The budget determination "is limited by [the Legislature's] own discretion, and beyond the interference of courts." (*Ibid.*; see *City of Sacramento v. California State Legislature* (1986) 187 Cal.App.3d 393, 398, 231 Cal.Rptr. 686.)

[33][34][35] ***799** For similar reasons, we conclude the writ also violates California's separation of powers doctrine. A court has no authority to issue a writ of mandate that interferes with powers exclusively committed to the other branches of government.*****718*** (*County of San Diego, supra*, 164 Cal.App.4th at pp. 593–594, 79 Cal.Rptr.3d 489.) The enactment of a budget bill is fundamentally a legislative act, entrusted to the Legislature and the Governor and not the judiciary. (See *Grossmont Union, supra*, 169 Cal.App.4th at p. 886, 86 Cal.Rptr.3d 890; *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1214, 70 Cal.Rptr.2d 745.) The California Constitution's separation of powers doctrine forbids the judiciary from issuing writs that direct

the Legislature to take specific action, including to appropriate funds and pass legislation. (*County of San Diego, supra*, 164 Cal.App.4th at pp. 593–594, 79 Cal.Rptr.3d 489; see *City of Sacramento v. California State Legislature, supra*, 187 Cal.App.3d at pp. 396–398, 231 Cal.Rptr. 686.)

[36][37] Under these principles, a court is prohibited from using its writ power to require an appropriation even if the Legislature is statutorily required to appropriate certain funds. (See *City of Sacramento v. California State Legislature, supra*, 187 Cal.App.3d at pp. 397–398, 231 Cal.Rptr. 686.) The "matter is ... one in which political power to accomplish that end is vested in the Legislature. 'Under our form of government the judicial department has no power to revise even the most arbitrary and unfair action of the legislative department, or of either house thereof, taken in pursuance of the power committed exclusively to that department by the constitution.' " (*Id.* at p. 398, 231 Cal.Rptr. 686.) Limitations on the use of judicial writ authority to control legislative action is a core purpose of the separation of powers doctrine.

C. *Cross-appeal: Court's Refusal to Order Relief for Past Unpaid Mandate Debt*

In addition to seeking an order directing the State to prospectively take certain actions, the School Districts also sought an order requiring the State to pay more than $900 million in unpaid mandate debt (including interest) for programs and services previously provided and unreimbursed by the State. The court declined to order this relief, noting the "magnitude of the funds" and the "separation of powers" principles embodied in the California Constitution. The court relied on our recent decision in *County of San Diego, supra*, 164 Cal.App.4th 580, 79 Cal.Rptr.3d 489, in which we upheld the trial court's discretion to deny monetary relief for prior mandate debt on similar grounds.

On appeal, the School Districts contend the trial court erred in reaching its conclusions without permitting them to conduct discovery on the availability of funding sources for the unpaid debt. We conclude the court acted within its discretion.

***800** 1. *Factual and Procedural Background*

In their complaint, the School Districts requested that the court enter an order compelling the State to reimburse them for $900 million in "outstanding unreimbursed costs from generally related State accounts which have been appropriated and are otherwise available for payment of the State's obligation...." This request was based on a line of cases in which the courts have recognized a narrow exception to the rule that a court has no power to compel the Legislature to appropriate funds. (See *Butt v. State of California* (1992) 4 Cal.4th 668, 697–703, 15 Cal.Rptr.2d 480, 842 P.2d 1240 (*Butt*); *Mandel v. Myers* (1981) 29 Cal.3d 531, 539–545, 174 Cal.Rptr. 841, 629 P.2d 935; *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 181, 275 Cal.Rptr. 449.) As explained in more detail below, this exception applies when funds have already been appropriated and ****719** the existing funds are related to the subject matter of the unpaid debt.

However, in their moving papers, the School Districts identified only one potential funding source for the payment of the outstanding $900 million debt: the "Proposition 98 reversion fund." (See Ed.Code, § 41207.5.) The School Districts argued that because the Legislature had previously used this account to reimburse districts for deferred mandates, it would be available to pay for some or all of the outstanding mandate debt. The State responded that the Proposition 98 reversion account does not contain funds available for this purpose, and would conflict with specific state law funding requirements.

This court then filed *County of San Diego,* in which we upheld the trial court's discretion to deny the counties' claims for reimbursement of mandate costs owed from prior budget years. (*County of San Diego, supra*, 164 Cal.App.4th at pp. 597–603, 79 Cal.Rptr.3d 489.) In supplemental briefing, the School Districts requested the court to bifurcate the matter and provide them an opportunity to conduct discovery and present evidence on the issue of the availability of existing State funds to pay the outstanding mandate debt. The State opposed this request, noting the request was untimely and that the nature and magnitude of the relief sought were inconsistent with the judiciary's role in the budgetary process and can only lead to "chaos" in the state budget.

After a hearing, the court declined to order affirmative relief on the prior debt claim, stating: "[T]he magnitude of the funds previously deferred and owed to [School Districts], coupled with the separation of powers clause set forth in article III, section 3 ... and

192 Cal.App.4th 770, 121 Cal.Rptr.3d 696, 265 Ed. Law Rep. 347, 11 Cal. Daily Op. Serv. 1923, 2011 Daily Journal D.A.R. 2308
(Cite as: 192 Cal.App.4th 770, 121 Cal.Rptr.3d 696)

the appropriation powers afforded to the Legislature under article IV, section 10 and 12, and article XVI, section 7 ... preclude the Court from ordering the Legislature to reimburse petitioners from undesignated existing appropriations....” The court also ***801** denied School Districts' request to conduct discovery “[i]n light of the Court's conclusion that [the requested] relief is precluded as a matter of law....”

The School Districts appeal from this ruling.

2. *Analysis*

[38][39] Under the California Constitution, the separation of powers doctrine prohibits a court from compelling the Legislature “to appropriate funds or to pay funds not yet appropriated.” (*County of San Diego, supra*, 164 Cal.App.4th at p. 598, 79 Cal.Rptr.3d 489.) A narrow exception to this rule exists “when a court orders appropriate expenditures from already existing funds” and the funds “ ‘are “reasonably available for the expenditures in question,” ’ ” which means that “ ‘the purposes for which those funds were appropriated are “generally related to the nature of costs incurred....” [Citation.]’ ” (*Ibid.;* see *Butt, supra*, 4 Cal.4th at pp. 698–703, 15 Cal.Rptr.2d 480, 842 P.2d 1240.)

[40] This exception must be strictly construed and is inapplicable if the existing funds have been appropriated for other purposes. (*Butt, supra*, 4 Cal.4th at pp. 698–703, 15 Cal.Rptr.2d 480, 842 P.2d 1240; see *County of San Diego, supra*, 164 Cal.App.4th at pp. 598–599, 79 Cal.Rptr.3d 489.) Moreover, a trial court has broad discretion to determine whether a mandamus remedy requiring a particular payment from an existing fund is warranted under the totality of the circumstances. “ ‘ “ ‘[C]ases may ... arise where the applicant for relief has an undoubted legal right, for which *mandamus* is the appropriate remedy, but where the court may, in ****720** the exercise of a wise discretion, still refuse the relief.’ ” ’ ” (*County of San Diego, supra*, at p. 599, 79 Cal.Rptr.3d 489.)

In *County of San Diego,* the parties stipulated that the State owed San Diego County $41 million and Orange County $72 million for prior unfunded mandates, and the counties asked the court to order this debt to be repaid from budgets of more than 20 state agencies. (*County of San Diego, supra*, 164 Cal.App.4th at pp. 599–600, 606, 79 Cal.Rptr.3d 489.) During a bench trial, the parties called numerous witnesses from the various state agencies on the issue of the existence of funds to pay for the costs of the State's prior mandate debt. (*Id.* at p. 591, 79 Cal.Rptr.3d 489.) After trial, the court found the counties had not met their burden to show the availability of the funds sought or the required relationship between many of the mandates and the funds sought. (*Ibid.*)

We concluded the evidence supported the trial court's factual findings. (See *County of San Diego, supra*, 164 Cal.App.4th at pp. 597–603, 79 Cal.Rptr.3d 489.) We additionally held the court's conclusion was proper even if there was a relationship with respect to some available funds and the unpaid mandates. (*Ibid.*) We ***802** explained that under “the unique circumstances surrounding the Counties' petition for writ of mandate in this case, ... the court acted well within the bounds of judicial discretion in denying the relief the Counties sought.” (*Id.* at p. 599, 79 Cal.Rptr.3d 489.) We reasoned that “the existence of a *clear, present,* ministerial duty to fully pay the Counties' subject reimbursement claims from the state budget of the single fiscal year in question was negated by the enormity of the relief the Counties sought. Given the magnitude of the Counties' reimbursement claims, the large number of mandates at issue, the large number of agencies from which the Counties sought reimbursement, and, most important, the insufficiency of the Counties' evidence to show that the purposes of the subject mandates were generally related to the various appropriations from which the Counties sought reimbursement, or that the targeted funds were reasonably available, the court acted well within its discretion in denying the Counties' request for a writ of mandate compelling prompt payment of their reimbursement claims from the state's 2005–2006 fiscal year budget.” (*Id.* at p. 603, 79 Cal.Rptr.3d 489.)

[41] We reach a similar conclusion in this case. The School Districts were seeking almost $1 billion in funds from the State, but cited only a single account (“the Proposition 98 reversion fund”) that could possibly contain funds to meet the reasonably related test. However, the School Districts did not present any specific evidence regarding the availability of funds in this account to satisfy the State's debt. Although the School Districts sought to conduct additional discovery to support their claim, they did not come forward with any predicate facts showing a reasonable basis to

believe sufficient funds exist and that the funds would meet the criteria of the exception (a relationship between available funds and the subject matter of the debt). (See *Butt, supra*, 4 Cal.4th at pp. 698–702, 15 Cal.Rptr.2d 480, 842 P.2d 1240.) Because appropriations for the budget year at issue were placed in a chartered bill following the Governor's signature on the Budget Act, this evidence was available without a discovery order. In seeking to make this showing, the School Districts asserted only that the Legislature had used funds in the Proposition 98 reversion fund in the past. This claimed fact is insufficient to show that funds currently exist to pay the mandate debt.

****721** Moreover, we decline the School Districts' invitation to construe our prior *County of San Diego* holding as limited only to its unique facts or to reconsider our holding. In *County of San Diego*, we affirmed a trial court's broad discretion to refuse to compel repayment of millions of dollars from a state budget where the magnitude of the reimbursement sought, as well as the large number of specific outstanding mandates and the potential funds from which such mandates would be paid, would place the court in a situation where it was essentially acting in a budgetary and legislative, rather than a ***803** judicial, role. (See *County of San Diego, supra*, 164 Cal.App.4th at pp. 602–603, 79 Cal.Rptr.3d 489.) This same principle supports the court's refusal to apply the exception in this case.

[42] Further, the court did not abuse its discretion in declining to permit petitioners to engage in a wide-ranging discovery investigation in an attempt to identify funds to pay prior mandate costs. Currently our state is experiencing an extreme budget crisis with a budget deficit estimated to be more than $20 billion. Any money a court would direct to the School Districts would reduce funds available for other obligations and implicate funding priorities and policy making decisions. These decisions are for the Legislature. Under the particular circumstances of the case, an order requiring the State to pay its claimed $900 million mandate debt from existing funds would improperly "elevate the judiciary above its coequal brethren, upset the delicate system of checks and balances, and stand the separation of powers clause on its head." (*Butt, supra*, 4 Cal.4th at p. 703, 15 Cal.Rptr.2d 480, 842 P.2d 1240.)

III. *Request for Judicial Notice*

[43][44] School Districts request that we take judicial notice of five sets of documents, identified as Exhibits A through E. Exhibits A, B, and C contain recently enacted statutes, which apparently reflect additional deferred mandates. Exhibits D and E are reports by the Legislature Analyst's Office prepared in February 2010 and April 2010, after the judgment was entered in this case. None of these exhibits were presented to the trial court.

[45] We deny this request. Generally, " 'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.' [Citation.]" (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3, 58 Cal.Rptr.2d 899, 926 P.2d 1085; accord, *In re Marriage of Forrest & Eaddy* (2006) 144 Cal.App.4th 1202, 1209, 51 Cal.Rptr.3d 172.) It is a fundamental principle of appellate law that our review of the trial court's decision must be based on the evidence before the court at the time it rendered its decision. (See *Vons Companies, Inc. v. Seabest Foods, Inc., supra*, 14 Cal.4th at p. 444, fn. 3, 58 Cal.Rptr.2d 899, 926 P.2d 1085; *Kumar v. National Medical Enterprises, Inc.* (1990) 218 Cal.App.3d 1050, 1057, fn. 1, 267 Cal.Rptr. 452.) School Districts have not cited any exceptional circumstances that would justify a deviation from this rule in this appeal.

Moreover, the proffered materials would not affect our analysis in this case. The fact the State has continued the practice of mandate deferral is already part of the record on appeal. Further, the opinions expressed by the Legislative Analyst Office after the judgment was entered are not relevant to our legal determinations.

***804** DISPOSITION

We reverse the judgment insofar as it grants injunctive relief in favor of School ****722** Districts, and affirm the judgment in all other respects. We remand for the court to vacate the writ of mandate and to issue a new judgment consistent with the determinations in this opinion. Each party to bear its own costs.

WE CONCUR: BENKE, Acting P.J., and AARON, J.

Cal.App. 4 Dist.,2011.
California School Boards Assn. v. State
192 Cal.App.4th 770, 121 Cal.Rptr.3d 696, 265 Ed.

192 Cal.App.4th 770, 121 Cal.Rptr.3d 696, 265 Ed. Law Rep. 347, 11 Cal. Daily Op. Serv. 1923, 2011 Daily Journal D.A.R. 2308
(Cite as: 192 Cal.App.4th 770, 121 Cal.Rptr.3d 696)

Law Rep. 347, 11 Cal. Daily Op. Serv. 1923, 2011
Daily Journal D.A.R. 2308

END OF DOCUMENT

CHARLES D. CHESNEY, Respondent,
v.
H. L. BYRAM, County Tax Collector, etc., Appellant.

L. A. No. 16484.

Supreme Court of California
April 29, 1940.

HEADNOTES

(1) Constitutional Law--Self-execution--Rule.

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.

(2) Taxation--Military Service--Exemptions--Constitutional Law.

Section 1 1/4, article XIII, of the Constitution of California, providing certain tax exemptions for those who have served in the army, navy, marine corps or revenue marine service in time of war, is self- executing, that is, it required no legislative enactment to put it into effect.

(3) Taxation--Claim of Exemption--Regulations.

Notwithstanding the fact that section 1 1/4, article XIII, of the state Constitution is self-executing, the legislature had power to enact legislation providing reasonable regulations for the exercise of the right to the exemptions granted therein.

(4) Taxation--Claim of Exemption--Section 3612, Political Code--Statutory Construction.

Section 3612 of the Political Code does not impose an unreasonable restriction or limitation upon the exercise of the right to exemption granted by section 1 1/4 of article XIII of the Constitution in requiring a claimant to make a claim of exemption provided for in said constitutional provision.

See 24 **Cal. Jur.** 106.

(5) Taxation--Constitutional Right--Waiver.

Section 3612 of the Political Code establishes a uniform system throughout the state for those desiring to claim the exemption granted under section 1 1/4 of article XIII of the Constitution; and a right granted by the Constitution may be waived by the inaction of the person entitled to exercise such right.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. Emmet H. Wilson, Judge. Reversed.

The facts are stated in the opinion of the court.

COUNSEL

Everett W. Mattoon, County Counsel, J. H. O'Connor, County Counsel, and Gordon Boller, Deputy County Counsel, for Appellant. ***461**

Holbrook & Tarr and W. Sumner Holbrook, Jr., for Respondent.

Bernard C. Brennan, as *Amici Curiae,* on Behalf of Respondent.

CARTER, J.

This is an appeal from a judgment of the Superior Court of Los Angeles County granting a writ of mandate against appellant, H. L. Byram, tax collector of the county of Los Angeles, compelling him to receive the sum of $21.84 as the full amount of taxes due on the real property of respondent for the fiscal year 1936-37, in lieu of taxes in the sum of $67 levied upon and extended against said property on the assessment roll of said county for said year.

Respondent's property was assessed by the Los Angeles County assessor for the fiscal year 1936-37 at the value of $1350. He claims an exemption in the amount of $1,000, by reason of his being a veteran within the meaning of section 1 1/4 of article XIII of the Constitution of California. He tendered payment to the appellant of taxes based upon the valuation of $350, which tender was refused. Respondent then secured a writ of mandate compelling appellant to accept the amount tendered and to issue a receipt in full for respondent's taxes.

The provision of the Constitution above referred to reads as follows:

"The property to the amount of one thousand dollars of every resident of this state who has served in the army, navy, marine corps or revenue marine service of the United States in time of war, and received an honorable discharge therefrom, ... shall be exempt from taxation; provided, this exemption shall not apply to any person named herein owning property of the value of five thousand dollars or more, or where the wife of such soldier or sailor owns property of the value of five thousand dollars or more. No exemption shall be made under the provisions of this act of the property of a person who is not a legal resident of the state."

Section 3612 of the Political Code provides that every person entitled to such exemption from taxation shall give to the assessor under oath all information required upon forms prescribed by the State Board of Equalization and failure ***462** of any person entitled to such exemption so to do shall be deemed as a waiver of such exemption.

The allegations of the petition for a writ of mandate bring respondent within the constitutional provision for exemption, to wit: that he is and was during the fiscal year 1936-37, a resident of California, that he served in the marine corps of the United States during the world war and received an honorable discharge therefrom, that he is married, that neither he nor his wife nor the two together owned property greater than $5,000 in value, and that in 1936 he furnished a copy of his honorable discharge to the county assessor. Respondent further alleged that at no time did he file an application for exemption or any affidavit as required by section 3612 of the Political Code.

The appellant, tax collector of the county of Los Angeles, contends that the failure of respondent herein to make the exemption claim required by Political Code section 3612 constituted a waiver of said exemption. The respondent, however, maintains his right thereto, claiming that the provision in said section, that a veteran having failed to make proof of his constitutional right to exemption prior to completion of the assessment roll "waives" such exemption, is unconstitutional and void, as being an invalid statutory "limitation" on such constitutional right.

The sole question then before this court is whether the waiver provision of section 3612 of the Political Code is an invalid infringement upon a constitutional right, or is a valid legislative provision regulating the exercise or assertion thereof.

Respondent contends that section 1 1/4 of article XIII of the Constitution is self-executing and that section 3612 of the Political Code is an attempt to limit the constitutional right to exemption from taxation granted to veterans under said provision of the Constitution. It has been held that:

(1) "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." (Cooley's Constitutional Limitations, 7th ed., p. 121; *Winchester v. Howard*, 136 Cal. 432, 439 [64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153]; *People v. Hoge*, 55 Cal. 612.) ***463**

(2) We are disposed to hold that the constitutional provision above-mentioned is self-executing; that is, that it required no legislative enactment to put it into effect. If the legislature had failed to make any provision for a veteran to avail himself of the tax exemption provided for in said provision of the Constitution, we are of the opinion that the veteran would nevertheless be entitled to the exemption provided for. How such exemption could be obtained, would be a matter first for the determination of the assessors of the respective political subdivisions, and in case of their failure to recognize the right granted to the veteran, their action would be subject to review by the courts. (3) However, it does not follow from the determination that the above-mentioned constitutional provision is self-executing, that the legislature did not have the power to enact legislation providing reasonable regulation for the exercise of the right to the exemption granted by the Constitution, and if section 3612 of the Political Code constitutes such reasonable regulation and not an invalid limitation of the right thereby granted, the power of the legislature to enact said section should be upheld. (*Chester v. Hall*, 55 Cal. App. 611 [204 Pac. 237]; *First M. E. Church v. Los Angeles County*, 204 Cal. 201 [267 Pac. 703].)

In the case of *Chester v. Hall*, *supra*, the court held that the requirement of section 1083a of the Political Code that the signer of a petition for a county charter election shall affix thereto the date of such signing is not void as making an additional require-

ment to the self-executing character of section 7 1/2 of article XI of the Constitution, since it in no manner prevents any person from signing but merely facilitates the operation of the constitutional provision and places a safeguard around the exercise of the rights thereby secured.

In that case the court said:

"It is clear that the constitutional provision in question is self- executing, but it does not follow that legislation may not be enacted to facilitate its operation and place safeguards around the exercise of the rights thereby secured so long as the right itself is not curtailed or its exercise unreasonably burdened. 'Legislation may be desirable, by way of providing convenient remedies for the protection of the right secured, or of regulating the claim of the right so that its ***464** exact limits may be known and understood; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it.' Cooley's Constitutional Limitations, 7th ed., p. 122. See, also, *Welch v. Williams*, 96 Cal. 365 [31 Pac. 222]; *State v. Hooker*, 22 Okl. 712 [98 Pac. 964]; *City of Pond Creek v. Haskell*, 21 Okl. 711 [97 Pac. 338]; *Stevens v. Benson*, 50 Or. 269 [91 Pac. 577]; *State v. Superior Court*, 81 Wash. 623 [Ann. Cas. 1916B, 838, 143 Pac. 461].) The requirement of section 1083a of the Political Code that the signer of a petition shall 'affix thereto the date of such signing' in no manner prevents any person from signing or places an undue burden on the exercise of the right. The Constitution prescribed the qualifications of electors and provides that all persons having such qualifications 'shall be entitled to vote at all elections'. The Constitution makes no provision for the registration of electors, yet registration laws have always been upheld as reasonable regulations by the legislature for the purpose of ascertaining who are qualified electors and preventing illegal voting."

In the case of *First M. E. Church v. Los Angeles County, supra,* this court while declining to pass upon the question of whether or not section 1 1/2 of article XIII of the Constitution of California is self-executing, made this comment with respect to legislation enacted for the purpose of facilitating the operation of a self-executing provision of the Constitution:

"It may be assumed as argued by respondent, that even though a constitutional provision is self-executing, the legislature may, and in many instances must, enact legislation to facilitate its operation, and to provide convenient remedies for the protection of the right established, and for the determination thereof and the regulation of claims thereto. Such legislation must be in furtherance of the purposes of the constitutional provisions, but if so, it is valid and enforceable. The last provision of section 3611 is, we think, such a law. It is regulatory, and places no unreasonable burden upon those entitled under section 1 1/2 of article XIII of the Constitution to tax exemption. It creates no hardship to require of a property owner that he file an affidavit showing that the property claimed to be exempt is used solely ***465** for religious worship, that it is required for the convenient use and occupation of the building upon the premises, and that the same is not rented for such purposes and rent received by the owner therefor."

(4) We are not impressed with the argument advanced by respondent to the effect that the provisions of section 3612 of the Political Code imposes an unreasonable restriction or limitation upon the exercise of the right to the exemption granted by the constitutional provision above mentioned. On the other hand, it appears to us reasonable and proper that some method should be provided by the legislature for the determination of those who may be entitled to the exemption provided for in the Constitution. It is obvious that the burden should be upon the person claiming the exemption to establish his right thereto. The method provided for under section 3612 of the Political Code is a simple one and is available to all who desire to claim the exemption provided for under the above-mentioned provision of the Constitution; in fact, it would be much easier and simpler for a person claiming such exemption to comply with the provisions of section 3612 of the Political Code than to resort to the procedure followed by respondent in this case, even if the tax collector had complied with respondent's request to accept the sum of $21.84 in full payment of the taxes due from respondent, and the latter had not been required to institute this action.

It has been uniformly held that the legislature has the power to enact statutes providing for reasonable regulation and control of rights granted under constitutional provisions. (*Bergevin v. Curtz*, 127 Cal. 86 [59 Pac. 312]; *Chester v. Hall, supra; Crescent Wharf etc. Co. v. Los Angeles*, 207 Cal. 430 [278 Pac. 1028];

Western Salt Co. v. City of San Diego, 181 Cal. 696 [186 Pac. 345]; *Bancroft v. City of San Diego*, 120 Cal. 432 [52 Pac. 712]; *Sala v. City of Pasadena*, 162 Cal. 714 [124 Pac. 539]; *Potter v. Ames*, 43 Cal. 75.) In the case of *Bergevin v. Curtz*, *supra*, this court considered the effect of a statute requiring a citizen to register in order to exercise the voting franchise guaranteed by the Constitution. In discussing the power of the legislature to impose conditions on those entitled to exercise the voting franchise under the Constitution, this court said: ***466**

"We do not think the legislature, even if it attempted to do so, could add any essential to the constitutional definition of an elector. It is settled by the great weight of authority that the legislature has the power to enact reasonable provisions for the purpose of requiring persons who are electors and who desire to vote to show that they have the necessary qualifications, as by requiring registration, or requiring an affidavit or oath as to qualifications, as a condition precedent to the right of such electors to exercise the privilege of voting. Such provisions do not add to the qualifications required of electors, nor abridge the right of voting, but are only reasonable regulations for the purpose of ascertaining who are qualified electors, and to prevent persons who are not such electors from voting. These regulations must be reasonable and must not conflict with the requirements of the constitution. The legislature has required that all electors, as a condition of the right to vote, shall have their names properly and in due season entered upon the great register of the county. (Pol. Code, sec. 1094.) The section provides that in the register shall be entered the names of the qualified electors of the county, and 'that any elector who has registered and thereafter moved his residence to another precinct in the same county thirty days before an election may have his registration transferred to such other precinct upon his application'. *The legislature has made no attempt to change or add to the qualifications of an elector, but has simply provided a means whereby the elector who is entitled to vote may be known by having his name enrolled upon an authentic list."*

In the case of *Crescent Wharf etc. Co. v. Los Angeles*, *supra*, this court had before it a case involving the right of a person whose property had been appropriated for public use to compensation for such property in accordance with the provisions of section 14 of article I of the Constitution of California. In that case it was contended by the plaintiff that its right to recover such compensation could not be abrogated by a charter provision of the city of Los Angeles requiring the presentation of a claim as a condition precedent to the commencement of an action to recover the value of the property appropriated by the city. In answering this contention, this court speaking through the late Mr. Justice Seawell said: ***467**

"All that the framers of the Constitution meant to do was to protect the citizen in his ownership of property against the state or its agencies appropriating private property to public uses against the will of the owner without making just compensation for all damages which the owner should sustain by the exercise of governmental power. It was not intended to remove the subject matter beyond the operation of reasonable statutory enactments which affect property rights generally, such as the bar of the statute of limitations."

Certainly, if the legislature has the power to pass statutes providing reasonable regulations and control over the constitutional right of a citizen to vote and the constitutional right of a citizen to recover compensation for his property which has been appropriated to a public use, it should likewise have the power to enact statutory provisions providing reasonable regulations and control over the exercise of rights granted by the Constitution for the exemption of property from taxation.

In determining the reasonableness of the regulation provided for in section 3612 of the Political Code as applied to the exercise of the right of a veteran to exemption from taxation under section 1 1/4 of article XIII of the Constitution, let us examine the constitutional provision and ascertain to whom it applies and what property is exempted from taxation thereunder. It is obvious that the exemption therein provided for is available to veterans of a particular class, having specific qualifications as to experience, property ownership and residence, to wit: (1) He must be a resident of this state; (2) he must have served in the army, navy, marine corps or revenue marine service of the United States army in time of war; (3) he must have received an honorable discharge; and, (4) neither he nor his wife is the owner of property of the value of $5,000 or more. If such veteran falls within the classification above-outlined, he is entitled to an exemption from taxation of any property owned by him up to the value

of $1,000. It is obvious that before an assessor can determine whether or not a property owner is entitled to an exemption under the above-mentioned provision of the Constitution, it is necessary to obtain sufficient information to enable him to ascertain whether or not such person comes within the classification specified therein. It ***468** is likewise obvious that such determination and ascertainment is necessary in order to enable the assessor to make up his assessment roll and determine the value of property within the political subdivision subject to assessment and taxation. Such determination must be made not later than the first of July of each year as the assessment roll is thereupon submitted to the Board of Equalization of the respective political subdivisions and the valuation determined by such board is used as the basis for the tax rate required to raise revenue for the maintenance of the government.

It would seem to be consonant with the establishment of a sound fiscal policy to have all matters of exemption of property from taxation determined not later than July 1st of each year, and it is obvious that this can only be done by the application of a uniform regulation to those who are entitled to exemptions. The legislature undoubtedly had the foregoing considerations in mind in the adoption of section 3612 of the Political Code and similar enactments for the determination of claims for exemption of property from taxation. Such regulations, if reasonable, as those provided for under section 3612 of the Political Code, do not constitute a limitation or restriction upon the constitutional right of the person entitled to the exemption, but simply establishes a rule for the determination of whether or not the right is to be exercised or waived.

(5) The provisions of section 3612 of the Political Code establish a uniform system throughout the state for those desiring to claim the exemption granted by the Constitution under the provisions of section 1 1/4 of article XIII thereof. It amply safeguards the exercise of the right of those entitled to the exemption, facilitates the operation of the system of assessment and taxation now authorized by law, and protects the public against the fraudulent claims of those not entitled to the exemption who may nevertheless assert their claim thereto. Such legislation is clearly not in contravention of the constitutional right to which it relates.

That a right to have property exempted from taxation can be waived, there can be no doubt. Even counsel for respondent in the case at bar concedes that unless appropriate legal proceedings were instituted by the exemption claimant to resist the payment of the tax or the recovery of the tax after ***469** the same is paid within the time provided for in the statute of limitation applicable thereto, the exemption claimant would lose his right; in other words, the exemption claimant would waive his right to the exemption by failing to assert his claim in time to have his exemption noted on the assessment roll or by failing to take appropriate action thereafter within the period of time allowed by the statute for the recovery of taxes paid under protest.

It is well settled that a right granted by the Constitution may be waived by the inaction of the person entitled to exercise such right. Probably the most common example of such waiver is disclosed by those cases where a property owner whose property has been taken or damaged for public use fails to avail himself of the remedies provided for by statute to either recover the property so taken or compensation and damages for its taking. It has been repeatedly held that mere inaction on the part of the owner of such property may constitute a waiver of the right to compensation or damages guaranteed to him by section 14 of article I of the Constitution of California. (*Bigelow v. Ballerino*, 111 Cal. 559 [44 Pac. 307]; *Gurnsey v. Northern Cal. Power Co.*, 160 Cal. 699 [117 Pac. 906, 36 L. R. A. (N. S.) 185]; *Sala v. City of Pasadena, supra; Yonker v. City of San Gabriel*, 23 Cal. App. (2d) 556 [73 Pac. (2d) 623].)

The trial court based its decision in favor of the respondent in this action upon the case of *St. John's Church v. County of Los Angeles*, 5 Cal. App. (2d) 235 [42 Pac. (2d) 1093], wherein it was held that a similar provision of the Constitution (sec. 1 1/2 of art. XIII) exempting church properties from taxation was self-executing, and that no legislation was necessary to achieve its purpose, and that no legislation was permissible that would impair, limit or destroy the rights thereby granted. In the written opinion filed by the learned trial judge in overruling the demurrer in the case at bar, he said:

"On the authority of that case (*St. John's Church v. County of Los Angeles*) it must be held that that part of section 3612 of the Political Code which declares

that failure to make the affidavit and to furnish the evidence therein required operates as a waiver of the constitutional exemption is void by reason of its being in excess of the power of the ***470** legislature to impair or destroy the exemption granted by a self- executing provision of the Constitution."

While it may be argued that a different rule should be applied to the legislation relating to the exemption of church property under the above-mentioned provision of the Constitution, it is our conclusion that the same rule should be applied to such legislation as that involved in the case at bar, and we therefore disapprove the holding of the District Court of Appeal in the case of *St. John's Church v. County of Los Angeles, supra*, to the effect that the provision in subdivision 3 of section 3611 of the Political Code that the failure on the part of the person claiming the exemption to make the affidavit mentioned therein should be deemed a waiver of such exemption is ineffective for the reason that it constitutes an attempt by the legislature to limit the exemption provided for in section 1 1/2 of article XIII of the Constitution.

In view of what we have said with respect to the power of the legislature to enact statutes providing for reasonable regulation and control of a constitutional right, we deem it unnecessary to devote further time in this opinion to a discussion of the St. John's Church case. We can see no reason why the same rule as to waiver of the right to exemption should not apply to church property as to any other right granted by the Constitution, and we think it is immaterial whether such waiver is the result of the failure of the exemption claimant to comply with the provisions of the statute providing such reasonable regulation or is the result of inaction on the part of such claimant.

The regulation provided for in section 3611 of the Political Code before its amendment in 1929 was held not to be unreasonable in the case of *First M. E. Church v. Los Angeles County, supra*, as appears from the portion of the opinion in said case hereinabove quoted. The 1929 amendment to section 3611 of the Political Code simply provides that the failure of the exemption claimant to make the affidavit required by said section constitutes a waiver of the exemption. From what we have heretofore said with reference to a similar provision contained in section 3612 of the Political Code, this amendment did not transform said section from a reasonable regulation into an invalid limitation upon the exercise ***471** of the constitutional right granted by section 1 1/2 of article XIII of the Constitution.

The basis of the decision of the District Court of Appeal in the St. John's Church case appears to be that property subject to exemption from taxation under the provisions of section 1 1/2 of article XIII of the Constitution of California, is not subject to assessment and taxation and that any attempt to place the same on the assessment roll of a political subdivision for the purpose of assessment and taxation is abortive. In the opinion in said case, the court said:

"The basic question is whether or not the property is taxable and while reasonable regulations may be made for the making of preliminary proof and while a failure to comply therewith may subject an owner of such property to the burden of making his proof in a more inconvenient and expensive manner, through an action in court, it cannot confer an authority to tax which has been expressly withheld by the Constitution. The authority to levy such a tax thus withheld cannot be acquired by a statute providing, in effect, that if the owner does not claim the exemption before the assessment roll is completed the tax will be levied."

The inevitable result to be obtained by the line of reasoning which is the basis of the decision in the St. John's Church case must be, that if an owner of property exempt from taxation under the provisions of section 1 1/2 of article XIII of the Constitution would fail to assert a claim of exemption for said property, and the same would be assessed and the taxes thereon become delinquent and the property sold in accordance with the law authorizing the sale of property for delinquent taxes, a purchaser at such delinquent tax sale would not acquire a valid title to the property; in other words, all proceedings in connection with the assessment, levy of taxes and sale of said property would be void. It would therefore follow that the owner of such property could ignore all proceedings instituted by public officials to have said property subjected to assessment, levy and payment of taxes, and would suffer no loss as the result of such inaction or failure to assert a claim of exemption. It is obvious that such a situation would have a detrimental effect upon the administration of the laws providing for the assessment, levy and collection of taxes, and would create a condition of uncertainty with respect to what

property was ***472** available for the purpose of taxation within the respective political subdivisions which have the power to levy and collect taxes for the maintenance of local government.

The opinion of the District Court of Appeal in the St. John's Church case does not discuss the well-settled rules that a right granted under a provision of the Constitution may be waived and that the legislature has the power to enact statutes providing for reasonable regulation and control of a right granted by the Constitution. The application of these rules to the factual situation in said case would have resulted inevitably in the reversal of the judgment rendered therein.

The judgment is reversed with directions to the trial court to enter judgment in favor of appellant denying respondent the relief prayed for in his petition.

Gibson, J., Edmonds, J., Curtis, J., Shenk, J., Waste, C. J., and Houser, J., concurred.

Rehearing denied.

Cal.
Chesney v. Byram
15 Cal.2d 460, 101 P.2d 1106

END OF DOCUMENT

JEROME C. CORNELL, Appellant,
v.
GEORGE R. REILLY et al., as Members of STATE BOARD OF EQUALIZATION, Respondents.

Civ. No. 16165.

District Court of Appeal, First District, Division 1, California.
Aug. 18, 1954.

HEADNOTES

(1a, 1b) Intoxicating Liquors § 82--Offenses--Evidence.
Finding that liquor licensee hired girls to solicit sales of alcoholic beverages, in violation of Pen. Code, § 303, is sustained by evidence that, among other things, when customer entered barroom a female employee asked him to buy her a drink and that bartender kept record of her drinks.

(2) Administrative Law § 6--Administrative Proceedings--Nature of Proceedings.
Although in disciplinary administrative proceedings burden of proof is on party asserting affirmative and guilt must be established to reasonable certainty and not based on surmise, conjecture, suspicion, theoretical conclusions or uncorroborated hearsay, the proceedings are not criminal in nature and not governed by law applicable to criminal cases.
See **Cal.Jur.2d,** Administrative Law and Procedure, §§ 86, 87; **Am.Jur.,** Public Administrative Law, § 107.
(3) Licenses § 55--Revocation--Proceedings--Purpose.
Administrative proceedings aimed at revoking license are not conducted for primary purpose of punishing an individual but to keep regulated business clean and wholesome and to protect public by determining whether licensee exercised his privilege in derogation of public interest.

(4) Intoxicating Liquors § 9.9--Licenses--Revocation.
Standards to be applied in proceeding for revocation of liquor license are not those applicable to criminal trials, the proceeding being a disciplinary function of Board of Equalization.
See **Cal.Jur.2d,** Alcoholic Beverages, § 33 et seq.
(5) Intoxicating Liquors § 9.9--Licenses--Revocation.
Board of Equalization need not define by law or rule all of things that will put liquor license in jeopardy. (Const. art. XX, § 22.)

(6) Intoxicating Liquors § 9.9--Licenses--Revocation.
Board of Equalization can revoke liquor license irrespective of violation of specific Penal Code section, if evidence shows situation contrary to public welfare or morals.

(7) Criminal Law § 369--Evidence--Intent.
Intent may be proved by circumstantial evidence. (Pen. Code, § 21.)

(8) Intoxicating Liquors § 9.9--Licenses--Revocation.
The asserted fact that liquor licensee had no specific intent to violate Pen. Code, § 303, would not prevent revocation of license because of acts of bartender-manager in hiring female employees to solicit drinks, since licensee who elects to operate business through employee is responsible to licensing authority for employee's conduct in exercise of license.

(9) Criminal Law § 1018--Judgment--Conclusiveness.
Acquittal of liquor licensee's bartender-manager of criminal charge of violation of Pen. Code, § 303, is not res judicata in proceedings before Board of Equalization aimed at revoking license.

SUMMARY

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Herbert C. Kaufman, Judge. Affirmed.

Proceeding in mandamus to review validity of order of State Board of Equalization revoking a liquor license. Judgment denying writ, affirmed.

COUNSEL

Donovan, Stuhr & Martin and Charles Stuhr for Appellant.

Edmund G. Brown, Attorney General, and William M.

Bennett, Deputy Attorney General, for Respondents.

PETERS, P. J.

The State Board of Equalization, after hearings before a hearing officer and the board, found that Jerome Cornell, the owner of an on-sale general liquor license and the operator of a restaurant-bar in San Francisco, had employed two girls to encourage customers to buy them drinks in violation of the law. Because of such violation, Cornell's liquor license was ordered revoked. Cornell, under the provisions of section 1094.5 of the Code of Civil Procedure, applied to the superior court for a writ of mandate to review the ***180** validity of the revocation order. That court found that the findings of the board were supported "by substantial evidence and by the weight of the evidence," that the findings constituted good cause for revocation, and denied the petition for a writ of mandate. Cornell appeals from the judgment based on those findings.

The accusation before the board contained two counts. The first charged Cornell with employing, on certain dates, two named girls for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, and with paying these girls a commission for such services. The second count is not here involved. [FN1] The first count charges, without mentioning, the commission of acts declared unlawful by section 303 of the Penal Code. That section makes it a misdemeanor for a liquor seller "to employ upon the premises where the alcoholic beverages are sold any person for the purpose of procuring or encouraging the purchase or sale of such beverages, or to pay any person a percentage or commission on the sale of such beverages for procuring or encouraging such purchase or sale." Section 24200 of the Business and Professions Code [FN2] provides that it is grounds for the suspension or revocation of a license "(a) When the continuance of a license would be contrary to public welfare or morals ... (b) ... the violation or the causing or the permitting of a violation by a licensee of ... any rules of the board ... or any other penal provisions of law of this State prohibiting or regulating the sale ... of alcoholic beverages. ..."

FN1 This second count charged Cornell with possession on the licensed premises on a certain date of 11 empty distilled spirits bottles, which, under the law, should have been destroyed. Cornell was found to have violated the law in this respect, and his license was suspended for 15 days for such violation. The validity of that suspension is not challenged in these mandate proceedings.

FN2 This section was added to the Business and Professions Code in 1953. Before that, its provisions, in substance, were to be found in 2 Deering's General Laws, Act No. 3796, section 40.

A hearing on the accusation was had, as provided by law, before a hearing officer, whose proposed decision, findings and conclusions, recommending revocation, were adopted by the board. Thereafter, Cornell, under the provisions of section 11521 of the Government Code, petitioned for a reconsideration, which was granted, and a second hearing was then had before the board. The board reaffirmed its original decision. It found that Cornell, on the dates in question, did employ the two girls named in the accusation "for the purpose of procuring ***181** or encouraging the purchase or sale of alcoholic beverages," in violation of section 303 of the Penal Code, but that it was not true that Cornell paid the girls a percentage or commission for procuring or encouraging such purchases or sales in violation of that section. Revocation of Cornell's license was ordered. The superior court, in the mandate proceedings, found these findings were supported and refused to grant the writ.

(1a) The basic facts as presented to the hearing officer and to the board, and as accepted by the board and the reviewing court, are not in serious dispute. Cornell, the owner of the bar and liquor license, was not present on the premises during the times the alleged offenses occurred, nor did he testify at the hearing before the hearing officer. During all times here relevant Cornell had delegated the operation of the bar to William Andrews, the bartender-manager. Just before midnight on March 24, 1953, several liquor control officers entered the bar. One of them, by the name of Wright, testified that he sat at the bar; that a woman, who later identified herself as Dottie Shannon, one of the entertainers, sat down beside him; that after some conversation he ordered a drink for himself and she asked "Am I in?"; that he replied that she was, whereupon the bartender Andrews, without further orders, served her a "champagne cocktail" taken from a Champale [FN3] bottle; that the bartender charged him eighty- five cents for the highball ordered

by him, and $1.50 for the cocktail served to the girl; that during the next hour he and Miss Shannon had three drinks each; that on each occasion he was charged $2.35 for the two drinks; that after the serving of the drinks the bartender made a notation on a pad lying beside the cash register.

> FN3 Champale is a malt beverage of low alcoholic content and much cheaper than champagne. It costs but 40 cents a bottle. The drinks here involved were 2 or 3 ounces each.

Officer Wright returned to the bar at about 10:50 p. m. on the night of March 27, 1953. He testified that on that occasion he observed Andrews serving drinks to Dottie Shannon and another identified liquor officer, and that each time a drink was served to the girl a notation was made by the bartender on the pad. Wright testified that he observed that the type of drink, price and procedure of notation were identical to his own prior experienced solicitation. Two other officers testified that on these occasions they had substantially similar ***182** experiences with Miss Shannon or Miss Lee, another entertainer. They corroborated Wright in all substantial respects.

The officers decided to and did make the arrest in the early morning hours of March 28, 1953. They confiscated the remainder of one of the girl's drinks, which, upon analysis, was discovered to have an alcoholic content of 5.1 per cent. They also confiscated the pad upon which the notations had been made, and 11 empty, but unbroken, distilled spirits bottles found under the bar. The pad contained the names of all of the entertainers and some other employees, and after each name were tally marks, and dollars and cents figures.

Andrews was then arrested. Vickie Lee, one of the entertainers for whom the officers had purchased drinks, told the officers at the time of Andrews' arrest that she was paid fifty cents by her employer for each "champagne cocktail" purchased for her. At the hearing before the hearing officer Miss Lee denied making any such statement, denied that she received any commission for the solicitation of drinks, and testified that she paid for all drinks consumed by herself when she cashed her paycheck each week. Andrews admitted keeping the pad with the tally marks after each entertainer's name, but testified that this was done to keep a record of the number of drinks each girl consumed and for which they were charged at the end of each week. This, according to him, was the reason for the tally marks and the dollars and cents figures after each girl's name on the pad. It will be noted that the officers had testified that they had paid $1.50 each for the drinks consumed by the entertainers, and that marks were made on the pad after the purchase of each drink for an entertainer. Thus, if Andrews' and Miss Lee's testimony had been believed, which it was not, the bar received double payment for the drinks consumed by the entertainers. Otherwise, there would have been no reason for keeping a record of drinks already paid for.

It was stipulated that if Cornell were present he would testify that Andrews had told him that the bar was being conducted lawfully and according to the rules and regulations of the board, and that, although female entertainers were employed, they were never paid any sums except the contract wages for their dancing and singing; in other words, were not employed to solicit drinks. The written contracts of the entertainers providing a salary for singing and dancing only were introduced into evidence, as well as certain paychecks issued to the entertainers. It also appears in evidence that ***183** Andrews had been charged with a violation of section 303 of the Penal Code and with keeping empty unbroken alcoholic beverage bottles on the premises, that he had been tried before a jury in the municipal court, and that he had been acquitted of both charges.

The basic argument of appellant is that administrative proceedings looking toward the revocation of a liquor license are criminal in nature insofar as the *quantum* of proof is concerned, and that the evidence here does not meet that test. The principal California case relied upon to establish this premise is *Messner v. Board of Dental Examiners*, 87 Cal.App. 199, where, at page 205 [262 P. 58], it is stated in reference to a proceeding resulting in the suspension of a dental license: "The statute [the Dental Act] is highly penal, and a proceeding thereunder for the revocation of a license to practice dentistry is in the nature of a criminal trial in which all intendments are in favor of the accused." Based on this argument, the appellant contends that all of the elements of the offense or offenses defined in section 303 of the Penal Code were not proved. Appellant admits that the evidence shows that he hired entertainers, but correctly points out that such is perfectly legal. He also admits that the evi-

dence shows that these entertainers solicited drinks from patrons of the bar, but correctly points out that mere solicitation by employees of drinks, under the law as it then existed, constituted no offense against the liquor laws so far as the licensee was concerned. He argues that to constitute an offense under section 303 of the Penal Code the employees must be hired "for the purpose" of soliciting drinks, [FN4] and that this requires evidence of a specific intent or *"mens rea"* on his part to so hire the employees. Appellant urges that there is no evidence at all of his specific intent to hire personnel to solicit drinks. Appellant further argues that, since the record shows that he personally was out of the city when the challenged acts took place, he cannot be held responsible for the acts of Andrews in the absence of any evidence that he authorized those acts, because the statute requires proof of his specific intent.

> FN4 The section prohibits the hiring of persons for the purpose of soliciting drinks or from paying any person a commission for soliciting drinks. So far as the "pay" provision of the statute is concerned, the board found the charge unfounded. The validity of the revocation, therefore, must be upheld, if at all, upon the charge of hiring employees for the purpose of soliciting drinks.

(2) It may be conceded that in disciplinary administrative ***184** proceedings the burden of proof is upon the party asserting the affirmative (*Bley v. Board of Dental Examiners*, 87 Cal.App. 193 [261 P. 1036]), and that guilt must be established to a reasonable certainty (*Furman v. State Bar*, 12 Cal.2d 212 [83 P.2d 12]; *Coffman v. Board of Architectural Examiners*, 130 Cal.App. 343 [19 P.2d 1002]) and cannot be based on surmise or conjecture, suspicion or theoretical conclusions, or uncorroborated hearsay. (See cases collected 2 Cal.Jur.2d 248, § 145.) But it is now well settled that such proceedings are not criminal in nature, and are not governed by the law applicable to criminal cases. (See many cases collected 2 Cal.Jur.2d 169, § 87.) The contrary language found in the Messner case (87 Cal.App. 199, 205) above quoted has been classified as a mere "dictum," and expressly disapproved. (*Webster v. Board of Dental Examiners*, 17 Cal.2d 534, 539 [110 P.2d 992].) (3) The object of an administrative proceeding aimed at revoking a license is to protect the public, that is, to determine whether a licensee has exercised his privilege in derogation of the public interest, and to keep the regulated business clean and wholesome. Such proceedings are not conducted for the primary purpose of punishing an individual. (See cases collected 2 Cal.Jur.2d 169, § 87, at p. 170.) Hence, such proceedings are not criminal in nature.

These principles are now well settled in this state, although admittedly there was language in several early cases to the contrary. The problem was thoroughly discussed and settled in *Webster v. Board of Dental Examiners*, 17 Cal.2d 534 [110 P.2d 992]. In that case, at page 537, it is stated:

"Appellant first challenges the order of suspension on the theory that administrative proceedings to revoke a professional license are quasi- criminal in nature. It is suggested that the rules governing burden of proof, and *quantum* of proof must be those which apply in criminal trials, and that in consequence the board used an improper standard in weighing the evidence. This analogy between a proceeding to revoke a license and a criminal trial is found in a number of the earlier cases. ...

"Where, on the other hand, the legislature has created a professional board and has conferred upon it power to administer the provisions of a general regulatory plan governing the members of the profession, [FN5] the overwhelming weight of authority has rejected any analogy which would require ***185** such a board to conduct its proceedings for the revocation of a license in accordance with theories developed in the field of criminal law. [Citing many cases.] Many California cases have expressly rejected the contention that administrative proceedings for the revocation of a professional license are to be governed by criminal law theories on matters of evidence. [Citing many cases.] ...

> FN5 In the instant case the State Board of Equalization was created by and receives its powers directly from the Constitution. (Art. XX, § 22.)

"Some of the cases relied upon by appellant are clearly distinguishable. ... The statement in *Messner v. Board of Dental Examiners*, 87 Cal.App. 199, 205 [262 P. 58] ... that the proceedings were *quasi*-criminal in nature is *dictum* which is contradicted so far as it relates to matters of evidence by the long line of cases

cited above. ... The few remaining decisions which contain language tending to support petitioner's view are contrary to the great weight of authority in California and elsewhere, as pointed out above."

In *Kendall v. Board of Osteopathic Examiners*, 105 Cal.App.2d 239, 248 [233 P.2d 107], this court quoted, with approval, the following statement from *Murphy v. Board of Medical Examiners*, 75 Cal.App.2d 161, 166 [170 P.2d 510]: " 'The proceeding here involved is an administrative, disciplinary proceeding, and is not criminal in its nature, nor is it to be judged by the legal standards applicable to criminal prosecutions.' "

(4) Thus, it follows that this proceeding for the revocation of a liquor license is a disciplinary function of the State Board of Equalization, and that the standards to be applied are not those applicable to criminal trials. Furthermore, in the instant case, it was not necessary for the board to find that there had been a criminal violation of section 303 of the Penal Code in order to revoke the license. (5) Article XX, section 22, of the Constitution, confers on the board "the exclusive power to license ... sale of intoxicating liquors in this State, ... and shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." This means that since a liquor license is a permit to do what would, without such license, be unlawful, the board need not define by law or rule all of the things that will put that license in jeopardy. (*Moore v. State Board of Equalization*, 76 Cal.App.2d 758, 764 [174 P.2d 323]; see also Bus. & Prof. Code, § 24200; *Covert v. State Board of Equalization*, 29 Cal.2d 125, 131 [173 P.2d 545].) ***186** (6) Thus, although it is not indispensable to a holding in the instant case that the evidence supports the findings, because the evidence does show a violation of section 303 of the Penal Code, it is the law that appellant's license could have been revoked irrespective of a violation of a specific Penal Code section, if the evidence shows a situation contrary to public welfare or morals.

(1b) Tested by the standards applicable to administrative proceedings, or even by the standards applicable to criminal trials, the evidence here is sufficient to support the finding of a hiring for the purpose of solicitation. The fact that the girls were employed by appellant is conceded. The fact that they, on numerous occasions, solicited drinks from patrons of the bar was established by substantial evidence, and is not denied. The fact that the bartender-manager Andrews knew of such solicitation was established by the record kept by the bar of all drinks consumed by the entertainers, even though paid for by a patron. Under such a state of facts the inference that such solicitation was an integral part of the employment of the entertainers is not only reasonable, but almost inevitable. Thus, even if it was necessary to establish that appellant had a specific intent to hire the employees for solicitation purposes, such fact was established by clear evidence and the reasonable inferences therefrom. (7) Intent can, of course, be proved by circumstantial evidence. (Pen. Code, § 21; *People v. Von Mullendorf*, 110 Cal.App.2d 286 [242 P.2d 403].)

(8) The contention of appellant that even if a hiring of girls for the purpose of soliciting drinks was proved, the evidence shows such hiring was by Andrews, his manager and agent, and cannot be charged to him in the absence of evidence that he knew of or directed such acts, because the Penal Code section requires a specific intent on the part of the person charged, requires but brief consideration. The question is not whether appellant is criminally liable for the acts of Andrews, but whether the board can revoke a license because of the acts of the manager of the establishment in violating the provisions of section 303 of the Penal Code. Obviously, as was said in *Mantzoros v. State Board of Equalization*, 87 Cal.App.2d 140, 144 [196 P.2d 657]: "The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license, else we would have the absurd result that liquor could be sold by employees at forbidden ***187** hours in licensed premises and the licensees would be immune to disciplinary action by the board. Such a result cannot have been contemplated by the Legislature. Even in the case of criminal statutes vicarious liability for the acts of employees is not unknown." By virtue of the ownership of a liquor license such owner has a responsibility to see to it that the license is not used in violation of law. Obviously, the economic benefits of the solicitation of drinks by the entertainers with Andrews' knowledge and participation redounded to the benefit of appellant. The responsibility for Andrews' acts in the operation of the license can and should be imputed to appellant.

(9) The somewhat related argument that Andrews' acquittal in the criminal action constitutes a conclusive determination, binding in this proceeding, that such offenses had not been committed is equally without merit. Even if appellant had been charged criminally and acquitted, such acquittal would be no bar in a disciplinary action based on the same facts looking towards the revocation of a license. (*Traxler v. Board of Medical Examiners*, 135 Cal.App. 37 [26 P.2d 710]; *Bold v. Board of Medical Examiners*, 135 Cal.App. 29 [26 P.2d 707]; *Saxton v. State Board of Education*, 137 Cal.App. 167 [29 P.2d 873].) Quite clearly, if the principle of res judicata is rejected where the defending party is identical in the two actions, it necessarily follows that it is not res judicata when the prior acquittal is of a different party.

The judgment appealed from is affirmed.

Bray, J., and Wood (Fred B.), J., concurred. ***188**

Cal.App.1.Dist.
Cornell v. Reilly
127 Cal.App.2d 178, 273 P.2d 572

END OF DOCUMENT

DESERT TURF CLUB (a Corporation), Appellant,
v.
THE BOARD OF SUPERVISORS OF RIVERSIDE COUNTY et al., Respondents.

Civ. No. 5262.

District Court of Appeal, Fourth District, California.
May 11, 1956.

HEADNOTES

(1) Constitutional Law § 107--Police Power--Legislative Discretion.

When the state sees fit to regulate a matter which is within its police power, its authority over the subject is plenary.

See **Cal.Jur.2d,** Constitutional Law, §§ 178, 179; **Am.Jur.,** Constitutional Law, § 305 et seq.

(2) Theaters and Exhibitions § 3--Regulation--Racing.

The state has taken over in its entirety the subject of horse racing.

See **Cal.Jur.,** Theaters, Shows, Exhibitions and Public Resorts, § 4 et seq.; **Am.Jur.,** Theaters, Shows, Exhibitions and Public Resorts, § 13 et seq.

(3) Theaters and Exhibitions § 3--Regulation--Racing.

A board of supervisors cannot overrule the act of the people of the state in adopting a constitutional amendment and the Legislature of the state in passing a full and comprehensive plan for licensing and control of horse racing by forbidding on moral grounds what the state expressly permits.

(4) Theaters and Exhibitions § 3--Regulation--Racing.

A board of supervisors, acting in good faith, may by properly adopting zoning restrictions exclude on soundly-based grounds the installation of a horse racing track or any other type of activity from those portions of the county as to which such exclusion is reasonable.

(5) Counties § 55--Boards--Powers.

A board of supervisors cannot, under the guise of doing one thing, accomplish a wholly disparate end.

(6) Administrative Law § 8, 9--Proceedings--Hearing--Evidence.

In an administrative hearing the evidence must be produced by witnesses personally present or by authenticated documents, maps or photographs; ordinarily hearsay evidence standing alone can have no weight, and this applies to hearsay evidence concerning someone else's opinion; cross- examination within reasonable limits must be allowed and statements in letters and arguments in petitions should not be considered.

(7) Counties § 176--Mandamus.

Where a board of supervisors, in denying a permit to use land subject to a zoning ordinance as a racetrack, based the denial on moral grounds of opposition to racing and betting under an erroneous conclusion as to the board's rights and duties, and, on the record legitimately before the board, abused its discretion, a writ of mandate will issue requiring the board to cancel the denial and, in the operation of its discretion in enforcement of the ordinance, to reconsider the application, giving no consideration to the alleged immorality of racing and betting.

(8) Courts § 75--Sessions.

The sessions of the superior court of a given county must be held in that county. (Gov. Code, §§ 68099, 69741.)

See **Cal.Jur.2d,** Courts, § 41; **Am.Jur.,** Courts, §§ 25, 26, 37 et seq.

SUMMARY

APPEAL from a judgment of the Superior Court of Riverside County. R. Bruce Findlay, Judge. [FN*] Reversed with directions.

FN* Assigned by Chairman of Judicial Council.

Proceeding in mandamus to compel a county board of supervisors to cancel its order denying a permit to conduct horse racing. Judgment denying writ reversed with directions.

COUNSEL

Thompson & Colegate and John E. Glover for Appellant.

Ray T. Sullivan, Jr., County Counsel, Leo A. Deegan, Deputy County Counsel, and James H. Angell, Assistant County Counsel, for Respondents.

CONLEY, J. pro tem. [FN*]

FN* Assigned by Chairman of Judicial Council.

This case involves the proper definition and delimitation of authority as between the state and the county of Riverside in their respective control and administration of horse racing and zoning.

The appellant, Desert Turf Club, a corporation, after securing a permit from the California Horse Racing Board to conduct quarter-horse racing at the site hereafter described, made written application to the Riverside County Planning Commission for a land use permit to establish, operate and maintain a race track on Zone M-3 land in the Northwest Quarter and the North Half of the Southwest Quarter of Section 6, Township 5 South, Range 6 East, S.B. B. & M., comprising 240 acres, situated on the east side of Del Sol Road, between Tamarisk Road and Avenue 40. The California Horse Racing Board by a decision and order of July 19, 1954, had determined: ***448**

"1. That the applicant, Desert Turf Club, has shown and established that the conducting of quarter-horse racing meetings of the proposed Palm Springs track would be in the public interest and would subserve the purposes of the California Horse Racing Act;

"2. That the conducting of quarter-horse racing meetings at the proposed Palm Springs track will be in the public interest and will subserve the purpose of the California Horse Racing Act."

After a public hearing pursuant to proper notice, the Riverside Planning Commission made its order and decision on February 23, 1955, recommending to the board of supervisors that the application be granted upon certain specified terms and conditions, all of which were afterwards accepted and agreed to by the applicant. In accordance with the requirements of article III of Ordinance 348 of Riverside County, the planning commission filed with the board of supervisors on March 2, 1955, in connection with its recommendation that the application be granted, a summary of the testimony presented at the public hearing and all reports and exhibits which had been introduced in evidence. Thereafter, the board of supervisors regularly noticed and held a public hearing on the question on March 28, 1955; besides the entire files and records of the planning commission on its hearing, the board received evidence from several witnesses respectively for and against the granting of the permit and also accepted as evidence various petitions and letters in opposition thereto. At the close of the hearing, the board, by unanimous vote, denied the application for the permit.

No findings of fact of any kind were made by the supervisors, but the record of the proceedings makes it abundantly clear that the board members took into consideration "every type of evidence that anybody cared to bring to us" and that they assumed that it was "up to the Board to look at all angles, the moral aspects or any other point."

On April 22, 1955, Desert Turf Club filed its petition for a writ of mandate praying that the board of supervisors be required to cancel its order denying the permit, and to make an order granting it and further praying that Charles Bixel, as Chief Building Inspector of Riverside County be required to issue the permit. The respondents below filed a general and special demurrer; at the hearing, which according to the reporter's transcript was held "Before Hon. R. Bruce Findlay, Superior Court Judge (of San Bernardino County), ***449** presiding as Superior Court Judge of Riverside County but actually sitting in San Bernardino County, California, May 24 and 25, 1955," it was stipulated that the special demurrer be deemed withdrawn, and that if the general demurrer should be overruled the cause would be submitted for decision substantially on the record of the hearing before the board of supervisors. The court overruled the general demurrer, denied the peremptory writ of mandate and discharged the alternative writ.

The trial court determined in its conclusions of law that the order of the board of supervisors denying the application for a permit was sufficiently supported by competent substantial evidence, that the board did not act arbitrarily, capriciously or unlawfully, and that

petitioner was not denied a fair trial and

"5. That, although the licensing throughout the State of California of horse racing tracks where pari-mutuel wagering is conducted is a matter of general and statewide concern, the same is, nevertheless, a municipal affair and is subject to local regulation as embodied by the provisions of Ordinance 348 of the County of Riverside, Section 3.1 of Article III thereof."

It is our opinion that the trial court erred in these views.

By the provisions of section 65300 of the Government Code each county in the state is required to create a planning commission; each of said latter bodies is directed to adopt a comprehensive long-term master plan for the development of the county (Gov. Code, § 65460). Zoning regulations by boards of supervisors are specifically authorized by law, it being provided that a county may by ordinance "regulate the use of buildings, structures, and land as between agriculture, industry, business, residence and other purposes." (Gov. Code, § 65800.) The Riverside County Zoning Ordinance Number 348, is a part of the master plan of land used in Riverside County, it having been adopted as recited in article I thereof "in order to classify, restrict, regulate and encourage the orderly use of land in the County of Riverside and to conserve and promote public health, peace, safety, comfort, convenience, and general welfare." Article III of the zoning ordinance provides that:

"All the unincorporated territory of the County which is not included under the terms of this ordinance in any other zone is hereby designated and classified as M-3 Zone. ***450**

"The restrictions pertaining to other zone classifications shall not be deemed or construed to apply to land or property in Zone M-3. The restrictions applicable to land use in M-3 Zone shall be only as hereinafter in this Article specifically set forth."

Article III, section 3.1 forbids a person to use any premises or erect any building in Zone M-3 for any of some 39 uses without first securing a permit; among these enumerated uses is "23. Race track, except for contests between human beings only."

By the adoption of section 25a of article IV of the Constitution, the people of the State of California enacted the controlling principle that the Legislature could provide for the regulation of horse races and horse race meetings throughout the state and wagering on the results thereof. (1) As is said in *Sandstrom v. California Horse Racing Board*, 31 Cal.2d 401, 407 [189 P.2d 17, 3 A.L.R.2d 90]:

"When the state sees fit to regulate upon a matter which is within its police power, its authority over the subject is plenary. ..."

Chapter 4 of division 8 (§§ 19400 to 19663) of the Business and Professions Code contains a full and comprehensive legislative treatment of legalized horse racing in this state which is a clear and complete plan for the state-wide control of the subject matter. Section 19480.5 of the Business and Professions Code provides that the board shall not issue any new license unless it shall determine that conducting horse racing meetings at such place will be in the public interest and will subserve the purposes of the provisions of state law relative to horse racing.

(2) There can be no legitimate doubt that the state has taken over in its entirety the whole subject of horse racing. There is also no room for doubt that many thousands of citizens (who were in a minority at the time the constitutional amendment was adopted) are uncompromisingly opposed to race tracks and any form of betting on horses, not only on abstract moral grounds, but because of their observations as to the practical effect on the community. They oppose, so they say, any improvement in the breed of horses that debases the breed of men.

It is not our province to pass on the moral question but only on the question of power. (3) The query to be answered is: can a board of supervisors overrule the act of the people of the state in adopting a constitutional amendment ***451** and the Legislature of the state in passing a full and comprehensive plan for the licensing and control of horse racing by forbidding on moral grounds what the state expressly permits? There is no escape, in our opinion, from a negative answer.

In *Shean v. Edmonds*, 89 Cal.App.2d 315, 325 [200 P.2d 879], it is said:

"Horse racing was recognized in this state in 1933 (Stats. 1933, p. 2046.) Section 25a of article IV of the Constitution gave certain powers regulating horse racing to the Legislature. 'The continuance of the grant of power' as expressed in certain sections of the Business and Professions Code 'did not affect its status as previously ratified and confirmed.' (*Sandstrom v. California Horse Racing Board,* 31 Cal.2d 401, 413 [189 P.2d 17, 3 A.L.R.2d 90].)

The opinion in *Cunningham v. Hart,* 80 Cal.App.2d 902, 906 [183 P.2d 75], thus enumerates various instances in which the adoption by the state of general laws covering the field deprives a local legislative body of any right to act relative to the subject matter involved:

"The following cases are examples of matters which have been determined to be of state-wide concern and in which general laws have prevailed over conflicting laws in municipalities adopting the 'home rule' afforded by section 6, article XI of the Constitution: *Ex parte Daniels,* 183 Cal. 636 [192 P. 442, 21 A.L.R. 1172], regulation of traffic on city streets. To the same effect, *Atlas Mixed Mortar Co. v. City of Burbank,* 202 Cal. 660 [262 P. 334]; *Mann v. Scott,* 180 Cal. 550 [182 P. 281]; *In re Murphy,* 190 Cal. 286 [212 P. 30]; *Pipoly v. Benson,* 20 Cal.2d 366 [125 P.2d 482, 147 A.L.R. 515]. Regulation of the character and standards of taxicab service to be performed on city streets, *In re Martinez,* 56 Cal.App.2d 473 [132 P.2d 901]. Appointment of a probation officer and the fixing of his salary payable out of the city and county treasury, pursuant to the Juvenile Court Law, *Nicholl v. Koster,* 157 Cal. 416 [108 P. 302]. Sustaining the Metropolitan Water District Act which permits individual municipalities to initiate proceedings in the formation of a water district, *City of Pasadena v. Chamberlain,* 204 Cal. 653 [269 P. 630]. Sustaining the City Boundary Line Act, *Gadd v. McGuire,* 69 Cal.App. 347 [231 P. 754]. Adoption of a pension system by a municipality does not take the place of the Workmen's Compensation Law in its application to city employees, *Sacramento v. Industrial Acc. Com.,* 74 Cal.App. 386 [240 P. 792]. General ***452** laws prohibiting the licensing by a city of a house of prostitution, *Farmer v. Behmer,* 9 Cal.App. 773 [100 P. 901]. General laws prohibiting the organization and control of a school district by a county, *Scott v. County of San Mateo,* 27 Cal.App. 708 [151 P. 33]. A statute claiming a city street to be a secondary state highway prevails over right of municipality to improve that street, *Southern California Roads Co. v. McGuire,* 2 Cal.2d 115 [39 P.2d 412]. Exclusive control in the state of liquor licensing, *Los Angeles Brewing Co.* v. [*City of*] *Los Angeles,* 8 Cal.App.2d 391 [48 P.2d 71]. Issuance and revocation of motor bus licenses within a city, *People v. Willert,* 37 Cal.App.2d Supp. 729 [93 P.2d 872]. Drunken driving provision in Motor Vehicle Act prevails over city ordinance, *Helmer v. Superior Court,* 48 Cal.App. 140 [191 P. 1001]. Liability of a municipality for tortious acts or omissions of its servants, *Douglass v. City of Los Angeles,* 5 Cal.2d 123 [53 P.2d 353]. Liability of a municipality for defective highways within its limits, *Wilkes v. City etc. of San Francisco,* 44 Cal.App.2d 393 [112 P.2d 759]."

This rule has also been applied by this court to a city ordinance requiring an electrical contractor, licensed by the state, to procure a local business license (*Horwith v. City of Fresno,* 74 Cal.App.2d 443 [168 P.2d 767]). (See *Agnew v. City of Los Angeles,* 110 Cal.App.2d 612 [243 P.2d 73].) And this court has pointed out that this principle gives the State of California the sole right to regulate and license the liquor business. (*City of San Diego v. State Board of Equalization,* 82 Cal.App.2d 453, 464 [186 P.2d 166].)

What does this holding do to the zoning ordinance? Nothing at all. The right to zone is by express provision of law a local matter. (4) A board of supervisors, acting of course in good faith, may by properly adopting zoning restrictions exclude on soundly-based grounds the installation of a horse racing track or any other type of activity from those portions of the county as to which such exclusion is reasonable, just as manufacturing establishments or business houses may be legitimately prohibited in residential districts. (5) But the board cannot under guise of doing one thing, accomplish a wholly disparate end. The board here, on moral grounds, contrary to the legislative fiat of the people, has in effect excluded all horse racing from all parts of the county-or, to borrow an analogy from the field of liquor regulation, has exercised a *local option* with respect to horse racing. There ***453** is no such thing as local option on this question under the present law.

If the opinion evidence of those persons opposed to the granting of the permit on the ground that horse

racing and its attendant betting are immoral be eliminated, there is insufficient evidence in the present record to uphold the decision of the board of supervisors, or the findings of the trial court. The testimony adduced on behalf of petitioner was: that the plans and specifications for the construction of the track and buildings in all respects conformed with state and county building codes and regulations; that access roads for ingress and egress were adequate to handle traffic; that the use and development of the land as proposed conformed with good and established planning and zoning regulations; that there would be no flood problem or water drainage problem; that the owners of all property within a distance of 500 feet from the exterior boundaries of the premises favored the granting of the application; that the nearest subdivided area is approximately one-half mile from the site; that government land and vineyards adjoin the proposed track; that no objections of any kind have been interposed by the Riverside County Flood Control and Water Conservation District or the Riverside County Agricultural Commissioner.

The opposing evidence of a number of citizens was that the nature of the general area as one of homes and farms would be violated by the building of a race track; that police problems, in the opinion of the witness based on hearsay, would be increased by the attraction to the course of undesirable types; that many petitioners opposed the coming of a race track believing that "gambling is a social evil." The Coachella Valley Ministerial Association filed a protest containing numerous names of citizens who opposed "the establishment of any race track where parimutuel betting is permitted"; attached to the signed document is a writing signed by Harvey W. Harper, Chairman, stating as further grounds of opposition "... it would not be within the public interest to bring such a questionable industry into this area" and asserting that it would be an economic burden, in that money would be taken away from the community by parimutuel betting, law enforcement problems would arise, county roads would be overtaxed and fire protection problems would arise; further it was said that "... It has been clearly demonstrated in other cases that credit ratings drop during racing seasons"; next the document states that a race track would ***454** be a social and cultural detriment through the attraction of "undesirable elements" and finally that the moral tone of the community would be lowered.

Supervisor Varner made the following observation at the close of the hearing:

"Out of 100 telephone calls received approximately ninety were in opposition to granting permission for the race track. I have received here and admitted in evidence some 20 letters, almost all-there were two in favor of it. There have been petitions submitted here today of between some four and five hundred names in opposition to granting this permit. In view of this fact it indicates to me that it is not in the public interest to grant this M-3 Permit to establish this quarter-horse race track. I move that the M-3 Permit be denied."

The motion having been seconded, all supervisors voted "Aye" and the permit was denied.

Some of the reasons advanced by the witnesses opposing the granting of the permit should weigh powerfully with the voters of California in determining whether race tracks and parimutuel betting should be allowed anywhere, but in view of the preemption by the state of the whole field of legislation and the passage of complete general laws on the subject such arguments are not available in the present situation. Counsel for respondents ably attempt a scholastic distinction between the abstract immorality of race tracks and parimutuel gambling which they concede is not available to respondents because the state has taken over that total legislative field, and the alleged objective social demoralization resulting from racing and gambling, which, they argue, may still be considered by the board of supervisors in judging whether a permit should be issued under the zoning ordinance. But, to use an old western expression, the hair goes with the hide. Those who believe strongly that gambling is immoral base their opinion largely, if not wholly, on its observed effect on people and the community. Similarly, the opposition to alcoholic drinks does not arise from any abstract hatred for alcohol as such, but from a dislike for what it does to drinkers, as individuals and social groups. The onus of the people's authorization of race tracks and parimutuel machines must be borne by the grouped voters of the whole state; they have, for the time being at least, decided the question, and whatever advantages or disadvantages go with the decision cannot be barred by local legislative action from the entire territory of any county, as has been done in this case. ***455**

Appellants also complain concerning the nature of the evidence accepted by the board of supervisors at the hearing. (6) While administrative bodies are not expected to observe meticulously all of the rules of evidence applicable to a court trial, common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined. Among these are the following: the evidence must be produced at the hearing by witnesses personally present, or by authenticated documents, maps or photographs; ordinarily, hearsay evidence standing alone can have no weight (*Walker v. City of San Gabriel*, 20 Cal.2d 879, 881 [129 P.2d 349, 142 A.L.R. 1383]; *Englebretson v. Industrial Acc. Com.*, 170 Cal. 793, 797 [151 P. 421]; *Employers A. Corp. v. Industrial Acc. Com.*, 170 Cal. 800, 801 [151 P. 423]; *Dyment v. Board of Medical Examiners*, 93 Cal.App. 65 [268 P. 1073]; *Thrasher v. Board of Medical Examiners*, 44 Cal.App. 26 [185 P. 1006]), and this would apply to hearsay evidence concerning someone else's opinion; furthermore, cross-examination within reasonable limits must be allowed. Telephone calls to one of the officials sitting in the case, statements made in letters and arguments made in petitions should not be considered as evidence.

(7) As it appears to us that the board of supervisors based its action on an erroneous conclusion as to its legal rights and duties, and that upon the record legitimately before it the board acted in abuse of its discretion, a writ of mandate should issue. (*Tilden v. Blood*, 14 Cal.App.2d 407, 413-414 [58 P.2d 381]; *Martin v. Board of Supervisors*, 135 Cal.App. 96, 103 [26 P.2d 843]; *Walker v. City of San Gabriel, supra*, 20 Cal.2d 879; *Bleuel v. City of Oakland*, 87 Cal.App. 594, 597-598 [262 P. 477].)

But, as the board of supervisors has a proper field for the operation of its discretion in the enforcement of its zoning ordinance, after eliminating the moral ground of opposition to racing, this court cannot agree with the contentions of the appellant that the board of supervisors is wholly without jurisdiction to pass on the application, and that the permit of the State Racing Board is all that is required. (*Dormax Oil Co. v. Bush*, 42 Cal.App.2d 243 [108 P.2d 710].) The same observation applies to the contention that the board should be by-passed and a writ directed to the respondent building inspector, requiring him to issue a permit forthwith. The writ should be directed to the board of supervisors and its members requiring them to cancel and annul the order denying ***456** appellant's application, and to reopen the hearing with leave to hold a supplemental hearing upon due notice if they be so advised, and to reconsider the petition of appellants as to land use, wholly excluding any consideration as to the alleged immorality of horse racing and betting as authorized by state law, and wholly excluding from such consideration all testimony not received in open hearing, and all statements of alleged fact and arguments in petitions and letters on file, except the bare fact that the petitioners or letter writers approve or oppose the granting of the petition; also wholly excluding each and every instance of hearsay testimony unless supported by properly admissible testimony, it being further required that the attorneys representing any party in interest be granted a reasonable opportunity to examine or cross-examine every new witness produced.

Attention has already been called to the statement in the reporter's transcript that the case was tried before a superior court judge of San Bernardino County, "presiding as Superior Court Judge of Riverside County but actually sitting in San Bernardino County." The first page of the transcript begins:

"San Bernardino, California, May 24, 1955,

Afternoon Session

"Mr. Deegan: Your Honor, for the purpose of this case you are sitting as Superior Court Judge of Riverside County?

"The Court: Yes, I appreciate you gentlemen coming over here, otherwise we would be in the position of having to exchange judges, get started on a case here, never could seem to finish up at the same time."

We assume from the foregoing that the judge who tried the case had secured the essential assignment from the Chairman of the Judicial Council to sit and act in Riverside County, but that for convenience the case was actually tried in the San Bernardino County courthouse, with the tacit or express consent of the attorneys. Appellant does not raise any point as to jurisdiction or error in this respect. But this court cannot let pass unnoticed the impropriety involved in this irregular procedure. (8) The sessions of the superior court of a given county, under the law, must be held in that county (Gov. Code, §§ 69741, 68099; 13

Cal.Jur.2d, "Courts," § 41).

The judgment is reversed, with instructions upon the going down of the remittitur to amend the findings of fact and conclusions ***457** of law in accordance with the views expressed in this opinion, and to enter a judgment granting a peremptory writ of mandate directed to the board of supervisors of Riverside County and the members thereof requiring them forthwith to cancel and annul their order denying appellant's petition and to proceed without delay to carry on and complete a hearing in the manner indicated and set forth in this opinion.

Barnard, P. J., and Griffin, J., concurred.

Cal.App.4.Dist.
Desert Turf Club v. Board of Sup'rs of Riverside County
141 Cal.App.2d 446, 296 P.2d 882

END OF DOCUMENT

133 Cal.App.4th 26, 34 Cal.Rptr.3d 520, 05 Cal. Daily Op. Serv. 8754, 2005 Daily Journal D.A.R. 11,938
(Cite as: 133 Cal.App.4th 26, 34 Cal.Rptr.3d 520)

Court of Appeal, Third District, California.
KAUFMAN & BROAD COMMUNITIES, INC. et al., Cross–Complainants and Respondents,
v.
PERFORMANCE PLASTERING, INC., Cross–Defendant and Appellant.

No. C049391.
Oct. 3, 2005.

Background: On appeal from decision of the Superior Court, No. 03AS03133, appellant moved for the Court of Appeal to take judicial notice of legislative history of amendment to ambiguous statute.

Holdings: The Court of Appeal, Sims, J., held that:
(1) Court would deny judicial notice of personal view of member of assembly;
(2) Court would grant judicial notice of Assembly Judiciary Committee Report and Senate Judiciary Committee Report; and
(3) Court would grant judicial notice of three enrolled bill reports.

Motion granted in part, denied in part.

Opinion, 33 Cal. Rptr.3d 362, vacated.

West Headnotes

[1] Statutes 361 217.4

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.4 k. Legislative History in General. Most Cited Cases

Resort to legislative history to aid in construction of a statute is appropriate only where statutory language is ambiguous.

[2] Statutes 361 217.4

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.4 k. Legislative History in General. Most Cited Cases

Even where statutory language is ambiguous, and resort to legislative history is appropriate, as a general rule in order to be cognizable, legislative history must shed light on the collegial view of the Legislature as a whole.

[3] Evidence 157 33

157 Evidence
157I Judicial Notice
157k27 Laws of the State
157k33 k. Legislative Proceedings and Journals. Most Cited Cases

Evidence 157 51

157 Evidence
157I Judicial Notice
157k51 k. Mode of Ascertaining Facts Required to Be Noticed; Motions and Notice of Reliance. Most Cited Cases

In order to help the Court of Appeal determine what constitutes properly cognizable legislative history, and what does not, motions for judicial notice of legislative history materials should be in the following form: (1) the motion shall identify each separate document for which judicial notice is sought as a separate exhibit; and (2) the moving party shall submit a memorandum of points and authorities citing authority why each such exhibit constitutes cognizable legislative history. Cal.Rules of Court, Rule 22(a). *See Cal. Jur. 3d, Statutes, § 118.*

[4] Evidence 157 33

157 Evidence
157I Judicial Notice
157k27 Laws of the State
157k33 k. Legislative Proceedings and

Journals. Most Cited Cases

Court of Appeal, in order to construe ambiguous statute, would not take judicial notice of document reflecting the personal views of a member of the assembly, which was apparently not made available to the Legislature as a whole, despite fact that document was found in committee files. West's Ann.Cal.Rev. & T.Code § 19719.

[5] Evidence 157 33

157 Evidence
157I Judicial Notice
157k27 Laws of the State
157k33 k. Legislative Proceedings and Journals. Most Cited Cases

Court of Appeal, in order to construe ambiguous statute, would take judicial notice of Assembly Judiciary Committee Report pertaining to assembly bill. West's Ann.Cal.Rev. & T.Code § 19719.

[6] Evidence 157 33

157 Evidence
157I Judicial Notice
157k27 Laws of the State
157k33 k. Legislative Proceedings and Journals. Most Cited Cases

Court of Appeal, in order to construe ambiguous statute, would take judicial notice of Senate Judiciary Committee Report pertaining to assembly bill. West's Ann.Cal.Rev. & T.Code § 19719.

[7] Evidence 157 33

157 Evidence
157I Judicial Notice
157k27 Laws of the State
157k33 k. Legislative Proceedings and Journals. Most Cited Cases

Court of Appeal, in order to construe ambiguous statute, would not take judicial notice of three enrolled bill reports on assembly bill, prepared by the Office of Insurance Advisor, the Department of Real Estate, and the Franchise Tax Board. West's Ann.Cal.Rev. & T.Code § 19719.

See 1 Witkin, Cal. Evidence (4th ed. 2000) Judicial Notice, § 6.

[8] Statutes 361 219(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most Cited Cases

Enrolled bill reports, prepared by a responsible agency contemporaneous with passage and before signing, are generally instructive on matters of legislative intent.

[9] Statutes 361 176

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k176 k. Judicial Authority and Duty. Most Cited Cases

The determination of the meaning of statutes is a judicial function.

****522** Dee Anne Ware, Cooper White & Cooper LLP, Walnut Creek, CA, for Cross–Complainant and Respondent.

George E. Murphy, Farmer Murphy Smith & Alliston, Melissa B. Aliotti, Read & Aliotti, Sacramento, CA, for Cross–Defendant and Appellant.

OPINION ON REHEARING OF RULING ON MOTION FOR JUDICIAL NOTICE OF LEGISLATIVE HISTORY DOCUMENTS

SIMS, J.

***29** Pursuant to rule 22(a) of the California Rules of Court, appellant Performance Plastering, Inc., has moved this court to take judicial notice of various documents that, in the view of appellant, constitute cognizable legislative history of a 1998 amendment to Revenue and Taxation Code section 19719 (Assembly Bill 1950 (AB 1950)). (Stats.1998, ch. 856, § 2.)

I
Legislative History Generally

133 Cal.App.4th 26, 34 Cal.Rptr.3d 520, 05 Cal. Daily Op. Serv. 8754, 2005 Daily Journal D.A.R. 11,938
(Cite as: 133 Cal.App.4th 26, 34 Cal.Rptr.3d 520)

Before turning to the specifics of appellant's request for judicial notice, we have some general comments about requests for judicial notice of legislative history received by this court.

Many attorneys apparently believe that every scrap of paper that is generated in the legislative process constitutes the proper subject of judicial notice. They are aided in this view by some professional legislative intent services. Consequently, it is not uncommon for this court to receive motions for judicial notice of documents that are tendered to the court in a form resembling a telephone book.[FN1] The various documents are not segregated and no attempt is made in a memorandum of points and authorities to justify each request for judicial notice. This must stop. And the purpose of this opinion is to help attorneys to better understand the role of legislative history and to encourage them to request judicial notice only of documents that constitute cognizable legislative history.

FN1. Appellant's motion was not one of these; rather, each document was separately tabbed.

[1] Preliminarily, we note that resort to legislative history is appropriate only where statutory language is ambiguous. As the California Supreme Court has said, "Our role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law. [Citation.] In determining intent, we look first to the words of the statute, giving the language its usual, ordinary meaning. If there is no ambiguity in the language, we presume the Legislature meant what it said, and the plain meaning of the statute governs. [Citation.]" (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000, 90 Cal.Rptr.2d 236, 987 P.2d 705, followed in *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063, 103 Cal.Rptr.2d 751, 16 P.3d 166; accord: *Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519, 106 Cal.Rptr.2d 548, 22 P.3d 324.) Thus, "[o]nly when the language of a statute is susceptible to more than one reasonable construction ***30** is it appropriate to turn to extrinsic aids, including the legislative history of the measure, to ascertain its meaning." (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1055, 80 Cal.Rptr.2d 828, 968 P.2d 539; followed in *People v. Farell* (2002) 28 Cal.4th 381, 394, 121 Cal.Rptr.2d 603, 48 P.3d 1155; accord: *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 269, 121 Cal.Rptr.2d 203, 47 P.3d 1069; ****523***Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119–1120, 81 Cal.Rptr.2d 471, 969 P.2d 564, and authorities cited therein; *Professional Engineers in Cal. Government v. State Personnel Bd.* (2001) 90 Cal.App.4th 678, 688–689, 109 Cal.Rptr.2d 375, but see *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 613, fn. 7, 15 Cal.Rptr.3d 793, 93 P.3d 386.)

Nonetheless, we will not require a party moving for judicial notice of legislative history materials to demonstrate the ambiguity of the subject statute at this juncture. This is so for two reasons. First, the ambiguity *vel non* of a statute will often be the central issue in a case, and parties would incur needless expense briefing the issue twice—once in a motion for judicial notice and again in a party's brief on the merits. Second, motions for judicial notice of legislative history materials are decided by writ panels of three justices who may not be the justices later adjudicating the case on the merits. The panel adjudicating the case on the merits should not be stuck with an earlier determination, by a different panel, as to the ambiguity *vel non* of a statute.

Even though we will grant motions for judicial notice of legislative history materials without a showing of statutory ambiguity, we do so with the understanding that the panel ultimately adjudicating the case may determine that the subject statute is unambiguous, so that resort to legislative history is inappropriate.

[2] Even where statutory language is ambiguous, and resort to legislative history is appropriate, as a general rule in order to be cognizable, legislative history must shed light on the collegial view of the Legislature *as a whole.* (See *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 701, 170 Cal.Rptr. 817, 621 P.2d 856.) Thus, to pick but one example, our Supreme Court has said, "We have frequently stated ... that the statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation. [Citations.]" (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062, 48 Cal.Rptr.2d 1, 906 P.2d 1057.)

[3] ***31** In order to help this court determine what constitutes properly cognizable legislative history, and what does not, in the future motions for judicial notice of legislative history materials in this court should be in the following form: [FN2]

> FN2. The correct way to request judicial notice of a document is by motion. (Cal. Rules of Court, rule 22(a).)

1. The motion shall identify each separate document for which judicial notice is sought as a separate exhibit;

2. The moving party shall submit a memorandum of points and authorities citing authority why each such exhibit constitutes cognizable legislative history.

To aid counsel in this respect, we shall now set forth a list of legislative history documents that have been recognized by the California Supreme Court or this court as constituting cognizable legislative history together with a second list of documents that do *not* constitute cognizable legislative history in this court.

DOCUMENTS CONSTITUTING COGNIZABLE LEGISLATIVE HISTORY IN THE COURT OF APPEAL FOR THE THIRD APPELLATE DISTRICT

A. ***Ballot Pamphlets: Summaries and Arguments/Statement of Vote*** ****524**(*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 903, 135 Cal.Rptr.2d 30, 69 P.3d 951; *Jahr v. Casebeer* (1999) 70 Cal.App.4th 1250, 1255–1256, 1259, 83 Cal.Rptr.2d 172; *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 790–791, 286 Cal.Rptr. 57.)

B. ***Conference Committee Reports*** (*Crowl v. Commission on Professional Competence* (1990) 225 Cal.App.3d 334, 347, 275 Cal.Rptr. 86.)

C. ***Different Versions of the Bill*** (*Quintano v. Mercury Casualty Co., supra*, 11 Cal.4th at p. 1062, fn. 5, 48 Cal.Rptr.2d 1, 906 P.2d 1057; *People v. Watie* (2002) 100 Cal.App.4th 866, 884, 124 Cal.Rptr.2d 258; *San Rafael Elementary School Dist. v. State Bd. of Education* (1999) 73 Cal.App.4th 1018, 1025, fn. 8, 87 Cal.Rptr.2d 67; *People v. Patterson* (1999) 72 Cal.App.4th 438, 442–443, 84 Cal.Rptr.2d 870.)

D. ***Floor Statements*** (*Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 926, fn. 6, 12 Cal.Rptr.3d 262, 88 P.3d 1; ***32***People v. Drennan* (2000) 84 Cal.App.4th 1349, 1357–1358, 101 Cal.Rptr.2d 584; *In re Marriage of Siller* (1986) 187 Cal.App.3d 36, 46, fn. 6, 231 Cal.Rptr. 757.)

E. ***House Journals and Final Histories*** (*People v. Patterson, supra*, 72 Cal.App.4th at pp. 442–443, 84 Cal.Rptr.2d 870 [procedural history of bill from Assembly final history]; *Joyce G. v. Superior Court* (1995) 38 Cal.App.4th 1501, 1509, 45 Cal.Rptr.2d 805; *Natural Resources Defense Council v. Fish & Game Com.* (1994) 28 Cal.App.4th 1104, 1117, 33 Cal.Rptr.2d 904, fn. 11 [House Conference Report]; *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754, 760, 110 Cal.Rptr. 257 [appendix to Journal of the Assembly]; *Rollins v. State of California* (1971) 14 Cal.App.3d 160, 165, fn. 8, 92 Cal.Rptr. 251 [appendix to Journal of the Senate].)

F. ***Reports of the Legislative Analyst*** (*Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1339–1340, 101 Cal.Rptr.2d 591; *People v. Patterson, supra*, 72 Cal.App.4th at p. 443, 84 Cal.Rptr.2d 870; *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1133, 61 Cal.Rptr.2d 207; *Aguimatang v. California State Lottery, supra*, 234 Cal.App.3d at p. 788, 286 Cal.Rptr. 57; *People v. Gulbrandsen* (1989) 209 Cal.App.3d 1547, 1562, 258 Cal.Rptr. 75.)

G. ***Legislative Committee Reports and Analyses*** (*Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn. 7, 253 Cal.Rptr. 236, 763 P.2d 1326.)

Assembly Committee on Criminal Law and Public Safety (*People v. Baniqued* (2000) 85 Cal.App.4th 13, 27, fn. 13, 101 Cal.Rptr.2d 835.)

Assembly Committee on Finance, Insurance and Commerce (*Martin v. Wells Fargo Bank* (2001) 91 Cal.App.4th 489, 496, 110 Cal.Rptr.2d 653.)

Assembly Committee on Governmental Organization (*Aguimatang v. California State Lottery, supra*, 234 Cal.App.3d at p. 788, 286 Cal.Rptr. 57.)

Assembly Committee on Health (*Kaiser Foundation Health Plan, Inc. v. Zingale* (2002) 99 Cal.App.4th 1018, 1025, 121 Cal.Rptr.2d 741; *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 50, 100 Cal.Rptr.2d 627; *Zabetian v. Medical Board* (2000) 80 Cal.App.4th 462, 468, 94 Cal.Rptr.2d 917; *Clemente v. Amundson*

(1998) 60 Cal.App.4th 1094, 1106, 70 Cal.Rptr.2d 645.)

Assembly Committee on Human Services (*Golden Day Schools, Inc. v. Department of Education* (1999) 69 Cal.App.4th 681, 692, 81 Cal.Rptr.2d 758.)

****525 *33 Assembly Committee on Insurance** (*Santangelo v. Allstate Ins. Co.* (1998) 65 Cal.App.4th 804, 814, fn. 8, 76 Cal.Rptr.2d 735.)

Assembly Committee on Judiciary (*Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 166, 128 Cal.Rptr.2d 65; *CalFarm Ins. Co. v. Wolf* (2001) 86 Cal.App.4th 811, 816, fn. 8, 820, 103 Cal.Rptr.2d 584, fns. 27–28; *In re Marriage of Perry* (1998) 61 Cal.App.4th 295, 309, fn. 3, 71 Cal.Rptr.2d 499; *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1819, fn. 5, 41 Cal.Rptr.2d 182.)

Assembly Committee on Labor, Employment and Consumer Affairs (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 138, 41 Cal.Rptr.2d 295.)

Assembly Committee on Public Employees and Retirement (*Board of Administration v. Wilson*, *supra*, 52 Cal.App.4th at p. 1133, 61 Cal.Rptr.2d 207.)

Assembly Committee on Public Safety (*People v. Blue Chevrolet Astro* (2000) 83 Cal.App.4th 322, 329, 99 Cal.Rptr.2d 609; *People v. Johnson* (2000) 77 Cal.App.4th 410, 419, 91 Cal.Rptr.2d 596; *People v. Sewell* (2000) 80 Cal.App.4th 690, 695, 95 Cal.Rptr.2d 600; *People v. Patterson*, *supra*, 72 Cal.App.4th at pp. 442–443, 84 Cal.Rptr.2d 870; *Sommerfield v. Helmick* (1997) 57 Cal.App.4th 315, 319, 67 Cal.Rptr.2d 51; *Ream v. Superior Court* (1996) 48 Cal.App.4th 1812, 1819, fn. 5, 1820–1821, 56 Cal.Rptr.2d 550 [interim hearing report and analysis of assembly bill]; *People v. Frye* (1994) 21 Cal.App.4th 1483, 1486, 27 Cal.Rptr.2d 52.)

Assembly Committee on Retirement (*Praiser v. Biggs Unified School Dist.* (2001) 87 Cal.App.4th 398, 407, fn. 16, 104 Cal.Rptr.2d 551.)

Assembly Committee on Revenue and Tax (*Sunrise Retirement Villa v. Dear* (1997) 58 Cal.App.4th 948, 959, 68 Cal.Rptr.2d 416.)

Assembly Committee on Water, Parks and Wildlife (*Natural Resources Defense Council v. Fish & Game Com.*, *supra*, 28 Cal.App.4th at p. 1118, 33 Cal.Rptr.2d 904 [bill analysis work sheet].)

Assembly Committee on Ways and Means (*People v. Patterson*, *supra*, 72 Cal.App.4th at pp. 442–443, 84 Cal.Rptr.2d 870; *Clemente v. Amundson*, *supra*, 60 Cal.App.4th at p. 1106, 70 Cal.Rptr.2d 645.)

Assembly Interim Committee on Municipal and County Government (*Board of Trustees v. Leach* (1968) 258 Cal.App.2d 281, 286, 65 Cal.Rptr. 588.)

***34 Assembly Office of Research** (*Forty–Niner Truck Plaza, Inc. v. Union Oil Co.* (1997) 58 Cal.App.4th 1261, 1273, 68 Cal.Rptr.2d 532.

Assembly Staff Analysis (*Clemente v. Amundson*, *supra*, 60 Cal.App.4th at p. 1107, 70 Cal.Rptr.2d 645).

Assembly Subcommittee on Health, Education and Welfare Services (*A.H. Robins Co. v. Department of Health* (1976) 59 Cal.App.3d 903, 908–909, 130 Cal.Rptr. 901.)

Senate Committee on Appropriations Fiscal Summary of Bill (*People v. Patterson*, *supra*, 72 Cal.App.4th at p. 443, 84 Cal.Rptr.2d 870.)

Senate Committee on Business and Professions (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 722, 3 Cal.Rptr.3d 623, 74 P.3d 726 [Senate committee staff analysis]; *Khajavi v. Feather River Anesthesia Medical Group*, *supra*, 84 Cal.App.4th at p. 50, 100 Cal.Rptr.2d 627; *Forty–Niner Truck Plaza, Inc. v. Union Oil Co.*, *supra*, 58 Cal.App.4th at p. 1273, 68 Cal.Rptr.2d 532 [bill analysis work sheet].)

****526 Senate Committee on Criminal Procedure** (*People v. Blue Chevrolet Astro*, *supra*, 83 Cal.App.4th at p. 329, 99 Cal.Rptr.2d 609.)

Senate Committee on Education (*Praiser v. Biggs Unified School Dist.*, *supra*, 87 Cal.App.4th at p. 407, fn. 15, 104 Cal.Rptr.2d 551; *Golden Day*

Schools, Inc. v. Department of Education, supra, 69 Cal.App.4th at p. 692, 81 Cal.Rptr.2d 758.)

Senate Committee on Health and Human Services (*In re Raymond E.* (2002) 97 Cal.App.4th 613, 617, 118 Cal.Rptr.2d 376.)

Senate Committee on Health and Welfare (*Zabetian v. Medical Board, supra*, 80 Cal.App.4th at p. 468, 94 Cal.Rptr.2d 917; *Clemente v. Amundson, supra*, 60 Cal.App.4th at p. 1105, 70 Cal.Rptr.2d 645 [request for approval of Senate bill].)

Senate Committee on Judiciary (*Martin v. Szeto* (2004) 32 Cal.4th 445, 450, 9 Cal.Rptr.3d 687, 84 P.3d 374 [background information]; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (2003) 108 Cal.App.4th 137, 146, 133 Cal.Rptr.2d 396; *Westly v. U.S. Bancorp* (2003) 114 Cal.App.4th 577, 583, 7 Cal.Rptr.3d 838; *Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960, 970, 4 Cal.Rptr.3d 340; *People v. Robinson* (2002) 104 Cal.App.4th 902, 905, 128 Cal.Rptr.2d 619; *Guillemin v. Stein, supra*, 104 Cal.App.4th at p. 167, 128 Cal.Rptr.2d 65; *In re Michael D.* (2002) 100 Cal.App.4th 115, 122–123, 121 Cal.Rptr.2d 909; ***35***In re Raymond E., supra*, 97 Cal.App.4th at p. 617, 118 Cal.Rptr.2d 376; *People v. Patterson, supra*, 72 Cal.App.4th at p. 443, 84 Cal.Rptr.2d 870; *In re Marriage of Perry, supra*, 61 Cal.App.4th at p. 309, fn. 3, 71 Cal.Rptr.2d 499.)

Senate Committee on Revenue and Taxation (*Heavenly Valley v. El Dorado County Bd. of Equalization, supra*, 84 Cal.App.4th at p. 1340, 101 Cal.Rptr.2d 591; *Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Bd.* (1999) 75 Cal.App.4th 327, 335, 89 Cal.Rptr.2d 215; *Sunrise Retirement Villa v. Dear, supra*, 58 Cal.App.4th at p. 959, 68 Cal.Rptr.2d 416.)

Senate Rules Committee (*Guillemin v. Stein, supra*, 104 Cal.App.4th at p. 166, 128 Cal.Rptr.2d 65.)

Senate Conference Committee (*Golden Day Schools, Inc. v. Department of Education, supra*, 69 Cal.App.4th at p. 692, 81 Cal.Rptr.2d 758.)

Senate Interim Committee on Fish and Game (*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 597, 255 Cal.Rptr. 184.)

Senate Subcommittee on Mental Health (*Clemente v. Amundson, supra*, 60 Cal.App.4th at p. 1104, fn. 10, 70 Cal.Rptr.2d 645.)

H. *Legislative Counsel's Digest* (*Pacific Gas & Electric Co. v. Department of Water Resources* (2003) 112 Cal.App.4th 477, 482–483, 5 Cal.Rptr.3d 283; *People v. Allen* (2001) 88 Cal.App.4th 986, 995, 106 Cal.Rptr.2d 253; *Heavenly Valley v. El Dorado County Bd. of Equalization, supra*, 84 Cal.App.4th at p. 1339, 101 Cal.Rptr.2d 591; *People v. Harper* (2000) 82 Cal.App.4th 1413, 1418, 98 Cal.Rptr.2d 894; *Alt v. Superior Court* (1999) 74 Cal.App.4th 950, 959, fn. 4, 88 Cal.Rptr.2d 530; *Construction Industry Force Account Council v. Amador Water Agency* (1999) 71 Cal.App.4th 810, 813, 84 Cal.Rptr.2d 139; *People v. Prothero* (1997) 57 Cal.App.4th 126, 133, fn. 7, 66 Cal.Rptr.2d 779; *Peltier v. McCloud River R.R. Co., supra*, 34 Cal.App.4th at p. 1819, fn. 5, 41 Cal.Rptr.2d 182.)

I. *Legislative Counsel's Opinions/Supplementary Reports* ****527**(*Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401, 1410, fn. 7, 129 Cal.Rptr.2d 904; *Trinkle v. Stroh* (1997) 60 Cal.App.4th 771, 778, fn. 4, 70 Cal.Rptr.2d 661; *People v. $31,500 United States Currency* (1995) 32 Cal.App.4th 1442, 1460–1461, 38 Cal.Rptr.2d 836.)

J. *Legislative Party Floor Commentaries*

Senate Republican Floor Commentaries (*Pacific Gas & Electric Co. v. Department of Water Resources, supra*, 112 Cal.App.4th at p. 498, 5 Cal.Rptr.3d 283.)

36 K. *Official Commission Reports and Comments

California Constitution Revision Commission (*Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 319, fn. 18, 127 Cal.Rptr.2d 482, 58 P.3d 339 [proposed revision].)

California State Government Organization and Economy Commission (*Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 183, 6 Cal.Rptr.2d 714.)

California Law Revision Commission (*Estate of Dye* (2001) 92 Cal.App.4th 966, 985, 112 Cal.Rptr.2d 362; *Estate of Della Sala* (1999) 73

Cal.App.4th 463, 469, 86 Cal.Rptr.2d 569; *Estate of Reeves* (1991) 233 Cal.App.3d 651, 656, 284 Cal.Rptr. 650; *In re Marriage of Schenck* (1991) 228 Cal.App.3d 1474, 1480, fn. 2, 279 Cal.Rptr. 651.

L. ***Predecessor Bills*** (*City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1199, 75 Cal.Rptr.2d 754.)

M. ***Statements by Sponsors, Proponents and Opponents Communicated to the Legislature as a Whole***

Assembly Bill Digest by Assembly Speaker (*People v. Drennan*, *supra*, 84 Cal.App.4th at p. 1357, 101 Cal.Rptr.2d 584.)

Floor Statement by Sponsoring Legislator (*In re Marriage of Siller*, *supra*, 187 Cal.App.3d at p. 46, fn. 6, 231 Cal.Rptr. 757.)

N. ***Transcripts of Committee Hearings*** *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 376, 2 Cal.Rptr.3d 655, 73 P.3d 517; *Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519, fn. 5, 106 Cal.Rptr.2d 548, 22 P.3d 324.)

O. ***Analyses by Legislative Party Caucuses (e.g. Senate Democratic and Republican)*** (*People v. Allen*, *supra*, 88 Cal.App.4th at p. 995, fn. 16, 106 Cal.Rptr.2d 253; *Golden Day Schools, Inc. v. Department of Education*, *supra*, 69 Cal.App.4th at p. 691–692, 81 Cal.Rptr.2d 758; *Forty–Niner Truck Plaza, Inc. v. Union Oil Co.*, *supra*, 58 Cal.App.4th at p. 1273, 68 Cal.Rptr.2d 532.)

Assembly Office of Research Report (*Crowl v. Commission on Professional Competence*, *supra*, 225 Cal.App.3d at pp. 346–347, 275 Cal.Rptr. 86 [staff report].)

Assembly Committee on Judiciary (*Wood v. County of San Joaquin*, *supra*, 111 Cal.App.4th at p. 969, 4 Cal.Rptr.3d 340; *Rieger v. Arnold* (2002) 104 Cal.App.4th 451, 463, 128 Cal.Rptr.2d 295; *Guillemin v. Stein*, *supra*, 104 Cal.App.4th at p. 167, 128 Cal.Rptr.2d 65.)

***37 Office of Assembly Floor Analyses** (*People v. Patterson*, *supra*, 72 Cal.App.4th at p. 443, 84 Cal.Rptr.2d 870.)

Office of Senate Floor Analyses (*Pacific Gas & Electric Co. v. Department of Water Resources*, *supra*, 112 Cal.App.4th at p. 497, 5 Cal.Rptr.3d 283; *People v. Robinson*, *supra*, 104 Cal.App.4th at p. 905, 128 Cal.Rptr.2d 619; *In re Raymond E.*, *supra*, 97 Cal.App.4th at pp. 616–617, 118 Cal.Rptr.2d 376; *Khajavi v. Feather River Anesthesia Medical Group*, *supra*, 84 Cal.App.4th at p. 50, 100 Cal.Rptr.2d 627; *People v. Chavez* (1996) 44 Cal.App.4th 1144, 1155–1156, 52 Cal.Rptr.2d 347.)

****528 P.** ***Enrolled Bill Reports*** (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 934, fn. 19, 22 Cal.Rptr.3d 530, 102 P.3d 915.)

DOCUMENTS *NOT* CONSTITUTING LEGISLATIVE HISTORY IN THE COURT OF APPEAL FOR THE THIRD APPELLATE DISTRICT

A. ***Authoring Legislator's Files, Letters, Press Releases and Statements Not Communicated to the Legislature as a Whole***

Files (*People v. Patterson*, *supra*, 72 Cal.App.4th at p. 444, 84 Cal.Rptr.2d 870.)

General (*People v. Garcia* (2002) 28 Cal.4th 1166, 1176, fn. 5, 124 Cal.Rptr.2d 464, 52 P.3d 648.)

Letters from Bill's Author to Governor Without An Indication the Author's Views Were Made Known to the Legislature as a Whole (*Heavenly Valley v. El Dorado County Bd. of Equalization*, *supra*, 84 Cal.App.4th at p. 1340–1341, 101 Cal.Rptr.2d 591; *People v. Patterson*, *supra*, 72 Cal.App.4th at pp. 443–444, 84 Cal.Rptr.2d 870.)

Statements By Bill's Author About Bill's Intended Purpose (*People v. Patterson*, *supra*, 72 Cal.App.4th at p. 443, 84 Cal.Rptr.2d 870.)

B. ***Documents with Unknown Author and Purpose*** (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 10, fn. 3, 219 Cal.Rptr. 13, 706 P.2d 1146.)

C. ***Handwritten Document Copies, Without Author, Contained in Assemblymember's Files*** (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1263, fn. 13, 48 Cal.Rptr.2d 12, 906 P.2d 1112.)

D. ***Letter from Consultant to the State Bar Taxation Section to Governor*** (*Heavenly Valley v. El Dorado County Bd. of Equalization*, *supra*, 84 Cal.App.4th at pp. 1340–1341, 101 Cal.Rptr.2d 591.)

38 E.** ***Letter from the Family Law Section of the State Bar of California to Assemblymember or Senator (*In re Marriage of Pendleton & Fireman*

(2000) 24 Cal.4th 39, 47, 99 Cal.Rptr.2d 278, 5 P.3d 839.)

F. ***Letters to Governor Urging Signing of Bill*** (*California Teachers Assn. v. San Diego Community College Dist., supra*, 28 Cal.3d at p. 701, 170 Cal.Rptr. 817, 621 P.2d 856; *Heavenly Valley v. El Dorado County Bd. of Equalization, supra*, 84 Cal.App.4th at p. 1327, fn. 2, 101 Cal.Rptr.2d 591.)

G. ***Letters to Particular Legislators, Including Bill's Author*** (*Quintano v. Mercury Casualty Co., supra*, 11 Cal.4th at p. 1062, fn. 5, 48 Cal.Rptr.2d 1, 906 P.2d 1057; *Heavenly Valley v. El Dorado County Bd. of Equalization, supra*, 84 Cal.App.4th at p. 1327, fn. 2, 101 Cal.Rptr.2d 591.)

H. ***Magazine Articles*** (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 168, 96 Cal.Rptr.2d 518, 999 P.2d 706.)

I. ***Memorandum from a Deputy District Attorney to Proponents of Assembly Bill*** (*People v. Garcia, supra*, 28 Cal.4th at p. 1176, fn. 5, 124 Cal.Rptr.2d 464, 52 P.3d 648.)

J. ***Proposed Assembly Bill Which Was Withdrawn by Author*** (*Heavenly Valley v. El Dorado County Bd. of Equalization, supra*, 84 Cal.App.4th at p. 1342, 101 Cal.Rptr.2d 591.)

K. ***State Bar's View of the Meaning of Proposed Legislation*** (*Peltier v. McCloud River R.R. Co., supra*, 34 Cal.App.4th at p. 1820, 41 Cal.Rptr.2d 182.)

L. ***Subjective Intent Reflected by Statements of Interested Parties and Individual Legislators, Including Bill's Author, Not Communicated to Legislature as a Whole*** ****529**(*Quintano v. Mercury Casualty Co., supra*, 11 Cal.4th at p. 1062, 48 Cal.Rptr.2d 1, 906 P.2d 1057; *Collins v. Department of Transportation* (2003) 114 Cal.App.4th 859, 870, fn. 11, 8 Cal.Rptr.3d 132.)

M. ***Views of Individual Legislators, Staffers, and Other Interested Persons***

Document Related to Bill from File of Assembly Committee on Ways and Means

Material on Bill from File of Assembly Committee on Public Safety

Material on Bill from File of Assembly Republican Caucus

Material on Bill from File of Author

***39 Material on Bill from File of Office of Senate Floor Analyses**

Material on Bill from File of Senate Committee on Appropriations

Material on Bill from File of Senate Committee on the Judiciary

Postenrollment Documents Regarding Bill (*People v. Patterson, supra*, 72 Cal.App.4th at pp. 442–443, 84 Cal.Rptr.2d 870.)

II

Appellant's Specific Requests

We now turn to the documents for which judicial notice is sought.

[4] A. The first document is entitled "AB 1950 (Torlakson) Construction Defect Litigation Reform [¶] Fact Sheet." Nothing in appellant's motion suggests this document was made available to the Legislature as a whole. Rather, it appears to reflect the personal view of Assemblymember Tom Torlakson. Appellant argues that judicial notice is appropriate because the document was located in the file of a legislative committee. We acknowledge that in *James v. St. Elizabeth Community Hospital* (1994) 30 Cal.App.4th 73 at page 81, 35 Cal.Rptr.2d 372, this court considered the contents of a document simply because it was found in the files of a committee. But, upon reflection, we now conclude that this practice should not be further condoned. Many pieces of paper that are never seen by members of the committee, let alone by the Legislature as a whole, find their way into committee files. Unlike committee reports, which are routinely available to the Legislature as a whole, these random documents are not reliable indicia of legislative intent. Because there is no showing that Assemblymember Torlakson's "Fact Sheet" was communicated to the Legislature as a whole, it does not constitute cognizable legislative history, and the request for judicial notice of this document is denied. (See *Quintano v. Mercury Casualty Co., supra*, 11 Cal.4th at p. 1062, 48 Cal.Rptr.2d 1, 906 P.2d 1057; *People v. Patterson, supra*, 72 Cal.App.4th at p. 444, 84 Cal.Rptr.2d 870.)

[5] B. Next is the Assembly Judiciary Committee Report dated April 21, 1998, pertaining to AB 1950. The request for judicial notice is granted with respect to this document. (*Guillemin v. Stein, supra*, 104

Cal.App.4th at p. 166, 128 Cal.Rptr.2d 65, and authorities cited at p. 525, *ante.*)

[6] C. Next is the Senate Judiciary Committee Report pertaining to AB 1950. The request for judicial notice is granted with respect to this document. (*Martin v. Szeto*, *supra*, 32 Cal.4th at p. 450, 9 Cal.Rptr.3d 687, 84 P.3d 374, and authorities cited at p. 526, *ante.*)

[7] ***40** D. Next, and finally, are three enrolled bill reports on AB 1950, prepared respectively by the Office of Insurance Advisor, the Department of Real Estate, and the Franchise Tax Board.

****530** Generally, "enrolled bill" refers to a bill that has passed both houses of the Legislature and that has been signed by the presiding officers of the two houses. (1 Sutherland, Statutes and Statutory Construction (6th ed.2002) § 15:1, p. 814.) In some states, enrollment also includes signature by the Governor (*ibid.*), but not in California.

California law provides that bills ordered enrolled by the Senate or Assembly are delivered to the clerk of the house ordering the enrollment. (Gov.Code, § 9502.) [FN3] The clerk delivers the bills to the State Printer. (§ 9503.) The State Printer shall "engross [FN4] or enroll (print) them" and return them to the clerk. (§§ 9504–9505.) "If the enrolled copy of a bill or other document is found to be correct, [it shall be presented] to the proper officers for their signatures. When the officers sign their names thereon, as required by law, *it is enrolled.*" (§ 9507, italics added.) Enrolled bills are then transmitted to the Governor for his approval. (§ 9508.) If the Governor approves it and deposits it with the Secretary of State, it becomes the official record and is given a chapter number. (§ 9510.)

FN3. Further statutory references are to the Government Code.

FN4. Traditionally, engrossing meant the process of final authentication in a single house. (Sutherland, *supra*, § 15:1, p. 814.)

Thus, an enrolled bill is one that has been passed by the Senate and Assembly but has not yet been signed by the Governor.

An "enrolled bill report" is prepared by a department or agency in the executive branch that would be affected by the legislation. Enrolled bill reports are typically forwarded to the Governor's office before the Governor decides whether to sign the enrolled bill.

In *McDowell v. Watson* (1997) 59 Cal.App.4th 1155 at pages 1161 through 1162, footnote 3 [69 Cal.Rptr.2d 692] (*McDowell*), the Fourth Appellate District opined that enrolled bill reports should not be considered for legislative intent: "[I]t is not reasonable to infer that enrolled bill reports prepared by the executive branch for the Governor were ever read by the Legislature.

"We recognize that courts have sometimes cited the latter materials as indicia of legislative intent. [Numerous citations.] However, none of those opinions address[es] the propriety of doing so. Accordingly, we decline to follow their example. 'Such a departure from past rules of statutory construction, we ***41** believe, should be effected only after full discussion and exposure of the issue.' (*California Teachers Assn. v. San Diego Community College Dist.* [(1981)] 28 Cal.3d [692] 701 [170 Cal.Rptr. 817, 621 P.2d 856].)

"We also note that *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211 at pages 218 through 219 [185 Cal.Rptr. 270, 649 P.2d 912], has been relied upon as authority for considering enrolled bill reports to determine legislative intent. [Citations.] However, that reliance is misplaced, because the Supreme Court in *Commodore* specifically noted that it had been requested to take notice of those reports and that the opposing party had not objected. [Citation.] Moreover, while *Commodore* cites authority for taking judicial notice of such executive acts, it does not address the relevance of that evidence to determining legislative intent." (*McDowell, supra,* 59 Cal.App.4th at p. 1162, fn. 3, 69 Cal.Rptr.2d 692; see also ****531***Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 487, fn. 4, 17 Cal.Rptr.3d 88 [following *McDowell*].)

This court has twice followed *McDowell, supra,* 59 Cal.App.4th 1155, 69 Cal.Rptr.2d 692, in declining judicial notice of enrolled bill reports. (See *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 121, fn. 4, 113 Cal.Rptr.2d 90; *People v. Patterson, supra,* 72 Cal.App.4th at p. 444, 84 Cal.Rptr.2d 870.)

On the other hand, in *People v. Allen* (2001) 88 Cal.App.4th 986, 106 Cal.Rptr.2d 253, this court said, "While enrolled bill reports prepared by the executive branch for the Governor do not necessarily demonstrate the Legislature's intent [citation], they can *corroborate* the Legislature's intent, as reflected in legislative reports, by reflecting a contemporaneous common understanding shared by participants in the legislative process from both the executive and legislative branches." (*Id.* at p. 995, fn. 19, 106 Cal.Rptr.2d 253.)

And in *People v. Carmony* (2005) 127 Cal.App.4th 1066, 26 Cal.Rptr.3d 365, this court recently took judicial notice of an enrolled bill report without discussion. (*Id.* at p. 1078, 26 Cal.Rptr.3d 365.)

[8] For practical purposes, these inconsistencies have been resolved by a 2004 decision of our Supreme Court in *Elsner v. Uveges, supra*, 34 Cal.4th 915, 22 Cal.Rptr.3d 530, 102 P.3d 915. There, the court took judicial notice of an enrolled bill report prepared by the Department of Industrial Relations. (*Id.* at p. 934, 22 Cal.Rptr.3d 530, 102 P.3d 915.) The court said, "Uveges challenges Elsner's reliance on the enrolled bill report, arguing that it is irrelevant because it was prepared after passage. However, we have routinely found enrolled bill reports, prepared by a responsible agency contemporaneous with passage and before signing, instructive on matters of legislative intent. [Citations.]" (*Id.* at p. 934, fn. 19, 22 Cal.Rptr.3d 530, 102 P.3d 915.)

We are obligated to follow *Elsner*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.) We ***42** hereby grant appellant's motion for judicial notice of the enrolled bill reports, and we leave it to the panel deciding this case to determine the extent to which these reports may be "instructive."

[9] Nonetheless, we respectfully add that we continue to find the logic of *McDowell, supra*, 59 Cal.App.4th 1155, 69 Cal.Rptr.2d 692, unassailable. In fact, enrolled bill reports cannot reflect the intent of the Legislature because they are prepared by the executive branch, and then not until after the bill has passed the Legislature and has become "enrolled." Moreover, to permit consideration of enrolled bill reports as cognizable legislative history gives the executive branch an unwarranted opportunity to determine the meaning of statutes. That is the proper and exclusive duty of the judicial branch of government. " '[T]he determination of the meaning of statutes is a judicial function....' [Citation.]" (*People v. Franklin* (1999) 20 Cal.4th 249, 256, 84 Cal.Rptr.2d 241, 975 P.2d 30.)

But we do not write on a clean slate.

We concur: SCOTLAND, P.J., and DAVIS, J.

Cal.App. 3 Dist.,2005.
Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.
133 Cal.App.4th 26, 34 Cal.Rptr.3d 520, 05 Cal. Daily Op. Serv. 8754, 2005 Daily Journal D.A.R. 11,938

END OF DOCUMENT

THE PEOPLE, Plaintiff and Respondent,
v.
ARMENIA LEVI CUDJO, Defendant and Appellant.

No. S006014.

Supreme Court of California
Dec 13, 1993.

SUMMARY

A jury convicted defendant of first degree murder (Pen. Code, § 187), found that he used a deadly weapon to commit the murder (Pen. Code, § 12022, subd. (b)), and found that he committed the murder while engaged in the commission of robbery (Pen. Code, § 190.2, subd. (a)(17)(i)) and burglary (Pen. Code, § 190.2, subd. (a)(17)(vii)). The jury also convicted defendant of one count each of robbery (Pen. Code, § 211) with the use of a deadly weapon (Pen. Code, § 12022, subd. (b)) and burglary of an inhabited dwelling (Pen. Code, §§ 459, 462, subd. (a)). The jury fixed the penalty for the murder at death. The trial court denied the automatic motion to modify this penalty verdict (Pen. Code, § 190.4, subd. (e)), stayed the pronouncement of sentence on the noncapital counts, and sentenced defendant to death. (Superior Court of Los Angeles County, No. A746168, Howard J. Schwab, Judge.)

The Supreme Court affirmed the judgment of death. It held that the trial court abused its discretion in excluding a witness's testimony that defendant's brother had confessed to the murder; however, the error was harmless in light of the strong evidence of defendant's guilt and the lack of credibility of the witness and of the brother's confession. It held that defendant was not provided with ineffective assistance of counsel at the preliminary hearing or at trial. It also held that, by invoking his privilege against self-incrimination, defendant's brother was unavailable as a witness, and therefore his preliminary hearing testimony was admissible at trial. It further held that the trial court was not required to instruct the jury sua sponte to view with caution the testimony of the seven-year-old son of the victim. It also held that the prosecutor, in closing argument, did not improperly comment on defendant's potential for rehabilitation or make a prejudicial appeal to racial prejudice. The court also held that a defendant may waive the procedure whereby death-qualification voir dire is conducted individually and in sequestration, and that defendant was not provided with ineffective assistance of counsel when counsel stipulated to forgo the sequestration process. The court further held that the trial court's failure to instruct the jury that intent to kill was a required element of felony murder was harmless in light of the evidence of defendant's intent to kill.

As to penalty phase issues, the court held that defendant was not provided with ineffective assistance of counsel by counsel's argument concerning appeals, pardons, and the burden of proof. The court finally held that any error the trial court committed in referring to the probation report, prior to ruling on the automatic motion to modify the death verdict, was harmless, and that the trial court, in denying the motion, gave adequate reasons. (Opinion by the court. Separate dissenting opinion by Kennard, J., with Mosk, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Homicide § 41--Evidence--Admissibility-- Confessions and Admissions--Evidence That Defendant's Brother Had Confessed to Homicide.

In a capital homicide prosecution, the trial court abused its discretion in excluding evidence that defendant's brother had confessed to the murder. An individual who had been jailed with the brother was prepared to testify that the brother had stated that he had murdered the victim. In excluding this evidence, the court improperly focused on the credibility of the in-court witness. The statement was admissible under the hearsay exception for declarations against penal interest, since the brother was unavailable by his having earlier invoked his privilege against self-incrimination, the brother met the description of the victim's son, and any discrepancies between the brother's statement and the actual physical evidence could be attributed to the brother's agitation. Also, the evidence had substantial probative value and would not have caused undue delay. Further, the evidence was necessary, since there was no other comparable

evidence of the brother's guilt.

(2) Criminal Law § 417--Evidence--Hearsay--Exceptions to Exclusionary Rule--Declarations Against Penal Interest.

A party who maintains that an out-of-court statement is admissible under the hearsay exception for a declaration against penal interest (Evid. Code, § 1230) must show that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. To determine whether the declaration passes the required threshold of trustworthiness, a trial court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. On appeal, the trial court's determination on this issue is reviewed for abuse of discretion.
[See 1 **Witkin,** Cal. Evidence (3d ed. 1986) §§ 689-691.]

(3) Criminal Law § 410--Evidence--Hearsay.

Hearsay is generally excluded because the out-of-court declarant is not under oath and cannot be cross-examined to test perception, memory, clarity of expression, and veracity, and because the jury, or other trier of fact, is unable to observe the declarant's demeanor. Because the rule excluding hearsay is based on these particular difficulties in assessing the credibility of statements made outside the jury's presence, the focus of the rule's several exceptions is also on the reliability of the out-of-court declaration. Thus, the various hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for the absence of the oath, cross-examination, and jury observation.

(4) Criminal Law § 413--Evidence--Hearsay--Exceptions to Exclusionary Rule--Credibility of In-court Witness.

Neither the hearsay rule nor its exceptions are concerned with the credibility of witnesses who testify directly to the jury. When evidence is offered under one of the hearsay exceptions, the trial court must determine as preliminary facts both that the out-of-court declarant made the statement as represented, and that the statement meets certain standards of trustworthiness. The first determination-whether the declaration was made as represented-is governed by the substantial evidence rule. The trial court is to determine only whether there is evidence sufficient to sustain a finding that the statement was made. As with other facts, the direct testimony of a single witness is sufficient to support a finding unless the testimony is physically impossible or its falsity is apparent without resorting to inferences or deductions. Except in these rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury's resolution; such doubts do not afford a ground for refusing to admit evidence under the hearsay exception for statements against penal interest.

(5a, 5b) Criminal Law § 289--Evidence--Admissibility--Relevance--Third Party Culpability.

When an objection to evidence is raised under Evid. Code, § 352, the trial court is required to weigh the evidence's probative value against the danger of prejudice, confusion, and undue time consumption. Unless these dangers substantially outweigh probative value, the objection must be overruled. On appeal, the ruling is reviewed for abuse of discretion. To withstand a § 352 challenge, evidence of a third party's culpability need only be capable of raising a reasonable doubt of the defendant's guilt.

(6) Criminal Law § 657--Appellate Review--Harmless and Reversible Error-- Evidence--Erroneous Exclusion of Evidence of Third Party Culpability.

As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's constitutional right to present a defense. Courts retain a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. This principle applies perforce to evidence of third party culpability. The mere erroneous exercise of discretion under such normal rules does not implicate the federal Constitution. Even in capital cases, when a trial court misapplies Evid. Code, § 352, to exclude defense evidence, including third party culpability evidence, the applicable standard of prejudice is that for state law error, i.e., the error is harmless if it does not appear reasonably probable that the verdict was affected.

(7) Criminal Law § 243--Trial--Province of Court and Jury--Credibility of Witnesses.

Under California law, the credibility of individual witnesses is properly the province of the jury.

(8) Homicide § 41--Evidence--Admissibility--Confessions and Admissions-- Evidence That Defendant's Brother Had Confessed to Homicide--Harmless Error.

In a capital homicide prosecution, the trial court's error in excluding evidence that defendant's brother had confessed to the murder was not prejudicial. Although the evidence was relevant and not unduly time consuming, it was not reasonably likely the error affected the verdict. Even though the brother's statement and other evidence tended to be consistent with the brother's guilt, the inference that defendant, not the brother, committed the homicide was extremely strong. Semen consistent with defendant's was found on the victim, and defendant's explanation that the victim had exchanged sex for drugs was not credible, since all other evidence showed that the victim was not a user of drugs. Further, both the individual's testimony and the brother's statement lacked credibility. The statement contradicted both the physical evidence and other statements the brother had given. Moreover, after hearing the individual's in camera testimony and observing his demeanor, the trial court found the individual to be a patently incredible witness.

(9) Criminal Law § 77--Rights of Accused--Aid of Counsel.

The constitutional right to the assistance of counsel extends to every critical stage of a criminal proceeding, including the preliminary hearing. The right comprehends more than just the formality of representation by a lawyer; it entitles the defendant to competent and effective legal assistance.

(10) Criminal Law § 104--Rights of Accused--Competence of Defense Counsel.

A criminal defendant seeking relief on the basis of ineffective assistance of counsel must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings.

(11) Criminal Law § 113--Rights of Accused--Competence of Defense Counsel-- Tactical Matters--Failure to Object to Admission of Evidence--Preliminary Hearing Testimony of Unavailable Witness.

In a capital homicide prosecution, defendant was not provided with ineffective assistance of counsel by counsel's failure to object to the admission of the preliminary hearing testimony of defendant's brother, who was unavailable for trial by reason of his having invoked his privilege against self-incrimination. Although hearsay, the evidence was admissible under the hearsay rule exceptions for inconsistent statements and past recollection recorded. Thus, there was no sound legal basis for objection.

(12) Criminal Law § 115--Rights of Accused--Competence of Defense Counsel-- Tactical Matters--Failure to Request Instruction--Instruction Advising Jury That Witness's Preliminary Hearing Testimony Was Not to Be Considered for Truth of Matter Asserted.

In a capital homicide prosecution, defendant was not provided with ineffective assistance of counsel by counsel's failure to request an instruction advising the jury that a witness's preliminary hearing testimony was not to be considered for the truth of the matter asserted. After his previously taped statements were played at the preliminary hearing, the witness testified that the tape had refreshed his recollection, that he had not lied to the investigators and had told them what he knew, and that he did not disagree with any of the things he had told the officers. Because the witness in this way adopted and reaffirmed the substance of his statements to the officers, the jury was entitled to consider those statements for their truth under Evid. Code § 1291, as part of the witness's former testimony. An instruction correctly explaining this situation to the jury would not have benefited the defense.

(13) Criminal Law § 422--Evidence--Hearsay--Prior Testimony-- Nonavailability of Witness--Witness Who Invokes Privilege Against Self-incrimination.

Under Evid. Code, § 240, a person is unavailable as a witness if the person is exempted or precluded from testifying on the ground of privilege. One such privilege is the constitutional privilege against self-incrimination. To be found unavailable on this ground, a witness must not only intend to assert the privilege, but also be entitled to assert it.

(14a, 14b, 14c) Criminal Law § 422--Evidence--Hearsay--Prior Testimony--Nonavailability of Witness--Witness Who Invoked Privilege Against Self-incrimination--Intent to Invoke Privilege.

In a capital homicide prosecution, the trial court did not err in finding that a witness who invoked his

privilege against self-incrimination was unavailable and that, therefore, his preliminary hearing testimony was admissible at trial. The witness demonstrated his intention to assert the privilege during a foundational hearing out of the jury's presence. The prosecutor asked whether he intended to answer any questions about the murder, and whether he had conversed with defendant about a crime defendant had committed on the day of the murder. The witness refused to answer each question on the ground of the privilege. The witness's proposed testimony could have tended to incriminate him for the murder. He had been taken into custody as a suspect in that offense, and defendant asserted that the evidence was consistent with the hypothesis that the witness, rather than defendant, killed the victim. Answers to the prosecution's questions could have developed evidence tending to establish the witness's own complicity in the victim's death. Further, defense counsel had had an opportunity to cross-examine the witness at the preliminary hearing.

(15) Witnesses § 6--Duty to Testify--Privilege Against Self-incrimination-- Invocation.

To invoke the privilege against self-incrimination, a witness need not be guilty of any offense; rather, the privilege is properly invoked whenever the witness's answers would furnish a link in the chain of evidence needed to prosecute the witness for a criminal offense. To satisfy this standard, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. Consistent with these principles, a trial court may compel a witness to answer a question only if it clearly appears to the court that the proposed testimony cannot possibly have a tendency to incriminate the person claiming the privilege.

(16) Criminal Law § 422--Evidence--Hearsay--Prior Testimony-- Nonavailability of Witness--Confrontation of Witness.

The constitutional right to confront witnesses is not absolute. It does not preclude the prosecution from proving its case through the prior testimony of a witness who is unavailable at trial, so long as the defendant had the right and the opportunity to cross-examine the witness during the earlier proceeding at which the witness gave this testimony.

(17) Criminal Law § 55--Rights of Accused--Confrontation of Witnesses-- Unavailable Witness--Witness Who Invoked Privilege Against Self-incrimination-- Trial Court's Grant of Immunity.

In a capital homicide prosecution, defendant's right to confront witnesses was not violated by the trial court's failure to grant immunity to a witness who was unavailable by reason of his having invoked his privilege against self-incrimination. First, defendant failed to request immunity, and therefore waived the issue. Moreover, defendant failed to demonstrate the existence of circumstances that would have required the trial court to confer immunity in order to ensure defendant a fair trial. Such immunity would have been required only if the witness's testimony was both clearly exculpatory and essential to an effective defense, and if no strong governmental interest weighed against the grant of immunity. Defendant did not demonstrate that the witness's testimony would have been clearly exculpatory or that it would have differed from his preliminary hearing testimony. Also, because the issue was never raised at trial, the record was inadequate to determine whether a strong governmental interest would have weighed against a grant of immunity.

(18) Witnesses § 6--Duty to Testify--Privilege Against Self-incrimination-- Informing Jury That Witness Had Invoked Privilege.

In a capital homicide prosecution in which a witness was unavailable to testify by reason of his having invoked his privilege against self-incrimination, the trial court did not err in failing to inform the jury of the witness's invocation of the privilege before allowing the witness's preliminary hearing testimony to be admitted at trial. Permitting the jury to learn that a witness has invoked the privilege against self-incrimination serves no legitimate purpose and may cause the jury to draw an improper inference of the witness's guilt or complicity in the charged offense.

(19) Criminal Law § 111--Rights of Accused--Competence of Defense Counsel-- Tactical Matters--Failure to Call Certain Witnesses--Witness Who Has Invoked Privilege Against Self-incrimination.

In a capital homicide prosecution in which a proposed defense witness invoked his privilege against self-incrimination, the trial court had no duty

on its own initiative to compel the witness to assert under oath his privilege against self-incrimination. Also, defense counsel's failure to call the witness to the stand did not constitute ineffective assistance. After talking with both the witness and his counsel, defense counsel announced on the record that he saw no reason even to call him to the stand. Because the witness was a defense witness, this decision was properly for defense counsel, not the trial court. The record provided no basis for concluding that defense counsel's decision not to require the witness to assert the privilege under oath was one that would not have been made by a reasonably competent attorney acting as a diligent advocate, or that it was reasonably probable a more favorable determination would have resulted had counsel acted differently.

(20a, 20b) Witnesses § 9--Infants--Defendant's Rights.

In a capital homicide prosecution, defendant's constitutional rights were not violated by the admission of the testimony of the seven-year-old son of the victim. Although the constitutional right to confront witnesses requires that an accused receive an adequate opportunity to cross-examine adverse witnesses, it does not protect against testimony that is marred by forgetfulness, confusion, or evasion. Even though the witness's testimony contained some inconsistencies and the witness did not demonstrate total recall of the events on the day his mother died, the witness's answers on the whole were lucid and responsive, and nothing in his testimony revealed either an inability to distinguish truth from falsehood or a failure to appreciate his obligation as a witness to tell the truth. Also, the admission of the testimony did not violate defendant's right to be free from cruel and unusual punishments. Although U.S. Const., 8th Amend., imposes heightened reliability standards for both guilt and penalty determinations in capital cases, these standard were met, since defendant was given an opportunity to be heard and to cross-examine in a judicial forum.

(21) Witnesses § 7--Competency--Burden of Proof.

The primary statutory grounds for disqualification of a witness are inability to express oneself comprehensibly on the subject of the testimony and inability to understand the obligation to tell the truth. A party who claims that a witness lacks either or both of these basic qualifications bears the burden at trial of proving disqualification. Moreover, to preserve for appeal a claim that a witness lacked testimonial competence, a party must object on this ground in the trial court. A party may not circumvent this objection requirement by claiming that the trial court should have inquired into a witness's qualifications on its own.

(22) Criminal Law § 113--Rights of Accused--Competence of Defense Counsel-- Tactical Matters--Failure to Object to Admission of Evidence--Testimony of Minor.

In a capital homicide prosecution, defendant was not provided with ineffective assistance of counsel by counsel's failure to object to the admission of the testimony of the seven-year-old son of the victim. If the record contains an explanation for the challenged aspect of counsel's representation, the reviewing court must determine whether the explanation demonstrates that counsel was reasonably competent and acting as a conscientious, diligent advocate. On the other hand, if the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. The record contained no explanation for defense counsel's failure to challenge the son's testimony, and it did not show that counsel was asked for an explanation and failed to provide one. Moreover, this was not a situation in which there could have been no satisfactory explanation for counsel's conduct.

(23) Criminal Law § 246--Trial--Instructions--Duty to Instruct Sua Sponte-- Viewing Minor's Testimony With Caution.

In a capital homicide prosecution, the trial court did not err in failing to instruct the jury to view a seven-year-old's testimony with caution. Although Pen. Code, § 1127f, requires the trial court to give this instruction "upon the request of a party," absent a request the trial court is not required to give either the statutory instruction or some other form of cautionary instruction.

(24) Criminal Law § 451--Argument and Conduct of Counsel--Prosecutor-- Closing Argument--Raising Issue of Defendant's Potential for Rehabilitation.

In a capital homicide prosecution, the prosecutor did not improperly raise the issue of defendant's potential for rehabilitation in the closing argument. The prosecutor referred to the money defendant was ob-

taining by selling drugs. The prosecutor then stated, "then of course when he gets out of jail he's back making hundreds of dollars." This was not an argument without evidentiary support that defendant would not be rehabilitated by prison, thus improperly inviting the jury to convict him for what he might do in the future rather than for what he had allegedly done in the past. To the contrary, a reasonable juror would understand the statement as a description of past events as related in defendant's testimony. Defendant had testified that he had earned substantial profits, both before and after an incarceration for grand theft from the person, by selling rock cocaine, the evident purpose of this testimony being to show that defendant would have had no need to commit a robbery and that he could afford to trade cocaine for sex, his defense to the charged crimes. No reasonable juror would understand the argument as an adverse comment on defendant's potential for rehabilitation.

(25) Criminal Law § 451--Argument and Conduct of Counsel--Prosecutor-- Closing Argument--Appeal to Racial Prejudice.

In a capital homicide prosecution, the prosecutor did not improperly appeal to racial prejudice in the closing argument. To persuade the jury to reject defendant's testimony that the victim had consented to sexual intercourse, the prosecutor stated that defendant wanted the jury to believe that a happily married woman with her five-year-old son in the house would have had consensual sex with "a strange man-frankly any man-a Black man." Prosecutorial argument that includes racial references appealing to or likely to incite racial prejudice violates the due process and equal protection guarantees of U.S. Const., 14th Amend. Because racial prejudice can strongly compromise a juror's impartiality, even neutral, nonderogatory references to race are improper absent compelling justification. Although there was no compelling justification for the prosecutor's racial reference in this case, there was no prejudice to defendant. The reference to race occurred in the course of an argument listing factors that undermined the credibility of defendant's testimony that the victim had consented to sexual intercourse. The racial reference added little to the force of the argument and was a brief and isolated remark.

(26) Criminal Law § 113--Rights of Accused--Competence of Defense Counsel-- Tactical Matters--Failure to Object to Admission of Evidence--Defendant's Prior Conviction.

In a capital homicide prosecution, defendant was not provided with ineffective assistance of counsel by counsel's failure to solicit a ruling on the use of defendant's prior grand theft conviction for impeachment or by eliciting testimony from defendant on direct examination admitting the conviction. The prior conviction for grand theft was admissible for purposes of impeachment. Grand theft necessarily involves both moral turpitude and dishonesty, it is dissimilar from and substantially less inflammatory than the charged offense of capital murder, and defendant's conviction for this offense had occurred just three years before defendant's testimony. Because the prosecution could and undoubtedly would have used the prior conviction to impeach defendant, defendant's attorney made a reasonable and common tactical decision to put the prior conviction before the jury promptly at the outset of defendant's direct examination.

(27) Jury § 43--Challenges--Voir Dire--Inquiry as to Views on Capital Punishment--Sequestration of Prospective Jurors--Waiver of Sequestration Procedure.

In a capital homicide prosecution, defendant's rights were not violated by the trial court's soliciting and accepting the parties' stipulation to, or by defendant's personal waiver of, the recommended sequestration procedure to conduct the vior dire concerning prospective jurors' views on the death penalty. This procedure is judicially established; it is not mandated by statute or the Constitution. Moreover, a defendant is free to waive the advantage of any law. The sequestration procedure was adopted to benefit capital defendants, and thus they may waive it. Further, defense counsel did not render ineffective assistance of counsel by agreeing to the stipulation. The death-qualification voir dire occurred primarily through the written juror questionnaires rather than through voir dire in open court. Because the prospective jurors answered the questionnaires individually and in isolation from each other, defendant received the primary advantage of the sequestration procedure, i.e., minimizing each prospective juror's exposure to the death-qualification voir dire of others.

(28) Homicide § 85--Trial--Instructions--Felony Murder--Intent to Kill as Required Element--Failure to Instruct.

In a capital homicide prosecution, which occurred while the rule requiring an instruction that intent to kill

is a required element of felony murder was in effect, the trial court's failure to so instruct the jury as to robbery-murder and burglary-murder special circumstances was harmless. The only reasonable conclusion one could draw from the evidence and the jury's findings was that defendant intentionally murdered the victim. The victim's son testified that an intruder generally matching defendant's description bound and gagged the victim in a manner making either self-defense or provocation impossible. The body was found in that same condition. The victim had died from multiple blows to the back and sides of the head, fracturing the skull and lacerating the brain. The systematic and prolonged assault with manifestly deadly force on the helpless victim was consistent only with an intent to kill, and the evidence to this effect was uncontroverted. Relying on an alibi defense, defendant presented no evidence that the killing was other than intentional.

(29) Criminal Law § 521.1--Punishment--Penalty Trial of Capital Prosecution--Argument--Defense Counsel's Argument Concerning Appeal and Pardon.

In the penalty phase of a capital homicide prosecution, defendant was not provided with ineffective assistance of counsel by counsel's argument to the jury referring to appeals and the possibility of a pardon. Although it is error for the court to instruct that the governor could commute a sentence of life imprisonment without possibility of parole, defense counsel's argument posed little risk of prejudice to defendant. Counsel referred to the power of pardon as extending to both the sentence of death and the sentence of life without possibility of parole, counsel characterized commutation of sentence and reversal of sentence on appeal as "rare events," and counsel noted that a sentence of life without possibility of parole "means exactly that period." Nothing in counsel's argument carried the improper suggestion that the jury could take its sentencing responsibility lightly because an erroneous death sentence would be subject to correction by appeal or by commutation. Moreover, the argument had a sound tactical purpose. The defense at the penalty phase was lingering doubt. Counsel argued that the prosecution's evidence was not conclusive, that defendant continued to maintain his innocence, and that evidence establishing his innocence might later come to light.

(30a, 30b) Criminal Law § 521.1--Punishment--Penalty Trial of Capital Prosecution--Argument--Defense Counsel's Argument Concerning Burden of Proof.

In the penalty phase of a capital homicide prosecution, defendant was not provided with ineffective assistance of counsel by counsel's argument to the jury concerning the burden of proof. Counsel told the jury that California allows for a death penalty if "12 people like you feel that it is appropriate," and "the standard of proof now is less than it was before, so if you simply want to balance the ledger you could flip a coin. It would be inappropriate, but you could determine it that way, and I don't mean by flipping a coin, but you can in your own mind say, 'Well, we have two choices, which shall it be.' " The first remark was a substantially correct description of the jury's role at the penalty phase of a capital case. The penalty jury's role is to determine, as defense counsel stated, which of the two alternative penalties, death or life imprisonment without possibility of parole, is appropriate. Because the determination of appropriateness is a reasoned moral decision, rather than an emotional response, the word "feel" was somewhat inapt, but any confusion was dispelled by the court's instructions. The second remark by defense counsel was also substantially correct. The point of counsel's remark was merely that the two penalty options were equally available, that there was no "thumb," in the form of a presumption, burden of proof, or other legal rule, on either side of the scale, and that the jurors should therefore enter the penalty deliberations with their minds open to both potential verdicts.

(31) Homicide § 101--Punishment--Death Penalty--Burden of Proof.

To return a death verdict, the jury must be persuaded that aggravation so outweighs mitigation that such a verdict is appropriate, but neither party has the burden of proof on that issue, and the jury need not be persuaded of its sentencing decision beyond a reasonable doubt.

(32) Homicide § 101--Punishment--Death Penalty--Automatic Motion to Modify Death Verdict--Review of Probation Report Prior to Hearing.

In a capital homicide prosecution, any error in the trial court's review of the probation report prior to the automatic motion to modify the death verdict was harmless. The trial court did not refer to any material in the probation report when giving its reasons for denying the modification motion. Therefore, it had to be assumed that the court was not improperly influ-

enced by the report.

(33) Homicide § 101--Punishment--Death Penalty--Automatic Motion to Modify Death Verdict--Denial of Motion.

In a capital homicide prosecution, the trial court gave adequate reasons for denying defendant's automatic motion to modify the death verdict. Although the court found that the murder was intentional and committed in the course of a rape, the court did not base the decision upon findings of intentional murder or rape not found by the jury. The trial judge did no more than evaluate the circumstances of defendant's capital crime. In this regard, the absence of express jury findings was not significant. The jury never made express findings on rape or intentional murder because these issues were never submitted to the jury, not because it resolved these issues in defendant's favor. In the absence of any express jury findings on these issues, the trial judge was permitted, and indeed required, to make whatever findings he deemed necessary to properly evaluate the circumstances of the offense in order to independently determine whether the weight of the evidence supported the verdict of death.

COUNSEL

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THE COURT.

In this death penalty case, a jury convicted defendant Armenia Levi Cudjo of the first degree murder of Amelia P. (Pen. Code, § 187; all further statutory references are to this code unless otherwise indicated); it found that defendant used a deadly weapon to commit the murder (§ 12022, subd. (b)) and that defendant committed the murder while engaged in the commission of robbery (§ 190.2, subd. (a)(17)(i)) and burglary (§ 190.2, subd. (a)(17)(vii)). The jury also convicted defendant of one count each of robbery (§ 211) with the use of a deadly weapon (§ 12022, subd. (b)) and burglary of an inhabited dwelling (§§ 459, 462, subd. (a)).

The jury fixed the penalty for the murder at death. The trial court denied the automatic motion to modify this penalty verdict (§ 190.4, subd. (e)), stayed the pronouncement of sentence on the noncapital counts, and sentenced defendant to death. Defendant's appeal from the judgment is automatic. (§ 1239, subd. (b).)

We conclude that the judgment should be affirmed in its entirety.

I. Facts and Proceedings

A. *Guilt Phase*

1. *Prosecution evidence*

On March 21, 1986, Los Angeles County sheriff's deputies found the body of Amelia P. in the master bedroom of her home in the desert community of Littlerock, in the County of Los Angeles. The body was face down on the floor, with the hands tied together behind the victim's back, the ankles tied together, and the hands tied to the ankles. These bindings were made with neckties belonging to the victim's husband, Ubaldo P. A piece of cloth was found in the victim's mouth, secured by a necktie tied around the victim's head and upper neck.

The body was clothed only in a robe. On the floor near the body were the victim's underwear, socks, and running shoes, as well as a bloodstained hammer and the broken tip of a fireplace poker. The cause of death was multiple blows to the back and sides of the head, fracturing the skull and lacerating the brain. Semen was present on the victim's right inner thigh and genital area, but there were no indications of traumatic sexual assault. Based on the temperature of the liver when the body was found, death was estimated to have occurred between 8:10 a.m. and 12:30 p.m. that day. The ***599** victim's blood tested negative for alcohol and an array of illegal drugs, including cocaine.

Kevin P., the youngest of the victim's sons, was five years old on the day of his mother's death, and seven years old when he testified at trial. According to that testimony, a Black man Kevin had never seen before entered the house with a knife in his hand. The man had no facial hair and no tattoos on his arms. It was before lunch, and Kevin was under a table in the

living room watching television. The man, who was wearing a sleeveless blue top and dark blue cut-off pants, put the knife to the victim's neck and demanded money. As Kevin described it, the knife was black with a "little round silver ball around it, and it was a survival knife." At the man's direction, Kevin retrieved the keys to the family van from the kitchen and gave them to the man. The man tried to start the van but was unable to do so. The man then took the victim to the master bedroom, where the man tied up the victim. From the closet in the master bedroom, the man removed two guns belonging to Kevin's father. Kevin went into his own bedroom and stayed there for a long time. Some days later, Kevin attended a lineup but did not identify anyone.

Ubaldo P. testified that he had left the house that morning between midnight and 1 a.m. to go to work 77 miles away in the City of Commerce. When he returned at 5 p.m., the sheriff's deputies were already there. Missing from the house were an M-1 carbine, a 30.06 rifle, and an army duffel bag. The victim's jewelry case, usually kept in the bedroom, was in the family van. The hammer found on the bedroom floor was normally kept in a toolbox in the garage. The fireplace poker was in its usual place, but there were bloodstains on the shaft and the tip had been broken off. The victim was very neat and normally did not leave her clothing on the floor. He had no reason to suspect that she was abusing drugs or alcohol.

Investigating officers found the keys to the van outside the victim's house, about 30 feet from the rear garage door. Nearby, the officers found a single set of shoe prints leading away from the house. It had rained the previous day, making a crusty surface. The officers followed the tracks for about a third of a mile, at intervals observing marks consistent with an object such as a rifle dragging on the ground. The tracks led to a camper, from which the victim's house was easily visible. [FN1] The officers ordered the occupants to leave the camper. Defendant and his brother Gregory emerged from the camper and were taken into custody. ***600**

> FN1 The tracks mentioned in the text were not the only ones found in the area. A thorough examination by investigating officers disclosed tracks made by the same or virtually identical shoes on roads to the east and west of the victim's house and Cudjo camper. (The camper was north of the victim's house, separated by an expanse of roadless desert.) On the road to the west, there were two sets of tracks, both heading south. On the road to the east, there were two sets of tracks, one heading north and the other south. In addition, two sets of tracks led away from the Cudjo camper, heading east, and a single set of tracks led to the victim's house from the house immediately to the west.

Inside the camper, the officers found a pair of MacGregor athletic shoes that could have made the shoe prints. The officers found an identical pair of athletic shoes behind the front seat of an automobile belonging to defendant's mother, Maxine Cudjo. Unlike the shoes found in the camper, the shoes found in the automobile were "very wet."

In addition to the shoes, the officers found a black survival knife and a pair of cut-off blue jeans in the Cudjo camper. When shown these articles at trial, Kevin testified that the knife was different from the knife wielded by the man who had assaulted his mother, and that the cut-off pants the assailant had worn were similar to, but shorter than, the ones found in the Cudjo camper. No firearms were found in the camper or in Maxine Cudjo's automobile.

Maxine Cudjo testified that on the day of the murder she was living in the camper. Defendant and Gregory had slept in the camper the previous night, as they occasionally did. She spent most of that morning in the house next door, doing housework for the man who owned the land under the camper. Returning to the camper at 11 a.m., she found defendant and Gregory, both wearing their MacGregor athletic shoes. The three of them went in Maxine's car to the post office and then to the residence of Julia Watson, one of Maxine Cudjo's daughters. Maxine returned to the camper; a little while later, at about 1:30 p.m., she departed again in her car to visit friends, leaving defendant and Gregory in the camper. On her next return to the camper, at approximately 4 p.m., sheriff's deputies had taken her sons into custody.

Julia Watson testified that her mother had visited her house that day with defendant and Gregory at approximately 1 or 2 p.m. Defendant was wearing cut-off jeans and work boots; Gregory wore shorts and tennis shoes.

Gregory Cudjo did not testify at trial, but the prosecution introduced evidence of the testimony he had given at defendant's preliminary hearing and statements he had made to investigating officers during a tape-recorded interview the morning of the day after the murder of Amelia P. In these prior statements, Gregory maintained that he had remained in the camper throughout the morning of the murder until his mother returned at approximately 11 a.m. During this time, he alternately slept and listened to a professional baseball game on the radio. He said defendant was gone from the camper for ***601** about two hours, leaving at about the time the baseball game started and returning at the same time as Maxine. During the taped interview, Gregory said that later that afternoon defendant had washed off his MacGregor athletic shoes when they were at Julia Watson's house.

Analysis of semen found on the victim's external genital area and right inner thigh revealed that it could have come from defendant but could not have come from Gregory Cudjo or from Ubaldo P. [FN2]

> FN2 The information did not charge rape or the rape-murder special circumstance, but the jury was instructed on first degree felony murder in the course of rape. According to the prosecutor, the evidence at the preliminary hearing was insufficient to support a charge of rape, and therefore the information did not charge rape expressly. Only after the preliminary hearing did the prosecution complete the laboratory work excluding Gregory and the victim's husband, but not defendant, as the source of the semen found on the victim.

2. *Defense evidence*

Defendant testified in his own behalf. He admitted that he knew Amelia P., that he had been in her house on the morning of her death, and that he had had sexual relations with her, but he denied that he had killed her. He said he had seen Amelia P. on three occasions before the day of her death.

Defendant explained that he and a woman named Iris Thomas had worked together selling cocaine, and that he had derived most of his income from this illicit trade. On two occasions, he had seen Amelia P. purchase cocaine. One of these transactions had occurred in the parking lot of an apartment complex in Quartz Hill. The other transaction had occurred on March 4 or 5, 1986, at a house belonging to Thomas's mother. According to defendant, Amelia P. had announced at the door that she had come "to see Miss Thomas about some coke." Defendant had invited Amelia inside. Amelia had asked Thomas's mother to "front her an eight track of cocaine." (Defendant testified that an "eight track" is one-eighth of an ounce.) After some discussion of arrangements for payment, Thomas's mother had given cocaine to Amelia. On a later date, defendant had seen Amelia P. at a market and they had waved to each other but had not conversed.

On the morning of March 21, defendant was driving his mother's car to a friend's house when he noticed Amelia P. standing in the front yard of her residence. She was wearing a housecoat or robe. It was about 9 a.m. When he blew the horn, she came to the car and asked how he had been and if he knew anybody who had any cocaine. Defendant said he had some. She asked if she could have it on credit as a favor. He said that it would depend on whether she would do him a favor. They agreed to talk about it further.

Defendant drove to the camper, retrieved some cocaine, and returned to the victim's residence. Amelia P. invited him into the house. He sold her ***602** some cocaine on credit for $50. (Sheriff's officers did not find rock cocaine at the victim's residence, but they did find an empty "baggie" in the garage. Just two and one-half inches square, the baggie was smaller than the ones normally sold in supermarkets; it was a convenient size for $50 worth of rock cocaine. The officers did not take possession of the baggie.)

Defendant smoked some cocaine, then asked Amelia P. when she could pay him. After further conversation, Amelia agreed to have sex with defendant in lieu of cash payment. They engaged in sexual intercourse on the living room couch; defendant left five minutes later. Defendant did not see anyone else in the house. He went back to the camper and told Gregory he had had sex with Amelia P. in exchange for cocaine. Defendant then went jogging. He did not wear the MacGregor shoes, which had cleats, but athletic shoes with smooth soles. When he returned to the camper, Gregory was there and their mother arrived about five minutes later.

Defendant changed to work boots. Gregory and defendant went with their mother to the post office, and then to Julia Watson's house. Defendant sat in the front passenger seat of his mother's automobile during this excursion.

At that time, defendant had tattoos on both biceps, on his right shoulder, and on his lower left arm. Defendant denied owning the cut-offs found in the camper and denied knowing to whom they belonged, although he admitted he had seen them in the camper. Defendant admitted owning the survival knife found in the camper. Gregory is two years younger than defendant and had no facial hair on the day of the murder. (Apparently, a photograph in evidence, taken on the day of the murder after defendant's arrest, showed that defendant had a goatee and/or a mustache.)

To establish Gregory's knowledge of the details of the murder, the defense introduced the complete tape recordings of Gregory's two interviews with investigating officers. During these interviews, Gregory said that when defendant saw the officers following his tracks to the camper, he admitted to Gregory that it appeared the officers were following his (i.e., defendant's) tracks.

According to Gregory, defendant gave this description of what he had done: Defendant had hidden and the woman had walked up with a basket of clothes. The woman was wearing a housecoat, which came open. Defendant rushed up, grabbed her, put a knife to her throat, and said he wanted only money. The woman had no money and no jewelry, but defendant took a couple of shotguns, one of which looked like a rifle. The woman started to make a lot of noise, so defendant put a sock in her mouth. There was a little boy, and there was a boa constrictor in an aquarium. (Kevin kept a pet snake ***603** in his bedroom.) The little boy had shown defendant where to find the keys to a van. Defendant had started the van but was unable to drive it out of the garage because the garage door was padlocked on the outside. Defendant had "hogtied" the woman with some neckties that were in the closet "next to a ... jacket with all kinds of medals on it-something like a Ranger jacket or something." (Ubaldo P. testified he had been an Airborne Ranger in the United States Army, and his green full-dress uniform had been hanging in the closet.) Defendant became "real nervous" because the woman had said her husband would come home at noon and it was then 11:25 a.m. He had tied her up to give himself enough time to get away. He did not rape the woman. According to Gregory, defendant said nothing about hitting the woman.

By stipulation, the defense established, first, that Kevin had told investigating officers on the day of the murder that he had been watching a certain television program when the intruder entered his house; second, that this program had been broadcast that day from 10:30 to 11:00 a.m.; and, third, that the professional baseball game that was broadcast that morning began at 10:30 a.m.

An expert in drug dependency testified that it is frequently impossible to determine from an individual's appearance and behavior whether that individual has been using cocaine. He also testified that it is not uncommon for the spouse of a cocaine addict to profess ignorance of the addict's use of cocaine. This may indicate genuine ignorance or the psychological state of denial.

A defense investigator testified that he had driven the route that defendant said in his testimony that he had jogged on the morning of the murder and that the distance was three miles.

3. *Rebuttal*

On rebuttal, Deputy Sheriff Robert Flores testified that on March 21, 1986, the time from the landing of the sheriff's helicopter at the victim's residence to the officers' arrival at the Cudjo camper was at least one hour and thirty minutes.

B. *Penalty Phase*

The prosecution presented no evidence at the penalty phase. The only defense evidence was the testimony of defendant. Asked but a single question, defendant again denied killing Amelia P. There was no cross-examination. ***604**

II. Guilt Phase Errors

A. *Exclusion of Evidence of Gregory Cudjo's Confession*

(1a) Defendant contends that the trial court erred in excluding evidence that Gregory had confessed to the murder of Amelia P. We agree that the ruling was erroneous, but we conclude that defendant was not thereby prejudiced.

1. *Proceedings in the trial court*

The prosecution had intended to call Gregory Cudjo as a witness during its case-in-chief, but the trial court determined that Gregory was unavailable as a witness (see Evid. Code, § 240) after Gregory asserted his privilege against self-incrimination during a nonjury hearing. The prosecution then introduced the testimony Gregory had given at defendant's preliminary hearing.

During the defense case, defense counsel represented to the trial court that John Lee Culver was prepared to testify that Gregory Cudjo had admitted responsibility for the murder of Amelia P. while Culver and Gregory were incarcerated together at the Antelope Valley sheriff's substation. The prosecutor remarked that the trial court would have to rule on the admissibility of the proposed testimony both as a statement against penal interest and under Evidence Code section 352. [FN3] To permit the trial court to make the necessary determinations of preliminary fact (see Evid. Code, § 402), Culver then testified out of the jury's presence, to the following effect.

> FN3 "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

When not incarcerated, Culver lived in Littlerock. He had known defendant for approximately 15 to 20 years. He also knew defendant's mother, his sisters, and his brother Gregory. In March 1986, Culver was in custody at the Antelope Valley sheriff's substation, where he shared a cell with Gregory Cudjo. Because of Gregory's restless pacing, Culver asked what was wrong. Gregory answered, "Man, they got me in here for a murder" and "I need [to] talk to somebody." As Culver put it, Gregory then "started talking about why he'd done it and what he'd done ...." According to Culver, Gregory said, "I went over to rob, burglarize this lady's house and she seen me and then that's when all the stuff went down and that's what happened."

Gregory then explained, in Culver's words, that he "went in the house and this woman supposed to have been washing clothes, and she caught him ***605** coming in the house .... When the woman seen him he just started beating the woman up and then she started screaming, so he knocked her out and went and done it again, kept hitting her, kept hitting her .... He kept banging her around in the head." Gregory reportedly said that the woman started screaming as soon as she saw him, that he "knocked her out," that she "came back to," and that he "started hitting her and hitting her with a hammer or whatever he hit her with." Gregory also said, reportedly, that he had found jewelry and guns in the house, and that he knew the lady because they had "smoked dope together." Gregory did not mention raping the woman.

On cross-examination, the prosecutor asked Culver if Gregory had mentioned anyone besides the woman being present in the house. Culver answered that at the time Gregory had not mentioned anyone else, but that Culver had talked to Gregory shortly before Culver's testimony and that through this conversation Culver had learned that there "probably was a little boy or somebody in the house."

According to Culver, Gregory had been taken from the cell he shared with Culver. When Gregory returned, he told Culver that detectives had interviewed him about the murder. Asked whether Gregory had admitted inculpating defendant for the murder, Culver at first said that Gregory had done so, but he immediately changed his testimony, stating that he merely inferred that Gregory had blamed defendant because Gregory was released shortly thereafter and because defendant's criminal record was worse than Gregory's. [FN4] Culver testified that he first became aware of defendant's presence at the substation two days after his conversation with Gregory, when Culver was being taken to court. At that time, Culver told defendant nothing about Gregory's confession, even after defendant said he was incarcerated for murder. Culver said he first spoke of the confession approximately three months before his testimony, when he was contacted and interviewed by a defense investigator.

> FN4 "Q. So did he tell you he copped out on his brother?
>
> "A. Yeah, he said he told that he didn't do it, he said that his brother done it.
>
> "Q. So, now you're saying that he did say he

copped out on his brother?

"A. Well, that it seemed like, because as soon as he got out of the holding tank to go into the court, he gets out, so he had to cop out, anybody can see through that.

"Q. Okay, so what you're saying is that you formed the opinion that Gregory had copped out instead of Gregory telling you that he had copped out.

"A. I formed the opinion that Gregory told the police that his brother had done it because ... [defendant's] record looks worser than Gregory['s]. Automatically they're going to keep the man that got the worstest record and let the man that don't have the worstest record go."

Following Culver's testimony, the trial court invited argument. The prosecutor asserted that Culver's demeanor, background, and relationship to the ***606** defendant, as well as the content of his testimony, made him unworthy of belief. The prosecutor framed the question as "whether or not we should allow a liar to testify in front of the jury just for the purpose of propping up a straw man." The prosecutor urged the court to exclude Culver's testimony under Evidence Code section 352 as inherently incredible.

The court inquired whether it would then be "making a judgment as trier of fact and taking it away from the jury." The prosecutor said that Evidence Code section 352 required this on some occasions. The court agreed it must "resolve" issues such as Culver's friendship with defendant and the fact that Culver waited so long to come forward; "[t]hese are the things that I consider."

Defense counsel maintained that the evidence was admissible as a declaration against penal interest under Evidence Code section 1230. The trial court agreed with defense counsel that Gregory was unavailable as a witness because he had exercised his privilege against self-incrimination and that the statements attributed to him by Culver were against his penal interest.

However, the court found that "to allow this testimony would be a travesty of justice ...." Concluding that the evidence lacked "indicia of reliability," the court ruled that it was not admissible as a declaration against interest. In support of the ruling, the court cited Evidence Code section l230 and *People v. Martin* (1983) 150 Cal.App.3d 148, 162 [197 Cal.Rptr. 655].

Later that day, after another defense witness had testified before the jury, the trial court added that "in interpreting section 1230 of the Evidence Code" it had also relied upon *People v. Chapman* (1975) 50 Cal.App.3d 872, 878-881 [123 Cal.Rptr. 862]. Later still, during a hearing on defendant's motion for a new trial, the court stated "for the record" that it had found Culver's testimony "unreliable and untrustworthy" and had concluded that the probative value of the evidence "was outweighed by prejudice under section 352 of the Evidence Code within the meaning of *People* versus *Green*, 27 Cal.3d 1 [164 Cal.Rptr. 1, 609 P.2d 468]."

2. *Evidence Code section 1230*

Under one of the statutory exceptions to the hearsay rule, a party may introduce in evidence, for the truth of the matter stated, an out-of-court statement by a declarant who is unavailable as a witness at trial if the ***607** statement, when made, was against the declarant's penal, pecuniary, proprietary, or social interest. [FN5] (2) A party who maintains that an out-of-court statement is admissible under this exception as a declaration against *penal* interest must show that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. (*People v. Frierson* (1991) 53 Cal.3d 730, 745 [280 Cal.Rptr. 440, 808 P.2d 1197].) To determine whether the declaration passes the required threshold of trustworthiness, a trial court "may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." (*Ibid.*) On appeal, the trial court's determination on this issue is reviewed for abuse of discretion. (*Ibid.*)

FN5 "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprie-

> tary interest, or so far subjected [the declarant] to the risk of civil or criminal liability, or so far tended to render invalid a claim by [the declarant] against another, or created such a risk of making [the declarant] an object of hatred, ridicule, or social disgrace in the community, that a reasonable [person] in [the declarant's] position would not have made the statement unless [the person] believed it to be true." (Evid. Code, § 1230.)

(1b) Here, Gregory Cudjo was unavailable as a witness because he had chosen to exercise his privilege against self-incrimination. (*People v. Leach* (1975) 15 Cal.3d 419, 438 [124 Cal.Rptr. 752, 541 P.2d 296].) It is likewise not disputed or reasonably disputable that a statement confessing to a killing during the course of a burglary and robbery, as attributed to Gregory in Culver's testimony, subjects the declarant to a risk of criminal liability and therefore on its face is against the alleged declarant's penal interest.

Moreover, given the circumstances of Gregory's alleged statement, the trial court had discretion to conclude that it was admissible despite its hearsay character because, if made as claimed, it was probably true. By Culver's account, Gregory made his statement spontaneously, while alone with an acquaintance, within hours after a murder for which Gregory, who had no alibi, was in custody as a prime suspect. Gregory tended to fit Kevin P.'s description of the assailant, and much of the other evidence, in particular the incriminating shoe prints, was as consistent with Gregory's guilt as with defendant's.

It is true, as the People suggest, that the alleged statement was inconsistent to some extent with the physical evidence, most notably the evidence that the victim was hog-tied before she was beaten to death. However, such discrepancies might be attributable to Gregory's agitation or Culver's misunderstanding of what he was told. They did not negate all possibility that if ***608** Gregory claimed to be the murderer, he was telling the truth. Hence, the court could properly have found that "a reasonable [person] in [Gregory's] position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.)

But the trial court did not focus exclusively, or even primarily, on whether Gregory's *hearsay statement* might be false. Instead, the court apparently accepted the prosecution's contention that *Culver* was probably a liar who should therefore be excluded as a *live witness*. In so doing, the court erred.

The People argue that in considering the admissibility of evidence offered under the hearsay exception for declarations against interest, the trial court could properly consider the credibility of the in-court witness, Culver. We disagree. The credibility of the in-court witness is not a proper consideration in this context.

(3) Hearsay is generally excluded because the out-of-court declarant is not under oath and cannot be cross-examined to test perception, memory, clarity of expression, and veracity, and because the jury (or other trier of fact) is unable to observe the declarant's demeanor. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 298 [35 L.Ed.2d 297, 310-311, 93 S.Ct. 1038]; *People v. Bob* (1946) 29 Cal.2d 321, 325 [175 P.2d 12].) Because the rule excluding hearsay is based on these particular difficulties in assessing the credibility of statements made outside the jury's presence, the focus of the rule's several exceptions is also on the reliability of the out-of-court declaration. Thus, the various hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for the absence of the oath, cross-examination, and jury observation. (*Chambers v. Mississippi, supra*, 410 U.S. at pp. 298-299 [35 L.Ed.2d at pp. 310-311].) Neither the hearsay rule nor its exceptions are concerned with the credibility of witnesses who testify directly to the jury.

(4) When evidence is offered under one of the hearsay exceptions, the trial court must determine, as preliminary facts, both that the out-of-court declarant made the statement as represented, and that the statement meets certain standards of trustworthiness. (See legis. committee com., 29B West's Ann. Evid. Code (1966 ed.) § 403, p. 268.) The first determination-whether the declaration was made as represented-is governed by the substantial evidence rule. The trial court is to determine only whether there is evidence sufficient to sustain a finding that the statement was made. (*Ibid.*) As with other facts, the direct testimony of a single witness is sufficient to support a finding unless the testimony is physically impossible or its falsity is apparent "without resorting to inferences or deductions." (***609***People v. Huston* (1943) 21 Cal.2d 690, 693 [134 P.2d 758]; accord,

People v. Jones (1990) 51 Cal.3d 294, 314-316 [270 Cal.Rptr. 611, 792 P.2d 643]; *People v. Thornton* (1974) 11 Cal.3d 738, 754 [114 Cal.Rptr. 467, 523 P.2d 267].) Except in these rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury's resolution; such doubts do not afford a ground for refusing to admit evidence under the hearsay exception for statements against penal interest. (See *U.S. v. Seeley* (1st Cir. 1989) 892 F.2d 1, 3; Comment, *Statements Against Penal Interest* (1978) 66 Cal.L.Rev. 1189, 1205, fn. 99; Note, *Declarations Against Penal Interest* (1976) 56 B.U.L. Rev. 148, 178-179; 2 McCormick on Evidence (4th ed. 1992) § 318, p. 342, fn. 10.)

3. *Evidence Code section 352*

(5a) When an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers "substantially outweigh" probative value, the objection must be overruled. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 688 [248 Cal.Rptr. 69, 755 P.2d 253].) On appeal, the ruling is reviewed for abuse of discretion. (*People v. Ashmus* (1991) 54 Cal.3d 932, 973 [2 Cal.Rptr.2d 112, 820 P.2d 214].)

(1c) Here, no claim is made that permitting Culver to testify would have taken an undue amount of time. Culver's testimony out of the jury's presence, including a thorough cross-examination, did not take long, and the prosecutor did not represent that rebuttal witnesses would be required.

Nor is there any apparent danger of confusion of the issues. Culver's testimony would not even have introduced the issue of Gregory's possible culpability for the murder of Amelia P. The issue was already there, as defense counsel had made clear from the outset of trial; Gregory's culpability constituted the primary defense. (See *People v. McAlpin* (1991) 53 Cal.3d 1289, 1310, fn. 15 [283 Cal.Rptr. 382, 812 P.2d 563].)

The evidence had substantial probative value. (5b) To withstand a challenge under Evidence Code section 352, evidence of a third party's culpability "need only be capable of raising a reasonable doubt of [the] defendant's guilt." (*People v. Hall* (1986) 41 Cal.3d 826, 833 [283 Cal.Rptr. 382, 812 P.2d 563].) (1d) Here, Culver would testify that Gregory, the other prime suspect in the case, had confessed to the murder within hours after the crime was committed and under circumstances providing substantial assurances that the confession was trustworthy. The issue of Gregory's ***610** guilt was highly material: given Kevin P.'s testimony describing a single intruder, and given also the single set of shoe prints leading away from the victim's residence, proof of Gregory's guilt would exonerate defendant. Thus, Culver's testimony raised the requisite reasonable doubt of defendant's guilt.

Finally, the evidence was highly necessary: although there was other evidence tending to cast suspicion on Gregory, there was no comparable direct evidence of Gregory's guilt. Gregory's decision to exercise his privilege against self-incrimination precluded the defense from calling Gregory as a witness.

Nor was there any danger of "undue prejudice" to the prosecution. The evidence was not likely "to arouse the emotions of the jurors" or "to be used in some manner unrelated to the issue on which it was admissible." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1016 [254 Cal.Rptr. 586, 766 P.2d 1]; see also, *People v. Farmer* (1989) 47 Cal.3d 888, 912 [254 Cal.Rptr. 508, 765 P.2d 940]; *People v. Karis* (1988) 46 Cal.3d 612, 638 [250 Cal.Rptr. 659, 758 P.2d 1189].)

As noted, the trial court apparently concluded that the evidence was more prejudicial than probative because Culver was not a credible witness. However, such doubts, however legitimate, do not constitute "prejudice" under Evidence Code section 352. (See *People v. Alcala* (1992) 4 Cal.4th 742, 791 [15 Cal.Rptr.2d 432, 842 P.2d 1192].) We have warned trial courts to avoid hasty conclusions that third-party-culpability evidence is "incredible"; this determination, we have affirmed, "is properly the province of the jury." (*People v. Hall*, *supra*, 41 Cal.3d at p. 834.) Unlike other cases in which similar evidence was excluded for lack of credibility (e.g., *People v. Blankenship* (1985) 167 Cal.App.3d 840, 849 [213 Cal.Rptr. 666]; *People v. Martin*, *supra*, 150 Cal.App.3d 148, 162; *People v. Chapman*, *supra*, 50 Cal.App.3d 872, 878), nothing in the record indicates that Culver's testimony was motivated by threats or bribery or expectation of personal advantage.

We conclude that doubts about Culver's credibility, though reasonable and legitimate, did not provide a sufficient basis to exclude his testimony. In sustaining the prosecutor's objection to this evidence, the trial court abused its discretion.

4. *Constitutional claims; standard of prejudice*

Defendant urges that the trial court's exclusion of Culver's testimony usurped his federal due process and fair trial rights. In essence, defendant ***611** complains he was unconstitutionally deprived of the right to present a defense. Hence, he reasons, the prejudicial effect of the error must be measured under the constitutional standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711, 87 S.Ct. 824, 24 A.L.R.3d 1065] (reversal required unless error harmless beyond reasonable doubt).

(6) We find no constitutional violation. "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain ... a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.] ... [T]his principle applies perforce to evidence of third-party culpability ...." (*People v. Hall, supra*, 41 Cal.3d 826, 834-835.)

It follows, for the most part, that the mere erroneous exercise of discretion under such "normal" rules does not implicate the federal Constitution. Even in capital cases, we have consistently assumed that when a trial court misapplies Evidence Code section 352 to exclude defense evidence, including third-party-culpability evidence, the applicable standard of prejudice is that for state law error, as set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243] (error harmless if it does not appear reasonably probable verdict was affected). (E.g., *People v. Alcala, supra*, 4 Cal.4th 742, 791; *People v. Babbitt, supra*, 45 Cal.3d 660, 688; *People v. Hall, supra*, 41 Cal.3d at p. 836; *People v. Wright* (1985) 39 Cal.3d 576, 585-586 [217 Cal.Rptr. 212, 703 P.2d 1106].)

Justice Kennard, in her dissent, urges that by barring a crucial defense witness as "incredible," the trial court unconstitutionally invaded the jury's function and denied defendant his right, under the compulsory process clause of the Sixth Amendment, to present witnesses in his behalf. The United States Supreme Court has held that the constitutional right to present and confront material witnesses may be infringed by *general rules* of evidence or procedure which preclude material testimony or pertinent cross-examination for arbitrary reasons, such as unwarranted and overbroad assumptions of untrustworthiness. However, the high court has never suggested that a trial court commits constitutional error whenever it individually assesses and rejects a material defense witness as incredible. (See, e.g., *Michigan v. Lucas* (1991) 500 U.S. 145 [114 L.Ed.2d 205, 111 S.Ct. 1743] [preclusive effect of statutory notice-of-evidence requirement in rape case]; *Taylor v. Illinois* (1988) 484 U.S. 400 [98 L.Ed.2d 798, 108 S.Ct. 646] [sanction of preclusion for defense violation of discovery rules]; *Rock v. Arkansas* (1987) 483 U.S. 44 [97 L.Ed.2d 37, 107 S.Ct. 2704] [exclusion of accused's own testimony under state rule disallowing all hypnotically refreshed evidence]; *Green* v. ***612** *Georgia* (1979) 442 U.S. 95 [60 L.Ed.2d 738, 99 S.Ct. 2150] [absolute state failure to recognize hearsay exception for declarations against penal interest]; *Davis v. Alaska* (1974) 415 U.S. 308 [39 L.Ed.2d 347, 94 S.Ct. 1105] [denial of cross-examination for bias based on state rule making evidence of juvenile proceedings inadmissible in adult court]; *Chambers v. Mississippi, supra*, 410 U.S. 284 [state rule precluding cross-examination of party's own witness]; *Washington v. Texas* (1967) 388 U.S. 14 [18 L.Ed.2d 1019, 87 S.Ct. 1920] [state rule precluding accomplice from testifying for defense]; but cf. *Delaware v. Van Arsdall* (1986) 475 U.S. 673 [89 L.Ed.2d 674, 106 S.Ct. 1431] [preclusion of cross-examination for bias, based upon individual assessment of probative value against prejudice, violated confrontation clause].)

(7) We reiterate that in general under California law, the credibility of individual witnesses "is properly the province of the jury." (*Hall, supra*, 41 Cal.3d at p. 834.) Nonetheless, absent clearer guidance from above, we will not lightly assume that a trial court invites federal constitutional scrutiny each and every time it decides, on the basis of the particular circumstances, to exclude a defense witness as unworthy of credit. We decline to extend the federal decisions in the manner proposed by defendant and in Justice Kennard's dissent. We conclude that the *Watson* standard of prejudice applies to the trial court's mistake.

5. *Prejudice*

(8) Applying the *Watson* standard, we conclude that exclusion of Culver's testimony, though erroneous, was harmless because it is not reasonably probable that admission of the testimony would have affected the outcome. We recognize that Gregory was the other prime suspect in the murder, and he disclosed accurate crime-scene details, which he told the police defendant had revealed to him. Moreover, Kevin P., the only eyewitness, never identified the assailant and gave a description which more closely resembled Gregory than defendant. Some other evidence was consistent with Gregory's guilt as well as defendant's. Yet the inference that defendant, not Gregory, was the murderer was extremely strong.

Trapped by a semen sample that included defendant but excluded all other known potential donors, including Gregory, defendant was forced to admit that he was present at the crime scene on the morning of the murder, and that he had sex with the victim. The physical evidence, in particular the shoe prints leading to and from the victim's home, strongly suggested there had been only one visitor during that morning. Just as important, Kevin described only one entry, by the man who robbed his mother. ***613**

By contrast, defendant's uncorroborated effort to provide an innocent explanation for his presence in the victim's house was not convincing. Defendant testified he had encountered the victim purchasing cocaine on two prior occasions, and that she traded cocaine for sex on the day of the murder. However, these claims contravened all other evidence about the victim's life-style and values.

The victim's husband testified that she never exhibited signs of drug use during a 13-year marriage, and there was no cocaine in her blood at the time of her death. Moreover, the victim's family was on a tight budget and managed its money carefully; the victim's husband noticed no unusual withdrawals from the family account.

It also seems unlikely that the victim, a housewife and mother, would have engaged in casual sex and drug activity in her living room with a near stranger while her five-year-old son was at home. Defendant's version of events failed to mention or explain Kevin's presence during the alleged sex-for-drugs encounter. The implausibility of defendant's account enhanced the inference that he was involved in the homicide.

Finally, as the trial court surmised, both Culver's testimony and the hearsay confession it recounted had obvious indicia of unreliability. Though he knew the entire Cudjo family, Culver was a particular friend of defendant and thus had a motive to lie. Moreover, Gregory's purported jailhouse confession contravened both the physical evidence and all other accounts Gregory had given, including his testimony under oath at the preliminary hearing.

According to Culver, Gregory said that as he was entering the victim's home to burglarize it, the victim came upon him by surprise, whereupon he "tripped" and immediately began beating her with a hammer. As previously noted, however, the crime-scene evidence made clear that the victim was carefully hog-tied in her bedroom before she was beaten and killed. When asked whether Gregory had mentioned anybody else in the house, Culver admitted that Gregory had originally failed to account for this crucial detail. However, Culver claimed that in a courthouse conversation just minutes before Culver took the stand, Gregory belatedly mentioned that there "probably was a little boy or somebody ...." This claim is suspect. It strains common sense that Gregory willingly provided additional details to Culver at a moment when he must have known Culver was about to give incriminating testimony against him.

In all his other known statements and sworn testimony, Gregory insisted he had no involvement in the homicide. Moreover, after observing Culver's ***614** demeanor and hearing his testimony, the trial court concluded that Culver was a patently incredible witness. Under all these circumstances, the chance that a competent jury would have given Culver's testimony substantial weight seems remote. Accordingly, it is not reasonably probable that admission of his testimony would have affected the outcome. No basis for reversal appears.

B. *Admission of Gregory Cudjo's Preliminary Hearing Testimony*

The prosecution had intended to call Gregory Cudjo as a witness during the case-in-chief. Because Gregory was a potential suspect in the murder of Amelia P., the trial court appointed counsel to advise him. After conferring with counsel, Gregory decided

to assert his privilege against self-incrimination (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15) and to refuse to answer any questions relating to the murder. The prosecution then announced its intention to offer in evidence, under the former testimony exception to the hearsay rule (see Evid. Code, §§ 1200, 1291), the testimony Gregory had given at the preliminary hearing. After Gregory had asserted his privilege against self-incrimination during a nonjury hearing, the trial court found that Gregory was unavailable as a witness (*id.*, § 240), and it overruled the defense objection to Gregory's former testimony. When proceedings with the jury resumed, the transcript of Gregory's preliminary hearing testimony was read aloud.

Here is what the transcript revealed:

Called as a prosecution witness at the preliminary hearing, Gregory had at first testified that on the morning of Amelia P.'s murder, and throughout that day, defendant had worn long pants and boots; that defendant had remained in the camper with Gregory from the time Gregory awoke, between 9:30 and 10 a.m., until their mother arrived and the three of them went together to the house of Julia Watson; and that Gregory had not seen defendant washing his tennis shoes at Watson's house. Under further questioning, including references to his previous interviews with sheriff's investigators, Gregory had testified that he could not be sure that defendant had remained in the camper during the late morning hours because he (Gregory) had fallen asleep again for most of this time, and that defendant had later told Gregory he had been jogging that morning. But Gregory denied that he had ever told sheriff's investigators that he had seen defendant leave the camper that morning, that defendant had been wearing cut-off jeans and tennis shoes, or that defendant had later washed his shoes at Watson's house.

Without objection, the prosecutor at the preliminary hearing had then played part of a tape recording of two sheriff's investigators interviewing ***615** Gregory on the day following the murder. During the portion of the taped interview that was played, Gregory had said that defendant had been gone from the camper for two hours on the morning of the murder, that defendant had worn cut-off jeans and white tennis shoes that morning, that at Watson's house defendant had taken off his tennis shoes and washed them, and that defendant had later changed into long pants and boots. After the tape had been played, Gregory had testified that he remembered the conversation with the sheriff's investigators, that hearing the tape had refreshed his recollection, that he had not lied to the investigators and had told them what he knew, and that he did not disagree with any of the things he had told the officers.

Defendant now contends: (1) his trial counsel was ineffective for failing to object at the preliminary hearing to the playing of the tape recording of the interview; (2) his trial counsel was ineffective for failing to request a jury instruction that Gregory's taped statements could not be considered for the truth of the matters asserted; (3) the trial court erred in finding Gregory unavailable as a witness; (4) admission of Gregory's preliminary hearing testimony denied defendant his right of confrontation; (5) the prosecutor's failure to grant immunity to Gregory violated various constitutional rights of defendant; and (6) the trial court should have told the jurors why Gregory was not appearing before them to testify.

1. *Ineffective assistance at preliminary hearing*

(9) A criminal defendant has a constitutional right to the assistance of counsel (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 15). This right to counsel extends to every critical stage of the proceeding, including the preliminary hearing. (*Coleman v. Alabama* (1970) 399 U.S. 1, 9-10 [26 L.Ed.2d 387, 396-397, 90 S.Ct. 1999] (lead opn. of Brennan, J.); *id.* at p. 11 [26 L.Ed.2d at pp. 397-398] (conc. opn. of Black, J.).) The right comprehends more than just the formality of representation by a lawyer; it entitles the defendant to competent and effective legal assistance. (*United States v. Cronic* (1984) 466 U.S. 648, 654-655 [80 L.Ed.2d 657, 664-666, 104 S.Ct. 2039]; *People v. Ledesma* (1987) 43 Cal.3d 171, 215 [233 Cal.Rptr. 404, 729 P.2d 839].)

(10) A claim of ineffective assistance of counsel is evaluated by well-established standards. A defendant seeking relief on the basis of ineffective assistance must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. (*People v. Fosselman* (1983) 33 Cal.3d 572, 584 [189 Cal.Rptr. 855, 659 P.2d 1144]; see also *Strick-*

land v. Washington (1984) 466 U.S. 668, 687-696 [80 L.Ed.2d 674, 693-699, 104 S.Ct. 2052].) ***616**

(11) Here, defendant has failed to show that a reasonably competent attorney, acting as a diligent advocate, would have objected at the preliminary hearing to introduction of evidence of the taped interview with Gregory. Although hearsay (Evid. Code, § 1200), the evidence was admissible under the hearsay rule exceptions for inconsistent statements (*id.*, § 1235) and past recollection recorded (*id.*, § 1237). Because there was no sound legal basis for objection, counsel's failure to object to the admission of the evidence cannot establish ineffective assistance.

2. *Ineffective assistance at trial*

(12) Defendant faults his trial counsel for not asking the trial court to instruct the jury that Gregory's taped statements could not be considered for the truth of the matters asserted. He relies on the Law Revision Commission's comment to Evidence Code section 1202, stating that although Evidence Code section 1235 permits a finder of fact to consider a *trial witness's* inconsistent statement for the truth of the matter stated, no similar hearsay exception applies to the inconsistent statements of a *hearsay declarant*. (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1979 ed.) § 1202, p. 62.)

What defendant's argument overlooks is that after his taped statements were played at the preliminary hearing, Gregory testified that the tape had refreshed his recollection, that he had not lied to the investigators and had told them what he knew, and that he did not disagree with any of the things he had told the officers. Because Gregory in this way adopted and reaffirmed the substance of his statements to the officers, the jury was entitled to consider those statements for their truth under Evidence Code section 1291 as part of Gregory's former testimony. An instruction correctly explaining this situation to the jury would not have benefited the defense.

3. *Gregory's unavailability as a witness*

(13) A person is unavailable as a witness if the person is "[e]xempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant." (Evid. Code, § 240, subd. (a)(1).) One such privilege, the exercise of which makes a person unavailable as a witness, is the constitutional privilege against self-incrimination. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1251 [270 Cal.Rptr. 451, 792 P.2d 251].) To be found unavailable on this ground, a witness must not only intend to assert the privilege, but also be entitled to assert it. (*People v. Ford* (1988) 45 Cal.3d 431, 440-441 [247 Cal.Rptr. 121, 754 P.2d 168, 76 A.L.R.4th 785].)

(14a) Here, Gregory demonstrated his intention to assert the privilege when he was called to testify during a foundational hearing out of the jury's ***617** presence. After Gregory was sworn, the prosecutor asked whether Gregory intended to answer any questions about the murder of Amelia P., and whether he had conversed with defendant about a crime defendant had committed near the Cudjo camper on the day of the murder. Gregory refused to answer each question, expressly grounding his refusal on the privilege against self-incrimination. Defense counsel then stipulated that Gregory would assert the privilege "as to any testimony he may give in this matter."

Defendant argues that even though Gregory intended to assert the privilege, Gregory did not sufficiently establish that he was entitled to do so. We disagree.

(15) To invoke the privilege, a witness need not be guilty of any offense; rather, the privilege is properly invoked whenever the witness's answers "would furnish a link in the chain of evidence needed to prosecute" the witness for a criminal offense. (*Hoffman v. United States* (1951) 341 U.S. 479, 486 [95 L.Ed. 1118, 1123-1124, 71 S.Ct. 814]; see also *People v. Mincey* (1992) 2 Cal.4th 408, 441 [6 Cal.Rptr.2d 822, 827 P.2d 388].) To satisfy this standard, "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." (*Hoffman v. United States*, *supra*, at pp. 486-487 [95 L.Ed.2d at pp. 1123-1124].) Consistent with these principles, our Evidence Code provides that when a witness grounds a refusal to testify on the privilege against self-incrimination, a trial court may compel the witness to answer only if it "clearly appears to the court" that the proposed testimony "cannot possibly have a tendency to incriminate the person claiming the privilege." (Evid. Code, § 404.)

(14b) Here, it did not "clearly appear" that Gre-

gory's proposed testimony could not have tended to incriminate him for the murder of Amelia P. Gregory had been taken into custody as a suspect in that offense. Indeed, defendant has argued, both at trial and on this appeal, that the evidence is entirely consistent with the hypothesis that Gregory, rather than defendant, killed Amelia P. Answers to the prosecution's questions about Gregory's observations on the day of the murder, and Gregory's conversations with defendant relating to the murder, could have developed evidence tending to establish Gregory's own complicity in the victim's death. (See *People v. Sipress* (1975) 51 Cal.App.3d 98, 102 [123 Cal.Rptr. 884]; *People v. Traylor* (1972) 23 Cal.App.3d 323, 330 [100 Cal.Rptr. 116].) Moreover, because Gregory had testified at the preliminary hearing, he could properly invoke the privilege to avoid exposing himself to a charge of perjury in that proceeding. (*People v. Maxwell* (1979) 94 Cal.App.3d 562, 570-571 [***618**156 Cal.Rptr. 630].) The trial court did not err in finding Gregory unavailable as a witness on the ground of privilege.

4. *The right of confrontation*

(16) Both the state and federal Constitutions guarantee criminal defendants the right to confront the witnesses against them. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) The right of confrontation is not absolute, however; in particular, it does not preclude the prosecution from proving its case through the prior testimony of a witness who is unavailable at trial, so long as the defendant had the right and the opportunity to cross-examine the witness during the earlier proceeding at which the witness gave this testimony. (*Barber v. Page* (1968) 390 U.S. 719, 722 [20 L.Ed.2d 255, 258-259, 88 S.Ct. 1318]; *People v. Alcala, supra*, 4 Cal.4th 742, 784-785.)

(14c) Here, defendant maintains that his right of confrontation was denied by the prosecution's use of Gregory's preliminary hearing testimony. Although his attorney did cross-examine Gregory at the preliminary hearing, defendant maintains that he did not have a fair opportunity to cross-examine because Gregory's ability to think and respond coherently had been impaired by the ingestion of some drug or drugs.

The record before us does not support defendant's contention. During the preliminary hearing, Gregory's competence as a witness was not challenged. Gregory was not asked at the preliminary hearing whether he had taken drugs, and no evidence on that subject was introduced at the preliminary hearing. Although at trial defense counsel voiced his opinion that Gregory had been under the influence of drugs at the time of his preliminary hearing, he provided no evidence to support the claim. Even if we assume that Gregory had ingested some drug, moreover, it does not appear that Gregory's mental functioning was so impaired as to preclude meaningful cross-examination. Gregory's testimony at the preliminary hearing was lucid and responsive to the questions asked. Although his testimony was internally inconsistent, this does not appear to have been the result of inability on his part to comprehend the questions or to understand his duty as a witness to tell the truth. Rather, it appears that Gregory was reluctant to give evidence damaging to defendant and did so only under the pressure of the prosecutor's examination and after listening to the tape recording of his prior interview. The failure of defense counsel to cross-examine more vigorously may be explained as a tactical decision. Gregory had already impeached himself by giving contradictory testimony, and further probing could have resulted in testimony more damaging to defendant. The trial court did not err, therefore, in concluding that defendant had a fair opportunity to cross-examine Gregory at the preliminary hearing. Defendant has not established a violation of his right of confrontation. ***619**

5. *Failure to grant immunity*

(17) Defendant contends that by not granting immunity to Gregory, and thereby removing the self-incrimination barrier to Gregory's testimony at defendant's trial, the prosecution violated defendant's constitutional right of confrontation and denied him due process of law. (U.S. Const., 5th, 6th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15.)

At no time during proceedings in the trial court did the defense request immunity for Gregory, nor did the defense make an offer of proof as to Gregory's testimony. Because the issue of immunity was not raised at trial, it is not preserved for review on appeal. (*People v. Sutter* (1982) 134 Cal.App.3d 806, 813 [184 Cal.Rptr. 829]; *People v. Sipress, supra*, 51 Cal.App.3d 98, 102.) Moreover, there is no authority in this state for the proposition that a prosecutor must request or the trial court must grant immunity to a witness on the ground that the witness's testimony could be favorable to the defense. (See *People v. Hunter* (1989) 49 Cal.3d 957, 973 [264 Cal.Rptr. 367,

782 P.2d 608]; *People v. Jackson* (1986) 178 Cal.App.3d 694, 700 [224 Cal.Rptr. 37]; *People v. DeFreitas* (1983) 140 Cal.App.3d 835, 841 [189 Cal.Rptr. 814].) In *Hunter, supra*, we assumed without deciding that in appropriate circumstances judicially conferred use immunity might be necessary "to vindicate a criminal defendant's rights to compulsory process and a fair trial[.]" (*Hunter, supra*, at p. 974.) But we also said that such immunity would be required only if the witness's testimony was both clearly exculpatory and essential to an effective defense, and if no strong governmental interest weighed against the grant of immunity. (*Ibid.*) Here, defendant has not demonstrated that Gregory's testimony would have been clearly exculpatory or that it would have differed from his preliminary hearing testimony. And, because the issue was never raised at trial, the record is inadequate to determine whether a strong governmental interest would have weighed against a grant of immunity. Thus, defendant has failed to demonstrate the existence of circumstances in which a trial court might be required to confer use immunity to ensure a fair trial.

6. *Failure to inform the jury*

(18) Defendant contends that the trial court should have either informed the jury of Gregory's refusal to testify or compelled Gregory to claim the privilege against self-incrimination in the jury's presence. We reject this contention. As we have explained in previous opinions, permitting the jury to learn that a witness has invoked the privilege against self-incrimination serves no legitimate purpose and may cause the jury to draw an improper inference of the witness's guilt or complicity in the charged offense. (***620***People* v. *Hill* (1992) 3 Cal.4th 959, 992 [13 Cal.Rptr.2d 475, 839 P.2d 984]; *People v. Mincey, supra*, 2 Cal.4th 408, 441; *People v. Frierson, supra*, 53 Cal.3d 730, 743.)

C. *Failure to Grant Immunity to Defense Witness Mitchell*

The defense had James Mitchell, a state prison inmate, brought to court to testify in defendant's trial. At defense counsel's suggestion, the court appointed an attorney to advise Mitchell. After conferring with counsel, Mitchell decided not to testify and, instead, to exercise his privilege against self-incrimination, unless he received immunity. Mitchell's counsel conveyed this decision to the prosecutor. At a hearing held outside the jury's presence, the prosecutor announced that he would not request immunity for Mitchell, noting that he did not even know the subject of Mitchell's proposed testimony. Defense counsel offered to provide this information, but the prosecutor said it would make no difference to his decision. The trial court stated that it could not compel the prosecutor to request immunity. Defense counsel then said there was no point in calling Mitchell to the stand, even out of the jury's presence, when it was apparent that he would refuse to testify. The defense did not ask the court to grant immunity, nor did the defense make an offer of proof as to the testimony Mitchell would have given had he received immunity.

Based on these facts, defendant contends: (1) the prosecutor improperly failed to request immunity for Mitchell; (2) the trial court erred in failing to grant Mitchell judicial immunity; (3) the trial court erred in failing to require that Mitchell assert under oath the privilege against self-incrimination; and (4) defense counsel's failure to call Mitchell to the stand constituted ineffective assistance of counsel.

As we have previously explained, no court in this state has ever decided that granting a defense witness immunity from prosecution for his or her testimony was essential "to vindicate a criminal defendant's rights to compulsory process and a fair trial." (*People v. Hunter, supra*, 49 Cal.3d 957, 974.) This court has explained that if immunity for a defense witness is ever constitutionally compelled, it is so compelled only when the witness's testimony is both clearly exculpatory and essential to an effective defense, and when no strong governmental interest weighs against the grant of immunity. (*Ibid.*)

Because the defense made no offer of proof as to Mitchell's testimony, the record before us on this appeal provides no basis for determining that his testimony was either clearly exculpatory or essential to an effective defense. ***621** Therefore, defendant has not shown that failure to grant Mitchell immunity resulted in the denial of defendant's rights to compulsory process and a fair trial.

(19) Also unavailing are defendant's related contentions, that the trial court on its own initiative should have compelled Mitchell to assert under oath his privilege against self-incrimination, and that defense counsel's failure to call Mitchell to the stand constituted ineffective assistance. After talking with both

Mitchell and his counsel, defense counsel announced on the record that he saw no reason "to even call him to the stand." Because Mitchell was a defense witness, this decision was properly for defense counsel, not the trial court. The record provides no basis for concluding that defense counsel's decision not to require Mitchell to assert the privilege under oath was one that would not have been made by a reasonably competent attorney acting as a diligent advocate, or that it is reasonably probable a more favorable determination would have resulted had counsel acted differently. (*People v. Fosselman*, *supra*, 33 Cal.3d 572, 584; *Strickland v. Washington*, *supra*, 466 U.S. 668, 687-696 [80 L.Ed.2d 674, 693-699].)

D. *Testimonial Competence of Kevin P.*

(20a) The victim's youngest son, Kevin P., testified at trial as a prosecution witness. When he gave this testimony, Kevin was seven years old. Defense counsel did not challenge Kevin's competency as a witness, and neither counsel nor the trial court questioned Kevin on voir dire. Defendant advances these contentions on the subject of Kevin's testimony: (1) the trial court erred in not raising the issue of competency on its own motion; (2) admission of the testimony violated defendant's right of confrontation under the Sixth Amendment to the federal Constitution; (3) admission of the testimony violated defendant's right to a reliable verdict under the Eighth and Fourteenth Amendments to the federal Constitution; (4) the trial court erred in not instructing the jury on its own motion to view the testimony with caution; and (5) defense counsel's failure to challenge Kevin's testimonial competence constituted ineffective assistance of counsel.

1. *Trial court determination of competence*

Except as provided by statute, "every person, irrespective of age, is qualified to be a witness." (Evid. Code, § 700; see also Pen. Code, § 1321.) The primary statutory grounds for disqualification are inability to express oneself comprehensibly on the subject of the testimony and inability to understand the obligation to tell the truth. (Evid. Code, § 701.) (21) A ***622** party who claims that a witness lacks either or both of these basic qualifications bears the burden at trial of proving disqualification. (*People v. Mincey*, *supra*, 2 Cal.4th 408, 444.) Moreover, to preserve for appeal a claim that a witness lacked testimonial competence, a party must object on this ground in the trial court. (*People v. Singh* (1920) 182 Cal. 457, 484 [188 P. 987]; *People v. Scaggs* (1957) 153 Cal.App.2d 339, 353-354 [314 P.2d 793].) Defendant may not circumvent this objection requirement by claiming that the trial court should have inquired into the witness's qualifications on its own. [FN6]

FN6 In *People v. Burton* (1961) 55 Cal.2d 328 [11 Cal.Rptr. 65, 359 P.2d 433], this court observed that the defendant's challenge to the competency of a prosecution witness "could be regarded as impliedly waived by failure to raise it in the trial court," but nonetheless proceeded to consider and reject the claim on the merits because " 'it would be manifestly unfair to affirm appellant's conviction ... merely because of the failure of his attorney to make proper objection in the trial court.' " (At p. 341, quoting *People v. Allen* (1955) 131 Cal.App.2d 72, 73 [279 P.2d 996].) We do not read this language as abrogating the requirement that challenges to the competency of a witness be made in the trial court. Rather, it appears that the court was anticipating and responding to a claim of ineffective assistance of trial counsel.

2. *Right of confrontation*

(20b) The Sixth Amendment to the federal Constitution gives an accused the right "to be confronted with the witnesses against him [or her]." (See also Cal. Const., art. I, § 15; Pen. Code, § 686.) Although the right of confrontation requires that an accused receive "an adequate opportunity to cross-examine adverse witnesses" (*U.S. v. Owens* (1988) 484 U.S. 554, 557 [98 L.Ed.2d 951, 956-957, 108 S.Ct. 838]), it does not protect against testimony that is " 'marred by forgetfulness, confusion, or evasion' " (*id.* at p. 558 [98 L.Ed.2d at p. 957], quoting *Delaware v. Fensterer* (1985) 474 U.S. 15, 21 [88 L.Ed.2d 15, 20-21, 106 S.Ct. 292]).

We have carefully reviewed the testimony of Kevin P., and, in particular, his testimony on cross-examination. Not surprisingly, the testimony contains some inconsistencies, and the witness did not demonstrate total recall of the events on the day his mother died. But the witness's answers on the whole were lucid and responsive, and nothing in his testimony reveals either an inability to distinguish truth from falsehood (or perception from imagination) or a failure to appreciate his obligation as a witness to tell

the truth. We are satisfied that the process of examination and cross-examination gave the jury an adequate basis on which to evaluate the truth of the witness's testimony. The Sixth Amendment's confrontation clause requires no more. (*U.S. v. Owens, supra*, 484 U.S. 554, 559 [98 L.Ed.2d 951, 957-958].) ***623**

3. *Right to a reliable verdict*

Also without merit is defendant's challenge under the federal Constitution's Eighth Amendment, which forbids infliction of "cruel and unusual punishments." Although the Eighth Amendment imposes heightened reliability standards for both guilt and penalty determinations in capital cases (see *Beck v. Alabama* (1980) 447 U.S. 625, 638 [65 L.Ed.2d 392, 403, 100 S.Ct. 2382]), defendant gives us no reason to conclude that those standards were not met here. As this court remarked in rejecting essentially the same contention, defendant "was given an opportunity to be heard and to cross-examine in a judicial forum." (*People v. Mincey, supra*, 2 Cal.4th 408, 445.)

4. *Ineffective assistance of counsel*

(22) As we have seen, a defendant seeking relief on the basis of ineffective assistance must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. (*People v. Fosselman, supra*, 33 Cal.3d 572, 584; see also *Strickland v. Washington, supra*, 466 U.S. 668, 687-696 [80 L.Ed.2d 674, 693-699].) If the record contains an explanation for the challenged aspect of counsel's representation, the reviewing court must determine "whether the explanation demonstrates that counsel was reasonably competent and acting as a conscientious, diligent advocate." (*People v. Pope* (1979) 23 Cal.3d 412, 425 [152 Cal.Rptr. 732, 590 P.2d 859, 2 A.L.R.4th 1].) On the other hand, if the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation ...." (*Id.* at p. 426.)

Here, the record contains no explanation for defense counsel's failure to challenge Kevin P.'s testimony, nor does it show that counsel was asked for an explanation and failed to provide one, nor, finally, is this a situation in which there could be no satisfactory explanation for counsel's conduct. Acting as a reasonably competent defense attorney, counsel may have declined to challenge the competence of the child witness because, in counsel's judgment, the challenge would have been futile or because counsel believed that the child's testimony would on balance be helpful to the defense. Under the rule set forth above, we therefore reject the claim of ineffective assistance.

5. *Jury instruction*

(23) We also reject defendant's claim that the trial court should have instructed the jury on its own initiative to view Kevin P.'s testimony with ***624** caution. Section 1127f requires the trial court, "upon the request of a party," to instruct the jury on evaluation of the testimony of a witness who is 10 years of age or younger. [FN7] Absent a request, however, the trial court is not required to give either the statutory instruction or some other form of cautionary instruction. (See *People v. Mincey, supra*, 2 Cal.4th 408, 445.)

FN7 The required instruction says: "In evaluating the testimony of a child you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. Although, because of age and level of cognitive development, a child may perform differently as a witness from an adult, that does not mean that a child is any more or less credible a witness than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child." (§ 1127f.)

E. *Prosecutorial Misconduct in Jury Argument*

Defendant contends that the prosecutor twice committed misconduct during closing argument to the jury at the guilt phase. According to defendant, the misconduct consisted in raising the issue of defendant's potential for rehabilitation and in appealing to racial prejudice.

1. *Potential for rehabilitation*

(24) Defendant cites as misconduct this portion of the prosecutor's argument: "You see, one of the things that's interesting is [defendant] has to portray himself in this case as the big wheeler dealer. [¶] 'Boy, before I went to jail for grand theft person, I was making eight

hundred to $1,200 a week cash.' That's not after taxes, ladies and gentlemen-or that is after taxes, because he doesn't pay taxes. [¶] Imagine, 40 to $60,000 a week in your pocket-a week, I'm sorry, a year in your pocket. I wonder when the last time you were able to tuck a $100 cash in your pocket and just go your way. If I understand what's going on in our society properly, most of us are not in that fortunate position, and then of course when he gets out of jail he's back making hundreds of dollars."

Because the defense did not object to these statements at trial, the claim of misconduct is not reviewable on appeal unless the statement was so prejudicial that an admonition by the trial court could not have cured the harm. (*People v. Medina* (1990) 51 Cal.3d 870, 895 [274 Cal.Rptr. 849, 799 P.2d 1282].) Here, we conclude that the argument was not prejudicial at all.

Defendant maintains that in the statements quoted above the prosecutor "argued without evidentiary support that [defendant] would not be rehabilitated by prison, thus improperly inviting the jury to convict him for what he might do in the future rather than for what he had allegedly done in the past." ***625**

Defendant misapprehends the argument. He evidently thinks that the final words of the quoted passage-"... when he gets out of jail he's back making hundreds of dollars"-constitute a prediction of future events. To the contrary, a reasonable juror would understand them as a description of past events as related in defendant's testimony. Defendant had testified that he had earned substantial profits, both before and after an incarceration for grand theft from the person, by selling rock cocaine, the evident purpose of this testimony being to show that defendant would have no need to commit a robbery and that he could afford to trade cocaine for sex. The prosecutor was merely describing this testimony, before proceeding to challenge it. In the immediately following portion of the argument, not cited by defendant, the prosecutor maintained that defendant had testified inconsistently both about the amount of his earnings and about the location of the profits remaining at the time of his arrest, and that defendant "is not a wheeler dealer." No reasonable juror would understand the argument as an adverse comment on defendant's potential for rehabilitation.

2. *Appeal to racial prejudice*

(25) To persuade the jury to reject defendant's testimony that the victim had consented to sexual intercourse, the prosecutor made this argument: "And what [defendant] wants you to believe, and what I believe to be perhaps the most telling thing in this whole case, is that this woman who, from all appearances is a happily married mother of three trying to make ends meet living out there where they can have a house they can afford, taking in sewing to help meet the family budget, keeping that kind of a house, that this woman is going to have intercourse with a strange man-frankly any man-a black man, on her living room couch with her five year old in the house."

Prosecutorial argument that includes racial references appealing to or likely to incite racial prejudice violates the due process and equal protection guarantees of the Fourteenth Amendment to the federal Constitution. (*U.S. v. Doe* (D.C. Cir. 1990) 903 F.2d 16, 24-25 [284 App.D.C. 199]; *McFarland v. Smith* (2d Cir. 1979) 611 F.2d 414, 416-417; *Miller v. State of N.C.* (4th Cir. 1978) 583 F.2d 701, 707; *United States* ex rel. *Haynes v. McKendrick* (2d Cir. 1973) 481 F.2d 152, 159; *United States v. Grey* (6th Cir. 1970) 422 F.2d 1043, 1045-1046; see also, *McCleskey v. Kemp* (1987) 481 U.S. 279, 309, fn. 30 [95 L.Ed.2d 262, 289-290, 107 S.Ct. 1756, 1776] ["The Constitution prohibits racially biased prosecutorial arguments."].) Because racial prejudice can strongly compromise a juror's impartiality (*Miller v. State of N.C.*, *supra*, at p. 706; *United States* ex rel. *Haynes v. McKendrick*, *supra*, at p. 157; *People v. Bain* (1971) 5 Cal.3d 839, 849 [***626**97 Cal.Rptr. 684, 489 P.2d 564]), even neutral, nonderogatory references to race are improper absent compelling justification. [FN8] (*U.S. v. Doe*, *supra*, at p. 25, fn. 63; *McFarland v. Smith*, *supra*, at pp. 416-417, 419.)

FN8 A reference to race as a factor in an eyewitness identification of a suspect is universally regarded as permissible. (*U.S. v. Doe*, *supra*, 903 F.2d 16, 25; *People v. Linson* (1956) 47 Cal.2d 380, 383 [303 P.2d 537].) And when the defense has falsely accused the prosecution of racial prejudice, the prosecutor may respond with a denial of the charge and an affirmation of the right of all persons to equal treatment regardless of race. (*People v. Jones* (1962) 205 Cal.App.2d 460, 465-466 [23 Cal.Rptr. 418].)

Although we do not find compelling justification for the prosecutor's racial reference in this case, neither do we find prejudice to defendant. The reference to race occurred in the course of an argument listing factors that undermined the credibility of defendant's testimony that the victim had consented to sexual intercourse. The racial reference added little to the force of the argument, which relied primarily on the implausibility of the victim engaging in intercourse with a virtual stranger in the presence of her five-year-old child. The racial reference was a brief and isolated remark; there was no continued effort by the prosecutor to call attention to defendant's race or to prejudice the jury against him on account of race. We are persuaded beyond a reasonable doubt that the prosecutor's racial reference in argument did not affect the outcome.

F. *Ineffective Assistance of Counsel for Failure to Object to Evidence of Prior Conviction*

(26) Defendant contends that evidence of his prior conviction for grand theft from the person (§ 487, subd. 2) was not admissible to impeach his credibility as a witness. From this premise, defendant argues that his trial attorney rendered ineffective assistance by failing to solicit a ruling on the use of this prior conviction for impeachment, and by eliciting testimony from defendant on direct examination admitting the conviction.

Contrary to defendant's argument, his prior conviction for grand theft was admissible for purposes of impeachment. Grand theft necessarily involves both moral turpitude and dishonesty (*People v. Wheeler* (1992) 4 Cal.4th 284, 297 [14 Cal.Rptr.2d 418, 841 P.2d 938]), it is dissimilar from and substantially less inflammatory than the charged offense of capital murder, and defendant's conviction for this offense had occurred just three years before defendant's testimony. (See *People v. Castro* (1985) 38 Cal.3d 301 [211 Cal.Rptr. 719, 696 P.2d 111].) Because the prosecution could and undoubtedly would have used the prior conviction to impeach defendant, defendant's attorney made a reasonable and common tactical decision to put the prior conviction before the jury promptly at the outset of defendant's ***627** direct examination. Defendant has not demonstrated that this action constituted ineffective assistance in this case.

G. *Ineffective Assistance of Counsel for Failure to Move to Suppress Evidence Seized From Camper*

Defendant contends that investigating officers violated the constitutional proscription against unreasonable searches (U.S. Const., 4th Amend.) when they searched the Cudjo camper following defendant's arrest; that certain prosecution exhibits at trial (defendant's survival knife, one pair of MacGregor athletic shoes, and a pair of cut-off jeans) were the tainted fruit of this illegal search; and that he was denied his constitutional right to effective assistance of counsel (U.S. Const., 6th Amend.) by his trial counsel's failure to bring a motion to suppress this evidence.

The record before us does not support defendant's contention. Because the legality of the search was never challenged or litigated, facts necessary to a determination of that issue are lacking. For example, defendant assumes that the officers did not have a warrant authorizing the search, but he provides no citation to the record to establish that fact. Also, as the Attorney General notes, Maxine Cudjo testified at the preliminary hearing that she consented to the search of the camper, and the search might be upheld on this basis. Defendant suggests in response that the consent may be invalid, but this is just speculation. Because defendant has not proven that the search was unlawful, his claim of ineffective assistance of counsel must be rejected. (See *Kimmelman v. Morrison* (1986) 477 U.S. 365, 375 [91 L.Ed.2d 305, 319, 106 S.Ct. 2574]; *People v. Wharton* (1991) 53 Cal.3d 522, 576 [280 Cal.Rptr. 631, 809 P.2d 290].)

H. *Waiver of Sequestered Hovey Voir Dire*

Before jury selection, the trial court showed the parties a proposed questionnaire to be completed by each prospective juror. Of the 56 proposed questions, 3 dealt with the prospective juror's views on the death penalty. [FN9] After minor changes, the parties approved the questionnaire. While the parties were discussing the questionnaire and related jury selection procedures, the trial court suggested that the parties by stipulation dispense with ***628** the procedure mandated by *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80 [168 Cal.Rptr. 128, 616 P.2d 1301], under which the death-qualification portion of the voir dire is conducted with each prospective juror individually and in sequestration. The prosecutor and defense counsel so stipulated and defendant personally waived the *Hovey* voir dire procedure with the understanding that sequestered voir dire of individual prospective jurors would be available based on responses to the

questionnaires and answers given in open court.

> FN9 The first question asked for the prospective juror's "general feelings regarding the death penalty." The second question asked whether the prospective juror believed the death penalty was applied too seldom or too often, whether the prospective juror belonged to any group that advocated either increased use or abolition of the death penalty, and whether the prospective juror's views were based on religious considerations. The third question incorporated the four standard *Witherspoon* questions (*Witherspoon v. Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770]).

(27) Defendant contends that the trial court erred in soliciting and accepting the parties' stipulation and defendant's personal waiver of the *Hovey* voir dire procedure. Defendant further contends that in agreeing to dispense with the *Hovey* procedure, defendant's trial counsel violated defendant's rights under the federal and state Constitutions to the effective assistance of counsel (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15).

No statute requires the *Hovey* voir dire procedure, nor has any court held it to be mandated by the Constitution of this state or of the United States. Rather, this court invoked its "supervisory authority over California criminal procedure" to declare that henceforth the death-qualification voir dire should be conducted with each juror individually and in sequestration. (*Hovey, supra*, 28 Cal.3d 1, 80.) When this court adopted the rule, we cited evidence that prolonged discussion of penalty phase procedures during voir dire fosters a perception that the penalty phase will occur, and thereby conditions jurors to anticipate that they will find the defendant guilty. (*Id.* at pp. 70-80.) Also, prospective jurors who see other jurors excused for cause after expressing reluctance or unwillingness to return a death verdict may conclude that the law disapproves of such attitudes and "may in consequence feel less willing to express or rely on such attitudes in their consideration of penalty." (*Id.* at p. 74, fn. omitted.)

As a general rule, a person is free to waive the advantage of any law or rule intended primarily or exclusively for that person's own benefit. (Civ. Code, § 3513.) This court adopted the *Hovey* voir dire procedure to benefit defendants in capital cases (*People v. Visciotti* (1992) 2 Cal.4th 1, 51 [5 Cal.Rptr.2d 495, 825 P.2d 388] ["the sequestered voir dire is for the benefit of the defendant"]), and defendant offers no persuasive reason for depriving defendants in capital cases of the freedom to waive *Hovey* voir dire procedures. We conclude that capital defendants may waive the *Hovey* procedure and that defendant validly waived it in this case.

We reject also defendant's contention that his trial counsel's stipulation to dispense with the *Hovey* voir dire procedure constituted ineffective assistance. The record contains no explanation for counsel's decision to dispense ***629** with *Hovey* voir dire procedures. In this situation, as we have seen, an appellate court will reject a claim of ineffective assistance "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation[.]" (*People v. Pope, supra*, 23 Cal.3d 412, 426.)

Defendant maintains that there could be no satisfactory explanation for a decision to waive a procedure that is clearly advantageous to the defense, but the argument is based on a false premise. Defendant assumes that by stipulating to dispense with the *Hovey* voir dire procedure defense counsel exposed defendant to the risks of collective voir dire mentioned in *Hovey, supra*, 28 Cal.3d 1. But the procedure used in this case was far different from the pre-*Hovey* collective voir dire; competent counsel might well conclude that it protected defendant's interests as well as, or better than, the *Hovey* procedure.

The record reveals that the death-qualification voir dire in this case occurred primarily through the juror questionnaires rather than through voir dire in open court. Because the prospective jurors answered the questionnaires individually and in isolation from each other, defendant received the primary advantage of *Hovey* voir dire-minimizing each prospective juror's exposure to the death-qualification voir dire of others (*Hovey, supra*, 28 Cal.3d 1, 81). By including the death-qualification questions among a much larger group of questions, the questionnaire avoided one of the main drawbacks of the *Hovey* voir dire procedure-giving special emphasis to the death-qualification aspect of voir dire. Moreover, the stipulation did not waive the *Hovey* procedure en-

tirely; defendant retained the right to obtain sequestered voir dire of individual jurors. Although some death-qualification questioning did occur during general voir dire, competent counsel might well conclude that a slight exposure of prospective jurors to the death-qualification of others was a small price to pay for the additional "reduction in the pretrial emphasis on penalty" (*id.* at p. 80) obtained by conducting death-qualification voir dire primarily through the questionnaires. (Cf. *People v. Lewis* (1990) 50 Cal.3d 262, 289-290 [266 Cal.Rptr. 834, 786 P.2d 892] [defense counsel's stipulation limiting death-qualification voir dire to four standard questions does not establish incompetence].)

I. *Failure to Instruct on Intent to Kill*

(28) In *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 153-154 [197 Cal.Rptr. 79, 672 P.2d 862], this court held that the felony-murder special circumstance (§ 190.2, subd. (a)(17)) requires proof and an express jury finding of intent to kill. Although we overruled this holding in ***630***People* v. *Anderson* (1987) 43 Cal.3d 1104 [240 Cal.Rptr. 585, 742 P.2d 1306], it continues to control cases like this one in which the crime was committed after *Carlos* and before *Anderson*. (*People v. Fierro* (1991) 1 Cal.4th 173, 227 [3 Cal.Rptr.2d 426, 821 P.2d 1302].)

Here, the trial court did not instruct the jury that intent to kill was an essential element of either the robbery-murder or the burglary-murder special circumstance, and the jury made no finding on this issue. Error in failing to instruct on an element of a special circumstance is subject to harmless error analysis under the standard of *Chapman v. California*, *supra*, 386 U.S. 18. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1254 [278 Cal.Rptr. 640, 805 P.2d 899]; *People v. Odle* (1988) 45 Cal.3d 386, 414, 415 [247 Cal.Rptr. 137, 754 P.2d 184].)

As in the recent case of *People v. Johnson* (1993) 6 Cal.4th 1 [23 Cal.Rptr.2d 593, 859 P.2d 673], "the only reasonable conclusion one can draw from the evidence and the jury's findings is that defendant intentionally murdered [the victim]." (At p. 47.) The victim's son testified that an intruder generally matching defendant's description bound and gagged the victim in a manner making either self-defense or provocation impossible. The body was found in that same condition. The victim had died from multiple blows to the back and sides of the head, fracturing the skull and lacerating the brain. The systematic and prolonged assault with manifestly deadly force on the helpless victim is consistent only with an intent to kill. The evidence to this effect stands uncontroverted. Relying on an alibi defense, defendant presented no evidence that the killing was other than intentional. Therefore, we are persuaded beyond a reasonable doubt that defendant was not prejudiced by the trial court's error in not instructing on intent to kill as an element of the felony-murder special circumstance.

J. *Cumulative Impact of Guilt Phase Errors*

Defendant maintains that the cumulative impact of the guilt phase errors mandates reversal. We conclude that the errors that occurred, whether considered separately or together, were inconsequential.

III. Penalty Issues

A. *Ineffective Assistance of Counsel*

1. *Argument about pardon and appeal*

During argument to the jury at the penalty phase, defense counsel made these references to the right of appeal and the possibility of pardon or commutation of sentence: ***631**

"You can vote for an option of death, and you know what that is, it's a termination of life. Will it be carried out immediately? No. It'll be some time before the sentence will be imposed-pardon me, carried out, not imposed.

"On the other hand, you have something called life without possibility of parole.

"In the beginning of this case we talked about it, you were assured by the defense and also by Mr. Ogden [the prosecutor], and by the bench definitely that life without possibility of parole as it's presently understood and defined, it means exactly that period.

"It leaves open the possibility of perhaps two other things which are somewhat-if not extraordinary, at least rare events. One may be gubernatorial pardon. That is not given on whimsy. The other may be granting of an appeal which results in some other course."

After noting that defendant continued to protest his innocence, defense counsel continued as follows:

"You have the opportunity to balance the scale, if you wish, impose a sentence of death. Ultimately that sentence may be carried out. You should assume for your purposes that if you do, it will be carried out, whether it is in 1990 or 1998 or 2061. At some point, that sentence will be carried out under the current state of the law, barring the one thing that I indicated earlier and that would be a gubernatorial pardon."

Defense counsel then alluded to a television drama, apparently based on fact, in which an individual convicted of murder was shown to be innocent by evidence produced many years after the conviction. Counsel then proceeded with his argument this way:

"I would hope that you'll reconsider some of the evidence. We would hope that you may go back over the mechanics of this event as the People have sought to prove them to you, and that you'll come back with a determination of life without possibility of parole may be the appropriate sanction in this case.

"You will have done your job. Mr. Cudjo cannot look forward to early parole or benefit or credit for performing well while in prison, because those are not criteria that would set aside that kind of a result. He can then continue to exhaust what rights he may have, something may be done that brings to light perhaps a way that you folks would not or could not see." ***632**

(29) Defendant contends that the references to appeal and pardon constituted ineffective assistance.

In *People v. Ramos* (1984) 37 Cal.3d 136, 150-159 [207 Cal.Rptr. 800, 689 P.2d 430], we held that a defendant was denied due process of law under the state Constitution when the court instructed the jury at the penalty phase of a capital case that the governor could commute a sentence of life imprisonment without possibility of parole. We concluded that the instruction was misleading because it failed to note that the power of commutation extended to a sentence of death as well as to a sentence of life without parole. In addition, the instruction could cause jurors to speculate on future events or to impose a death verdict on the impermissible basis that the defendant might otherwise eventually be released from custody.

In a footnote, we observed that it was a "close question" whether the subject of commutation should be addressed at all in jury instructions. We stated that if the jury inquired about the subject, or if the defense requested an instruction, the court should make a brief statement explaining that the power of commutation extended to both a sentence of death and a sentence of life without possibility of parole, but emphasizing that "it would be a violation of the juror's duty to consider the possibility of such commutation in determining the appropriate sentence." (*People v. Ramos, supra*, 37 Cal.3d 136, 159, fn. 12.)

The defense argument in this case posed little risk of prejudice. Defense counsel referred to the power of pardon as extending to both the sentence of death and the sentence of life without possibility of parole, counsel characterized commutation of sentence and reversal of sentence on appeal as "rare events," and counsel noted that a sentence of life without possibility of parole "means exactly that period." Nothing in counsel's argument carried the improper suggestion that the jury could take its sentencing responsibility lightly because an erroneous death sentence would be subject to correction by appeal or by commutation. (See *People v. Fierro, supra*, 1 Cal.4th 173, 245; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1106 [259 Cal.Rptr. 630, 774 P.2d 659].) On the contrary, defense counsel admonished the jury to assume that a sentence of death would eventually be carried out.

Finally, we do not agree that the argument lacked a sound tactical purpose. The defense at the penalty phase was lingering doubt. Counsel argued that the prosecution's evidence was not conclusive, that defendant continued to maintain his innocence, and that evidence establishing his innocence might later come to light. In referring to the governor's powers of pardon and commutation, defense counsel's main point appeared to be that ***633** these powers, though rarely exercised, exist because innocent men are sometimes convicted and innocence is sometimes demonstrated by evidence produced long after a conviction. The references to the governor's powers thus reinforced the lingering doubt argument.

2. *Argument about burden of proof*

Defense counsel gave the jury this description of the process of determining penalty: "The law in the state of California allows for a death penalty if 12 people like you *feel* that it is appropriate and fix it as the ultimate penalty to be handed out in any given sentence or case." (Italics added.) Later, defense

counsel added: "[T]he standard of proof now is less than it was before, so if you simply want to balance the ledger you could flip a coin. It would be inappropriate, but you could determine it that way, and I don't mean by flipping a coin, but you can in your own mind say, 'Well, we have two choices, which shall it be.' "

(30a) Defendant contends that by these words defense counsel mischaracterized and trivialized the burden of proof and the penalty determination process, and that there can be no justification for these statements. We disagree.

Preliminarily, we note that defense counsel's argument was followed by the court's instructions to the jury, and that these instructions resolved any ambiguities or misimpressions. On the subject of penalty determination, the court instructed in these words:

"After having heard all the evidence and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. [¶] In weighing the various circumstances, you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. [¶] To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that they warrant death instead of life without parole."

The first challenged remark by defense counsel is a substantially correct description of the jury's role at the penalty phase of a capital case. The ***634** penalty jury's role is to determine, as defense counsel stated, which of the two alternative penalties-death or life imprisonment without possibility of parole-is appropriate. Because the determination of appropriateness is a reasoned moral decision, rather than an emotional response, the word "feel" is somewhat inapt. But any confusion in this regard was dispelled by the court's instructions quoted above.

The second challenged remark by defense counsel is also substantially correct. (31) To return a death verdict the jury must be persuaded that aggravation so outweighs mitigation that such a verdict is appropriate, but "neither [party] has the burden of proof on that issue" (*People v. Daniels* (1991) 52 Cal.3d 815, 890 [277 Cal.Rptr. 122, 802 P.2d 906]; *People v. Robertson* (1989) 48 Cal.3d 18, 58-59 [255 Cal.Rptr. 631, 767 P.2d 1109]), and the jury need not be persuaded of its sentencing decision beyond a reasonable doubt (*People v. Bell* (1989) 49 Cal.3d 502, 553 [262 Cal.Rptr. 1, 778 P.2d 129]). (30b) The point of counsel's remark was merely that the two penalty options were equally available, that there was no "thumb"-in the form of a presumption, burden of proof, or other legal rule-on either side of the scale, and that the jurors should therefore enter the penalty deliberations with their minds open to both potential verdicts.

3. *Failure to present mitigating evidence*

The only defense evidence at the penalty phase was defendant's testimony, in which he once again denied killing Amelia P. Defendant contends that his trial counsel failed to effectively present a lingering doubt defense to penalty, and failed to present any other evidence that would have provided a basis for a sentence less than death.

The appellate record does not disclose what mitigating evidence was available that was not presented, or what reasons defense counsel may have had for not presenting it. "On a silent record, as we have here, we will not assume that the defense counsel's failure to present mitigating evidence rendered his assistance ineffective. Any assertion that counsel was inadequate in this regard must be raised on habeas corpus." (*People v. Diaz* (1992) 3 Cal.4th 495, 566 [11 Cal.Rptr.2d 353, 834 P.2d 1171].)

4. *Perfunctory closing argument*

Defendant characterizes his counsel's penalty phase argument as brief (eight pages of transcript), perfunctory, unfocussed, and generally a "dismal performance." The effectiveness of an advocate's oral presentation is difficult to judge accurately from a written transcript, and the length of an ***635** argument is not a sound measure of its quality. Although defense counsel's argument in this case appears to have been somewhat lacking in clarity, not to mention elo-

quence, we are not persuaded that it fell below the standard of reasonably competent representation or that there is a reasonable probability that a better presentation would have resulted in a more favorable penalty verdict.

B. *Ineffective Assistance for Failure to Renew Request to Admit Evidence of Confession by Defendant's Brother*

Defendant contends that his trial counsel should have renewed at the penalty phase his effort to admit the testimony of John Culver to the effect that Gregory Cudjo had confessed to the murder of Amelia P. He argues that in the penalty setting the trial court might have been persuaded to reconsider its earlier ruling excluding the evidence. Had the court admitted the evidence, it would have strengthened the lingering doubt penalty defense.

We have previously concluded that Culver's testimony was erroneously excluded at the guilt phase, but that the error was not prejudicial. Because the same evidentiary rules govern admissibility of evidence at the guilt and penalty phases, we question whether defense counsel demonstrates incompetence by failing to press at the penalty phase for admission of evidence excluded at the guilt phase. But we need not decide whether reasonably competent counsel would have again sought admission of Culver's testimony. For the reasons already stated, we are persuaded that Culver's testimony was lacking in credibility and could not have affected the outcome at either the guilt or penalty phases of the trial.

C. *Instructions Regarding Special Circumstances*

Defendant contends that the trial court should have instructed the jury on its own initiative not to treat the robbery and burglary special circumstances as separate circumstances in aggravation. We have previously rejected the same contention. (*People v. Sanders* (1990) 51 Cal.3d 471, 528-529 [273 Cal.Rptr. 537, 797 P.2d 561].) Defendant offers no new argument on this point, conceding that he raises the issue only to preserve it for federal review.

D. *Trial Court's Review of Probation Report*

(32) Before ruling on the automatic motion to modify penalty, the trial court announced that it had read and considered the probation report. Defendant argues that this was improper because the trial court is to consider ***636** only the evidence before the jury when ruling on the motion. (See *People v. Lewis, supra*, 50 Cal.3d 262, 287.)

We conclude that any error was harmless. The trial court did not refer to any material in the probation report when giving its reasons for denying the modification motion. Therefore, we must assume that the court was not improperly influenced by the report. (*People v. Raley* (1992) 2 Cal.4th 870, 922-923 [8 Cal.Rptr.2d 678, 830 P.2d 712]; *People v. Fauber* (1992) 2 Cal.4th 792, 866-867 [9 Cal.Rptr.2d 24, 831 P.2d 249].)

E. *Denial of Automatic Modification Motion*

(33) In stating its reasons for denying the automatic motion to modify the death penalty, the trial court recited its own findings that the murder of Amelia P. was intentional, premeditated, deliberate, willful, and committed with malice aforethought, and that the murder was committed in the course of a rape.

Defendant contends that it was improper for the trial court to base its denial of the modification motion upon findings of intentional murder and rape that the jury never made. We disagree.

In ruling on the automatic motion for modification, the trial judge "shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented." (§ 190.4, subd. (e).) Among the aggravating circumstances specified in section 190.3 is the "circumstances of the crime of which the defendant was convicted in the present proceeding" (§ 190.3, factor (a)). Here, the trial judge did no more than to evaluate the circumstances of defendant's capital crime. (See *People v. Turner* (1990) 50 Cal.3d 668, 716-717 [268 Cal.Rptr. 706, 789 P.2d 887].) In this regard, the absence of express jury findings is not significant. The jury never made express findings on rape or intentional murder because these issues were never submitted to the jury, not because it resolved these issues in defendant's favor. In the absence of any express jury findings on these issues, the trial judge was permitted, and indeed required, to make whatever findings he deemed necessary to properly evaluate the circumstances of the offense in order to independently de-

termine whether the weight of the evidence supported the verdict of death.

F. *Ineffective Assistance for Failure to Make Posttrial Motions*

Defendant contends that his representation by trial counsel during posttrial proceedings was inadequate because counsel failed to present available ***637** grounds for granting a new trial and failed to provide appropriate evidence and written authorities. We reject the contention. Defendant has failed to show there were any meritorious claims to present by way of posttrial motions.

G. *Cumulative Effect of Guilt and Penalty Phase Errors*

Defendant contends that the cumulative effect of guilt and penalty phase errors requires reversal of at least the penalty verdict. We disagree. Whether considered separately or in combination, the few errors that occurred during the guilt and penalty phases of defendant's trial were inconsequential.

H. *Constitutionality of 1978 Death Penalty Law*

Defendant challenges the constitutionality of the 1978 death penalty law on a variety of grounds. We have previously rejected these contentions. (See, e.g., *People v. Livaditis* (1992) 2 Cal.4th 759, 786 [9 Cal.Rptr.2d 72, 831 P.2d 297]; *People v. Visciotti, supra*, 2 Cal.4th 1, 78-79.) In particular, we have rejected the contention that certain aggravating factors, including the circumstances of the crime (§ 190.3, factor (a)), other violent criminal activity by the defendant (§ 190.3, factor (b)), and the age of the defendant (§ 190.3, factor (i)), are impermissibly vague under the Eighth Amendment to the federal Constitution. (*People v. Noguera* (1992) 4 Cal.4th 599, 648-649 [15 Cal.Rptr.2d 400, 842 P.2d 1160]; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 594-595 [15 Cal.Rptr.2d 382, 842 P.2d 1142]; *People v. Hawthorne* (1992) 4 Cal.4th 43, 77-79 [14 Cal.Rptr.2d 133, 841 P.2d 118].) Defendant has not persuaded us to reconsider any of these rulings.

IV. Disposition

The judgment of death is affirmed.

KENNARD, J.,

Dissenting.-I agree with the majority that the trial court erred when it precluded a defense witness from testifying that defendant's brother, Gregory Cudjo, had confessed that he, acting alone, committed the capital crimes at issue here. But I do not agree that this error was harmless.

When it refused to permit defendant's witness to testify, the trial court violated defendant's rights under the federal and state Constitutions to present a defense. The effect of the federal constitutional error must be measured against the controlling federal standard, which requires reversal unless the error was harmless beyond a reasonable doubt. When applied to the record in this case, the federal standard compels reversal of the judgment as to both guilt and penalty. Therefore, I dissent. ***638**

I.

Excluding the Testimony of Defendant's Witness Violated Defendant's Constitutional Right to Present a Defense

In an adversary system of adjudication, the right to be heard is essential to due process of law. (*Rock v. Arkansas* (1987) 483 U.S. 44, 51, fn. 8 [97 L.Ed.2d 37, 46, 107 S.Ct. 2704].) In a criminal prosecution, the defendant's right to be heard includes the right to summon and examine witnesses whose testimony is expected to support the defense case. Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his [or her] own defense." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [35 L.Ed.2d 297, 312-313, 93 S.Ct. 1038].) The right to summon and examine defense witnesses is guaranteed by both the state and federal Constitutions.

The Sixth Amendment to the United States Constitution guarantees to persons against whom the state brings criminal proceedings "the right ... to have compulsory process for obtaining witnesses in [their] favor." The California Constitution contains a similar provision. (Cal. Const., art. I, § 15.)

Because the right to compel witnesses to appear in court would be hollow and useless if the government was free to prevent those witnesses from testifying, the compulsory process guarantee encompasses a substantive right to have defense witnesses testify before the trial jury. (*Taylor v. Illinois* (1988) 484 U.S. 400, 407-409 [98 L.Ed.2d 798, 809-811, 108 S.Ct. 646]; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56 [94 L.Ed.2d 40, 56-57, 107 S.Ct. 989]; *Washington v. Texas* (1967) 388 U.S. 14, 23 [18 L.Ed.2d 1019, 1025-1026, 87 S.Ct. 1920]; see *In re Martin*

(1987) 44 Cal.3d 1, 29 [241 Cal.Rptr. 263, 74 P.2d 374].) The Sixth Amendment's right of compulsory process, which includes the right to have the testimony of defense witnesses received in evidence, is made applicable to state criminal trials by the due process clause of the Fourteenth Amendment to the federal Constitution. (*Washington v. Texas*, *supra*, at pp. 17-19 [18 L.Ed.2d at pp. 1022-1023]; *Rock v. Arkansas*, *supra*, 483 U.S. 44, 52 [97 L.Ed.2d 37, 46]; *Pennsylvania v. Ritchie*, *supra*, at p. 45, fn. 5 [94 L.Ed.2d at pp. 49-50].)

Of course, the right to present defense witnesses at trial is not absolute. Although "a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his [or her] favor," it is also true that "the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests." (*Taylor v. Illinois*, *supra*, 484 U.S. 400, 414 [98 L.Ed.2d 798, 813-814].) ***639**

Restrictions on the right to present defense evidence are constitutionally permissible if they " 'accommodate other legitimate interests in the criminal trial process' " and are not "arbitrary or disproportionate to the purposes they are designed to serve." (*Rock v. Arkansas*, *supra*, 483 U.S. 44, 55-56 [97 L.Ed.2d 37, 48-49], quoting *Chambers v. Mississippi*, *supra*, 410 U.S. 284, 295 [35 L.Ed.2d 297, 308-309]; accord, *Michigan v. Lucas* (1991) 500 U.S. 145 [114 L.Ed.2d 205, 211-213, 111 S.Ct. 1743, 1746-1747].)

In this case, excluding the testimony of defendant's witness, John Culver, was not reasonably necessary to further any legitimate governmental interest. Indeed, the majority effectively concedes as much when it concludes that no rule of evidence justified the exclusion, and that the trial court's ruling was therefore erroneous.

In particular, the ruling was not justified by the trial court's apparent belief that the proposed testimony would be untruthful. The decisions of the United States Supreme Court under the Sixth Amendment's compulsory process clause establish that, as one commentator has phrased it, the testimony of a defense witness may not be excluded because of doubts about the witness's credibility if the testimony is "capable of being rationally evaluated by a properly instructed jury for its probative value and weight." (Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases* (1978) 91 Harv.L.Rev. 567, 627, fn. 167.)

The high court first addressed this issue in 1967, in *Washington v. Texas*, *supra*, 388 U.S. 14. In that case, a defendant's attempt to offer exculpatory eyewitness testimony was frustrated by a state rule of evidence that barred a defendant from presenting the testimony of anyone who had been charged with the same crime. The court began its analysis with a look at the historical origins of the federal compulsory process clause:

"Joseph Story, in his famous Commentaries on the Constitution of the United States, observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all. Although the absolute prohibition of witnesses for the defense had been abolished in England by statute before 1787, the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury.

"Despite the abolition of the rule generally disqualifying defense witnesses, the common law retained a number of restrictions on witnesses who ***640** were physically and mentally capable of testifying. To the extent that they were applicable, they had the same effect of suppressing the truth that the general proscription had had. Defendants and codefendants were among the large class of witnesses disqualified from testifying on the ground of interest. A party to a civil or criminal case was not allowed to testify on his own behalf for fear that he might be tempted to lie. Although originally the disqualification of a codefendant appears to have been based only on his status as a party to the action, and in some jurisdictions co-indictees were allowed to testify for or against each other if granted separate trials, other jurisdictions came to the view that accomplices or co-indictees were incompetent to testify at least in favor of each other even at separate trials, and in spite of statutes making a defendant competent to testify in his own behalf. It was thought that if two persons charged with the same crime were allowed to testify on behalf of each other, 'each would try to swear the other out of

the charge.' This rule, as well as the other disqualifications for interest, rested on the unstated premises that the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue." (*Washington v. Texas, supra*, 388 U.S. 14, 19-21 [18 L.Ed.2d at pp. 1023-1024], fns. omitted.)

Having thus concluded that the compulsory process clause was introduced into the federal Constitution at least in part to preclude the operation of exclusionary rules based on fear of perjured testimony, the high court recalled language in one of its earlier decisions, *Rosen v. United States* (1918) 245 U.S. 467, 471 [62 L.Ed. 406, 409, 38 S.Ct. 148], referring to " 'the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court ....' " (*Washington v. Texas, supra*, 388 U.S. 14, 22 [18 L.Ed.2d at pp. 1024-1025].) The court immediately noted that although the decision in *Rosen* "rested on nonconstitutional grounds, we believe that its reasoning was required by the Sixth Amendment." (388 U.S. at p. 22 [18 L.Ed.2d at pp. 1024-1025].)

Applying this same reasoning to the issue before it, the court concluded that the defendant had been "denied [the] right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." (*Washington v. Texas, supra*, 388 U.S. 14, 23 [18 L.Ed.2d 1019, 1025-1026].) ***641**

The United States Supreme Court has subsequently reaffirmed this view of the right of compulsory process [FN1] in a case concerning a state rule of evidence restricting a defendant's ability to testify. Referring to the common law rule that barred an accused from testifying, the court said: "There is no justification today for a rule that denies an accused the opportunity to offer his [or her] own testimony. *Like the truthfulness of other witnesses*, the defendant's veracity, which was the concern behind the original common-law rule, can be tested adequately by cross-examination. See generally Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 119-120 (1974)." (*Rock v. Arkansas, supra*, 483 U.S. 44, 52 [97 L.Ed.2d 37, 46, 107 S.Ct. 2704], italics supplied.)

> FN1 Another fundamental right deserves mention in this context. As Justice Brennan has noted, "Precluding a witness based solely on a judge's belief that the witness lacks credibility might also implicate the constitutional right to a jury trial in that it usurps the jury's central function of assessing the credibility of witnesses. The constitutional right to a jury trial would mean little if a judge could exclude any defense witness whose testimony he or she did not credit." (*Taylor v. Illinois, supra*, 484 U.S. 400, 430, fn. 5 [98 L.Ed.2d 798, 824] (dis. opn. of Brennan, J.).)

From these decisions of the high court, I conclude that the Sixth Amendment's compulsory process guarantee requires that defense witnesses be permitted to testify to the jury, regardless of the trial court's apparent distrust of the proposed testimony, if the credibility question is one that the jury is reasonably well equipped to deal with. Here, the reasons for the trial court's apparent distrust of the defense witness-his prior friendship with defendant, inconsistencies both within his testimony and between his testimony and other evidence in the case-were reasons that the trial jury was competent to assess.

Finally, I reject the majority's suggestion that there was no constitutional violation in this case because the defendant's witness was barred from testifying, not by a state statute or rule of evidence, but as a result of the trial court's erroneous application of state law. The suggestion amounts to an odd distortion of the nature and purpose of the constitutional guarantee. What the state and federal Constitutions secure for the accused is the right to present a defense, not merely the right to be free of unduly restrictive state laws of evidence and procedure. When, in this case, a crucial defense witness was not permitted to testify, defendant was denied that fundamental right.

II.

Violation of the Constitutional Right to Present a Defense Requires Application of the Federal Harmless

Error Standard

Once a reviewing court determines that exclusion of defense evidence has violated the defendant's right of compulsory process, the effect of the ***642** violation on the validity of the resulting conviction is determined by harmless error analysis (*Crane v. Kentucky* (1986) 476 U.S. 683, 691 [90 L.Ed.2d 636, 645-646, 106 S.Ct. 2142]) using the "beyond a reasonable doubt" standard (see *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [89 L.Ed.2d 674, 686-687, 106 S.Ct. 1431]).

Under this test, the appropriate inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. _____, _____ [124 L.Ed.2d 182, 189, 113 S.Ct. 2078, 2081], original italics.)

III.

Application of the Federal Harmless Error Standard Compels Reversal of the Judgment

The determination of prejudice begins with an examination of the defense presented at trial, which was that defendant had consensual sexual relations with Amelia P. but did not murder her, and that his brother Gregory was the killer. The success of this defense depended in large measure on providing the jury with sufficient reasons to credit defendant's explanation and to doubt the contrary version presented through Gregory's previous statements inculpating defendant. By erroneously excluding evidence that Gregory had confessed to the killing, the trial court's ruling eviscerated this defense.

The prosecution's case was far from compelling. The murder victim's young son, Kevin, could not identify defendant, nor did he recognize the survival knife or the cut-off jeans found in the Cudjo camper. Defendant's fingerprints were not found at the victim's home, and no bloodstains were detected on any of defendant's clothing, on any articles seized from the Cudjo camper, or on the shoes seized from defendant's mother's automobile. No articles taken from the victim's residence were found in defendant's possession, nor did any witness testify to such possession.

The police inferred from their interviews with Kevin and from the shoe tracks that the murder was the work of one man. Because much of the evidence pointed as strongly to Gregory as to defendant, law enforcement suspicion initially focused equally on defendant and Gregory. Both Gregory and defendant were present in the camper to which the shoe tracks led, and both Gregory and defendant owned shoes that could have made the tracks. The cut-off jeans and the knife found in the camper were equally accessible to defendant and to Gregory. ***643**

Some of the evidence pointed more strongly to Gregory as the intruder that Kevin described. Kevin testified that the intruder, who wore a sleeveless top, did not have tattoos on his arms or any facial hair such as a mustache or beard. Defendant had tattoos on both arms, and he testified without contradiction that he had obtained them before the murder. Defendant also had facial hair on the day of the murder. Gregory, on the other hand, had neither tattoos nor facial hair.

Although the semen found on the murdered woman could not have come from Gregory, the murderer need not have been the person who was the source of the semen. The victim's body bore no signs of traumatic sexual assault, Kevin's testimony did not mention a sexual assault, and the physical evidence was consistent with defendant's account of consensual sexual relations with the victim.

Gregory's previous statements to sheriff's investigators, which closely tracked Kevin's description of the intruder's conduct and provided details about the interior of the murder victim's home, were perhaps the strongest evidence of defendant's guilt presented by the prosecution, yet this evidence too was equally if not more consistent with Gregory's guilt. Because Gregory did not testify at trial, the jury was never given an opportunity to judge his credibility by observing his demeanor under oath.

Because the trial court excluded Culver's testimony, defendant's testimony was essentially uncorroborated. Evidence that Gregory had confessed to the murder would have filled a major gap in the defense case, and would have greatly increased the likelihood of the jury's entertaining a reasonable doubt of defendant's guilt. Under the circumstances, it is not possible to conclude that the guilty verdict in defendant's trial "was surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. _____, _____ [124 L.Ed.2d 182, 189, 113 S.Ct. 2078,

2081].)

IV. Conclusion

Exclusion of the testimony of defense witness John Culver was error of constitutional dimension that may not be excused as harmless. I would reverse the judgment.

Mosk, J., concurred.

Appellant's petition for a rehearing was denied Feburary 9, 1994, and the opinion was modified to read as printed above. Mosk, J., and Kennard, J., were of the opinion that the petition should be granted. ***644**

Cal. 1993.
People v. Cudjo
6 Cal.4th 585, 863 P.2d 635, 25 Cal.Rptr.2d 390

END OF DOCUMENT

116 Cal.App.4th 1253, 11 Cal.Rptr.3d 317, 04 Cal. Daily Op. Serv. 2378, 2004 Daily Journal D.A.R. 3500
(Cite as: 116 Cal.App.4th 1253, 11 Cal.Rptr.3d 317)

Court of Appeal, Fourth District, Division 1, California.
The PEOPLE ex rel. Bill LOCKYER, as Attorney General, etc., Plaintiff and Respondent,
v.
R.J. REYNOLDS TOBACCO COMPANY, Defendant and Appellant.

No. D040854.
Feb. 25, 2004.
As Modified on Denial of Rehearing March 19, 2004.
Review Denied June 9, 2004.

Background: State filed complaint against tobacco company for enforcement order of consent decree entered on master settlement agreement (MSA) that prohibited targeting youth in advertising of tobacco products. The Superior Court, San Diego County, No. GIC764118,Ronald S. Prager, J., entered summary judgment permanently enjoining company from continuing to violate MSA and awarded State sanctions of $20 million. Company appealed.

Holdings: The Court of Appeal, McDonald, J., held that:
(1) company's access to media researcher's data showing that level of exposure of company's advertising to youth was about the same as exposure to targeted young adult smokers constituted substantial evidence that company violated MSA;
(2) injunction did not impose obligations on company beyond those to which it agreed in MSA;
(3) media researcher's survey data was admissible;
(4) substantial evidence supported finding that company violated MSA within State of California;
(5) no reversible error resulted from admission of evidence of policies of company's competitors to reduce advertising to youth;
(6) State was entitled to sanctions; and
(7) amount of sanctions was not supported by record.

Affirmed in part and reversed in part.

See also 107 Cal.App.4th 516, 132 Cal.Rptr.2d 151.

West Headnotes

[1] States 360 104

360 States
360III Property, Contracts, and Liabilities
360k104 k. Construction and Operation of Contracts. Most Cited Cases

Requirement in master settlement agreement (MSA) that prohibited tobacco company from targeting youth in advertising of tobacco products included intent as material element; word “target” incorporated concept of direct purpose and excluded indirect results.

[2] Appeal and Error 30 893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Where trial court's interpretation of provision in agreement does not turn on credibility of extrinsic evidence, Court of Appeal exercises de novo review of that interpretation.

[3] Contracts 95 152

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k152 k. In General. Most Cited Cases

Words in contract are given their ordinary meanings absent evidence parties intended to use those words in different sense.

[4] Contracts 95 152

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k152 k. In General. Most Cited Cases

To determine common meaning of word in contract, court typically looks to dictionaries.

[5] Contracts 95 152

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k152 k. In General. Most Cited Cases

Clear and explicit meaning of contract's words construed in their ordinary and popular sense generally controls judicial interpretation unless parties used words in technical sense or special meaning was given to words by usage.

[6] States 360 104

360 States
360III Property, Contracts, and Liabilities
360k104 k. Construction and Operation of Contracts. Most Cited Cases

Intent requirement in master settlement agreement (MSA) that prohibited tobacco company from targeting youth in advertising of tobacco products was satisfied not only by direct advertising to youth, but also by advertising, targeted at young adults, that company knew to substantial certainty would be exposed to youth to same extent as young adults.

[7] States 360 107

360 States
360III Property, Contracts, and Liabilities
360k107 k. Performance or Breach of Contracts. Most Cited Cases

Tobacco company's access to media researcher's data showing that level of exposure of company's advertising to youth was about the same as exposure to targeted young adult smokers constituted substantial circumstantial evidence that company violated master settlement agreement (MSA) that prohibited company from targeting youth in advertising of tobacco products, since company knew to substantial certainty that its advertising was exposed to youth.

[8] Constitutional Law 92 1645

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)2 Advertising
92k1645 k. Product Advertisements. Most Cited Cases
(Formerly 92k90.3)

First Amendment constrains state efforts to limit advertising of tobacco products, because so long as sale and use of tobacco is lawful for adults, tobacco industry has protected interest in communicating information about its products and adult customers have interest in receiving that information. U.S.C.A. Const.Amend. 1.

[9] Injunction 212 211

212 Injunction
212VI Writ, Order, or Decree
212k207 Final Judgment or Decree
212k211 k. Operation and Effect in General. Most Cited Cases

Injunction requiring tobacco company to avoid exposing its tobacco advertising to youth at levels similar to its advertising's exposure to its stated target of young adults did not impose obligations on company beyond obligation not to target youth in its advertising to which company agreed in master settlement agreement (MSA); injunction simply set forth means to measure existence of prohibited youth targeting and suggested way to avoid targeting youth.

[10] Contracts 95 147(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties

95k147(1) k. In General. Most Cited Cases

A contract extends only to those things it appears parties intended to contract.

[11] Contracts 95 143(3)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(3) k. Rewriting, Remaking, or Revising Contract. Most Cited Cases

Court's function in interpreting contracts is to determine what, in terms and substance, is contained in contract, not to insert what has been omitted; courts do not have power to create for parties a contract that they did not make and cannot insert language that one party later wishes were there.

[12] Constitutional Law 92 948

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(B) Estoppel, Waiver, or Forfeiture
92k948 k. Contractual Waiver. Most Cited Cases
(Formerly 92k43(1))

Tobacco company's First Amendment and due process challenge to injunction requiring company to avoid exposing its tobacco advertising to youth at levels similar to its advertising's exposure to its stated target of young adults was barred by company's voluntary waiver of constitutional challenges set forth in master settlement agreement (MSA) resolving earlier litigation with State. U.S.C.A. Const.Amends. 1, 14.

[13] Injunction 212 204

212 Injunction
212VI Writ, Order, or Decree
212k202 Writ or Order
212k204 k. Form and Requisites. Most Cited Cases

Injunction requiring tobacco company to avoid exposing its tobacco advertising to youth at levels similar to its advertising's exposure to its stated target of young adults was not impermissibly vague; evidence suggested methods by which percentage exposure to youth could be reduced without comparable reduction in exposure to young adults, and implementation of those methods were reasonable measures required by injunction.

[14] Evidence 157 314(1)

157 Evidence
157IX **Hearsay**
157k314 Nature and Admissibility
157k314(1) k. In General. Most Cited Cases

Survey conducted to record recollections of **survey** respondents is "**hearsay**."

[15] Evidence 157 361

157 Evidence
157X Documentary Evidence
157X(C) Private Writings and Publications
157k360 Books and Other Printed Publications
157k361 k. In General. Most Cited Cases

Media researcher's **survey** data showing level of exposure of tobacco company's advertising to youth were admissible, under **hearsay exception** for publications relied upon as accurate in course of business, in State's action against company to enforce master settlement agreement (MSA) prohibiting company's targeting youth in advertising; data were accepted by magazine industry, and State's statistics expert found data were reliably obtained. West's Ann.Cal.Evid.Code §§ 801(a), 1340.

[16] Evidence 157 361

157 Evidence
157X Documentary Evidence
157X(C) Private Writings and Publications
157k360 Books and Other Printed Publications
157k361 k. In General. Most Cited Cases

Statements within statutory hearsay exception for

publications relied upon as accurate in course of business are sufficiently trustworthy to overcome concerns about reliability of those hearsay statements. West's Ann.Cal.Evid. Code § 1340.

[17] Appeal and Error 30 946

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k944 Power to Review
30k946 k. Abuse of Discretion. Most Cited Cases

Appropriate test for abuse of discretion is whether trial court exceeded bounds of reason.

[18] Appeal and Error 30 996

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)1 In General
30k996 k. Inferences from Facts Proved. Most Cited Cases

When two or more inferences can reasonably be deduced from the facts, reviewing court has no authority to substitute its decision for that of trial court.

[19] Evidence 157 555.4(3)

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.4 Sources of Data
157k555.4(3) k. **Hearsay** or Evidence Otherwise Incompetent. Most Cited Cases

Even if media researcher's **survey** data showing level of exposure of tobacco company's advertising to youth were inadmissible **hearsay** in State's action against company to enforce master settlement agreement (MSA) prohibiting company's targeting youth in advertising, data constituted proper basis for expert opinion because advertising experts reasonably relied on those data to determine exposure of magazine advertising to youth. West's Ann.Cal.Evid.Code §§ 801(a), 1340.

[20] States 360 109

360 States
360III Property, Contracts, and Liabilities
360k109 k. Rights and Remedies of State on Contracts in General, and Debts Due State. Most Cited Cases

Substantial evidence supported finding that tobacco company violated master settlement agreement (MSA) prohibiting targeting youth in advertising of tobacco products within State of California; although media researcher's survey showing level of exposure of tobacco company's advertising to youth, admitted as evidence, was nationwide, researcher's sample included two large California cities, and company's advertising plan included advertising schedules for several large California cities.

[21] Appeal and Error 30 1051.1(2)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)10 Admission of Evidence
30k1051.1 Same or Similar Evidence Otherwise Admitted
30k1051.1(2) k. Particular Cases. Most Cited Cases

In State's action against tobacco company to enforce master settlement agreement (MSA), incorporated into a consent decree, that prohibited targeting youth in advertising of tobacco products, no reversible error resulted from admission of evidence of policies of company's competitors to reduce advertising to youth; other properly admitted evidence sufficiently showed that company could reduce advertising exposure to youth while maintaining significant exposure to company's stated target of young adults.

[22] Injunction 212 223

212 Injunction
212VII Violation and Punishment
212k223 k. Acts or Conduct Constituting Violation. Most Cited Cases

116 Cal.App.4th 1253, 11 Cal.Rptr.3d 317, 04 Cal. Daily Op. Serv. 2378, 2004 Daily Journal D.A.R. 3500
(Cite as: 116 Cal.App.4th 1253, 11 Cal.Rptr.3d 317)

Injunction 212 232

212 Injunction
212VII Violation and Punishment
212k232 k. Punishment. Most Cited Cases

State was entitled to monetary sanctions in successful action against tobacco company to enforce master settlement agreement (MSA), incorporated into a consent decree, that prohibited targeting youth in advertising of tobacco products, where evidence showed that company did little to reduce advertising exposure to youth and intentionally avoided examining data demonstrating that youth were exposed to company's advertising claimed to be targeted at young adults.

[23] Injunction 212 232

212 Injunction
212VII Violation and Punishment
212k232 k. Punishment. Most Cited Cases

Sanction of $20 million was not supported by record in State's successful action against tobacco company to enforce master settlement agreement (MSA), incorporated into a consent decree, that prohibited targeting youth in advertising of tobacco products, where amount was based on company's nationwide spending on print advertising and profitability without evidence of its advertising spending or profitability in California.
See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1373 et seq.; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶ 8:143 et seq. (CACIVAPP Ch. 8-c); Cal. Jur. 3d, Damages, § 130 et seq.

[24] Damages 115 87(1)

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Additional to Compensation
115k87(1) k. In General. Most Cited Cases

Punitive damages are aimed at deterrence and retribution.

[25] Constitutional Law 92 4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive Damages. Most Cited Cases
(Formerly 92k303)

While states possess discretion over imposition of punitive damages, there are procedural and substantive constitutional limitations on these awards; Due Process Clause prohibits imposition of grossly excessive or arbitrary punishments on tortfeasor. U.S.C.A. Const.Amend. 14.

[26] Damages 115 94.1

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.1 k. In General. Most Cited Cases
(Formerly 115k94)

To extent award of punitive damages is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property. U.S.C.A. Const.Amend. 14.

[27] Damages 115 179

115 Damages
115IX Evidence
115k164 Admissibility
115k179 k. Intent, Malice, or Motive of Defendant. Most Cited Cases

Lawful out-of-state conduct may be probative in determining punitive damages award when it demonstrates deliberateness and culpability of defendant's action in the state where it is tortious, but that conduct must have a nexus to specific harm suffered by plaintiff.

[28] Damages 115 87(1)

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Addi-

tional to Compensation
115k87(1) k. In General. Most Cited Cases

State cannot punish, with punitive damage award, a defendant for conduct that may have been lawful where it occurred.

[29] Damages 115 87(1)

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Additional to Compensation
115k87(1) k. In General. Most Cited Cases

Generally, a state does not have a legitimate concern in imposing punitive damages to punish defendant for unlawful acts committed outside of state's jurisdiction.

[30] Constitutional Law 92 4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive Damages. Most Cited Cases
(Formerly 92k303)

A punitive damages award that encompasses defendant's extraterritorial conduct may be unconstitutional even if size of award itself is not outside bounds of due process. U.S.C.A. Const.Amend. 14.

[31] Damages 115 94.3

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.3 k. Wealth of Defendant. Most Cited Cases
(Formerly 115k94)

Damages 115 94.8

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.8 k. Constitutional Limitations on Amount in General. Most Cited Cases
(Formerly 115k94)

Defendant's wealth cannot justify an otherwise unconstitutional punitive damages award. U.S.C.A. Const.Amend. 14.

****321 *1257** Paul, Weiss, Rifkind, Wharton & Garrison, Jeh Charles Johnson, Marc Falcone, Paul H. Cohen, Amelia A. Cottrell, Howard, Rice, Nemerovski, Canady, Falk, & Rabkin, and H. Joseph Escher III for Defendant and Appellant.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Dennis Eckhart, Senior Assistant Attorney General, Laura Kaplan, Alan Lieberman and Karen Leaf, Deputy Attorneys General for Plaintiff and Respondent.

G. Steven Rowe, Attorney General, Melissa Reynolds O'Dea, Assistant Attorney General (Maine), Christine O. Gregoire, Attorney General, and David M. Horn, Assistant Attorney General (Washington), for 38 states, the District of Columbia and Puerto Rico as Amici Curiae on behalf of Plaintiff and Respondent.

McDONALD, J.

Defendant R.J. Reynolds Tobacco Company (Reynolds) appeals a judgment in favor of plaintiff the People of the State of California on the People's complaint for an enforcement order of a consent decree (Consent Decree) entered on a master settlement agreement (MSA). Reynolds contends the court erred by (1) concluding Reynolds violated an MSA provision incorporated into the Consent Decree prohibiting Reynolds from targeting youth in its print advertising of tobacco products, (2) issuing an impermissibly vague injunction, and (3) imposing $20 million in sanctions on Reynolds. We reverse the imposition of sanctions and otherwise affirm the judgment.

****322** I
INTRODUCTION

We state the facts and reasonable inferences drawn from the evidence most favorably to the People as the party prevailing at trial. ***1258***(Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 544, 138 Cal.Rptr.

705, 564 P.2d 857, disapproved on another point in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 581, 34 Cal.Rptr.2d 607, 882 P.2d 298; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881, 92 Cal.Rptr. 162, 479 P.2d 362; *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912, 117 Cal.Rptr.2d 631; *Passante v. McWilliam* (1997) 53 Cal.App.4th 1240, 1243, fn. 2, 62 Cal.Rptr.2d 298.)

"Tobacco manufacturer Reynolds promoted its tobacco products in California." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 520, 132 Cal.Rptr.2d 151, fn. omitted (*Lockyer*).) In doing so, Reynolds and its media planner developed plans for advertising its products in print media, including magazines. Reynolds's media plans identified the magazines in which to place advertisements, formed its magazine approval policy and created media advertising schedules [FN1] by reference to survey data measuring magazine readership collected and analyzed by national research services, MediaMark Research Inc. (MRI) and, to a lesser extent, Simmons Market Research Bureau (Simmons). MRI's data do not show how many people have seen an advertisement in a magazine but instead simply quantify the people who read or looked at an issue of the magazine. Young adult smokers age 21 to 34 were generally the stated target of Reynolds's magazine tobacco advertising.

> FN1. A media advertising schedule is a list of magazines and the number of issues in which an advertisement is to appear in a magazine during a defined period of time.

"In November 1998 Reynolds and the People signed the MSA that settled the People's litigation against various tobacco product manufacturers, including Reynolds." (*Lockyer, supra*, 107 Cal.App.4th at p. 520, 132 Cal.Rptr.2d 151, fn. omitted.) "Further, the parties stipulated to entry of a consent decree and final judgment. As part of the consent decree, the Superior Court of San Diego County approved the MSA (*People v. Philip Morris, Inc.* (1998, No. JCCP4041, 2000 WL 34016276)) [and] retained exclusive jurisdiction for purposes of implementing and enforcing the MSA." (*Lockyer*, at p. 520, 132 Cal.Rptr.2d 151.)

"The MSA placed ... detailed express restrictions on Reynolds's advertising and marketing practices." (*Lockyer, supra*, 107 Cal.App.4th at p. 520, 132 Cal.Rptr.2d 151.) MSA, subsection III(a), entitled "*Prohibition on Youth Targeting*," provided: "No Participating Manufacturer may take any action, directly or indirectly, to target Youth within any Settling State [including California] in the advertising, promotion or marketing of Tobacco Products...." [FN2] Consent Decree, section V(A) permanently enjoined Reynolds from "[t]aking any action, ***1259** directly or indirectly, to target Youth within the State of California in the advertising, promotion or marketing of Tobacco Products...."

> FN2. MSA, subsection II(bbb) defined "Youth" as "any person or persons under 18 years of age." Our opinion uses the word "youth" to mean persons age 12 through 17.

The People's litigation settled under the MSA included allegations that Reynolds had targeted its advertising to youth. However, after entering into the MSA, Reynolds initially made no changes to its media advertising schedules, did not include in its media plans the goal of reducing exposure of its advertising to youth and did not determine the extent its advertising was exposed to youth. Although Reynolds eventually made changes to its media advertising schedules, those changes had minimal impact in reducing ****323** exposure of its advertising to youth. After the MSA was signed, Reynolds was more likely to advertise in magazines known to have a higher level of exposure to youth than before the MSA was signed. After the MSA was signed, Reynolds's print media advertising policy did not significantly avoid exposure of its advertising to youth.

Although the MSA was signed in 1998, during 1999 through 2001 Reynolds's tobacco print advertising was exposed to youth at levels virtually identical to the levels of its targeted group of young adult smokers. Those comparable exposures suggested Reynolds's print advertising was aimed at two audiences. If Reynolds had been aiming exclusively at young adult smokers, the exposure of its advertising to that group would have been higher than to youth. Because the MRI and Simmons data were available to Reynolds, Reynolds could have reasonably anticipated the comparable exposures of its print advertising to young adult smokers and youth. Alternative advertising strategies were available to Reynolds. Reynolds could have modified its existing advertising

policies and practices and created alternative media advertising schedules to reduce the exposure of magazines containing Reynolds's advertising to youth while retaining a reasonably good exposure to young adult smokers. The advertiser's selection of the magazines and the number of advertising insertions into those magazines determine the number of people exposed to the advertising within and outside the stated target group. An advertiser can target specific smoker demographic groups by selecting the magazines into which its advertisements are placed. The key to reducing advertising exposure to youth without a commensurate reduction in exposure to adult smokers is to select magazines with high adult-smoker-to-youth audience ratios and magazines with audiences containing a low composition of youth. Further, advertising in numerous magazines results in a cumulative effect of advertising exposure to youth. Reynolds could have reduced the number of magazines in which it advertised to avoid those with a high youth audience while continuing its advertising exposure to young adult smokers. Although Reynolds was aware it could adopt media advertising schedules less likely to expose its advertising to a high number of youth while maintaining a strong exposure of its advertising to young adult smokers, it chose not to do so.

***1260** A dispute arose between the parties about whether Reynolds was complying with subsection III(a) of the MSA and section V(A) of the Consent Decree. The People demanded that Reynolds modify its advertising practices. Communications between the parties did not resolve the matter, and in March 2001 the People filed this lawsuit alleging Reynolds violated the MSA and Consent Decree by targeting youth through placement of its tobacco advertisements in national consumer magazines in the years 1999, 2000 and 2001. [FN3] The People's lawsuit sought enforcement of the MSA and Consent Decree and sanctions for Reynolds's alleged violation of the ****324** Consent Decree provisions prohibiting the targeting of tobacco advertising to youth.

> FN3. On the same day the People filed this lawsuit, Reynolds announced a policy limiting its advertising to magazines with an exposure to youth of less than 25 percent as measured by the MRI or Simmons data. Reynolds's press release of that day stated "[o]ur advertising policy fulfills the intent and spirit of the MSA by dramatically reducing advertising exposure among minors, while allowing limited communication with adult smokers"; and "we believe our policy is a responsible way to minimize the number of cigarette ads minors may see in magazines." However, despite Reynolds's newly announced policy, the exposure of magazines containing Reynolds's advertising to youth insignificantly declined.

Before and during trial, Reynolds moved to exclude evidence of MRI's survey data, including its teenage audience data. Reynolds also moved to preclude the People's experts from offering opinion testimony based on those data. At trial, the parties litigated the accuracy and admissibility of MRI's data. The trial court overruled Reynolds's foundational objections to evidence of those data, concluding the People established an adequate foundation for admissibility of that evidence.

The trial court found that after "the MSA was signed, [Reynolds] ... exposed Youth to its tobacco advertising at levels very similar to those of targeted groups of adult smokers." The court also found that between 1997 and 2001, "the delivery of print media advertising by [Reynolds] to its stated target audience of young adult smokers and to Youth age 12 to 17 is essentially the same." Based on those findings, the court concluded Reynolds violated the MSA and Consent Decree's prohibition against targeting youth. The court entered judgment permanently enjoining Reynolds from continuing to violate MSA, subsection III(a) and Consent Decree, section V(A) "by exposing Youth to its tobacco advertising at levels similar to the levels of exposure of adult smokers." The judgment also ordered Reynolds to (1) adopt reasonable measures designed to reduce exposure of its advertising to youth to a level significantly lower than the exposure level of its advertising to its stated target of young adult smokers, and (2) use reliable means such as the MRI and Simmons data to measure and demonstrate whether Reynolds was achieving success toward that goal. Further, based on the Consent Decree's provisions authorizing sanctions, the court awarded the People $20 million sanctions against Reynolds.

***1261** Reynolds appeals the judgment, contending the trial court reversibly erred by concluding Reynolds violated MSA, subsection III(a) and Con-

sent Decree, section V(A) by targeting tobacco advertising to youth within California. Reynolds also contends the court reversibly erred by imposing a $20 million sanction without the requisite specific findings or any basis in the record.

II
DISCUSSION
A
MSA's Provision Prohibiting the Targeting of Advertising to Youth

Reynolds contends that the trial court improperly concluded the People met their burden to prove Reynolds violated MSA, subsection III(a) and Consent Decree, section V(A) by targeting its tobacco advertising to youth within California. Reynolds argues the court prejudicially erred by: (1) in effect rewriting subsection III(a) to eliminate the requirement that Reynolds have the purpose or intent to expose its advertising to youth; (2) violating Reynolds's due process rights by restricting Reynolds's First Amendment right to advertise to adult smokers; (3) issuing an impermissibly vague injunction; (4) admitting hearsay evidence of survey data of magazine readership for its truth and permitting the People's experts to offer opinions based on those data; (5) entering judgment against Reynolds although the evidence did not show any violation of MSA, subsection III(a) occurred within California; and (6) making findings and reaching conclusions about Reynolds's competitors Philip Morris and Brown & Williamson (B & W) based on inadmissible hearsay evidence.

****325** 1
Interpretation of MSA's Provision Prohibiting Reynolds from Targeting Youth

The parties dispute the meaning of MSA, subsection III(a) that provides Reynolds may not "take any action, directly or indirectly, to target Youth" in its advertising, promotion or marketing of tobacco products. The trial court interpreted that provision of the MSA to preclude Reynolds from "taking any action that exposes Youth to tobacco advertisement to virtually the same degree as if Youth had been directly targeted." In arriving at that interpretation, the court stated it did not matter whether Reynolds "had any purpose or primary purpose to increase the incidence of Youth smoking in designing and ***1262** implementing its advertising campaign." The court characterized subsection III(a) as prohibiting targeting youth "regardless of purpose or intent." The court also stated subsection III(a)'s term "indirectly" referred to "any tobacco advertising actions that result in Youth exposure to virtually the same degree as if Youth had been directly targeted." Applying its interpretation of subsection III(a) to the evidence adduced at trial, the court concluded Reynolds violated the MSA "by indirectly targeting Youth in its tobacco advertising."

[1][2] Reynolds contends the trial court erroneously transformed Reynolds's obligation under MSA, subsection III(a) by rewriting that contractual provision (1) to delete as a material element of a violation of the provision any requirement that Reynolds have the purpose or intent to expose its advertising to youths, and (2) to impose on Reynolds not simply a prohibition on targeting youth but rather an enormous and ill-defined affirmative obligation to avoid or reduce the levels of exposure of its tobacco advertising to youth. Because the court's interpretation of subsection III(a) does not turn on the credibility of extrinsic evidence, we exercise de novo review of that interpretation. (*Lockyer, supra*, 107 Cal.App.4th at p. 520, 132 Cal.Rptr.2d 151; *Morgan v. City of Los Angeles Bd. of Pension Comrs.* (2000) 85 Cal.App.4th 836, 843, 102 Cal.Rptr.2d 468; *Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1336, 93 Cal.Rptr.2d 635; *Centex Golden Construction Co. v. Dale Tile Co.*(2000) 78 Cal.App.4th 992, 996, 93 Cal.Rptr.2d 259; *Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 504, 61 Cal.Rptr.2d 668; *Foothill Properties v. Lyon/Copley Corona Associates* (1996) 46 Cal.App.4th 1542, 1549, 54 Cal.Rptr.2d 488; *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 22, 31 Cal.Rptr.2d 378.)

We depart from the trial court's interpretation of MSA, subsection III(a), and conclude that intent is a material element that must be proven to establish a violation of that contractual provision. Our interpretation of subsection III(a) to include an element of intent is consistent with the compromise struck by the parties in the MSA [FN4] and avoids any alleged unconstitutionality****326** in the trial court's interpretation. However, under our interpretation of subsection III(a), Reynolds has not demonstrated that any ***1263** error in the trial court's interpretation was prejudicial in this case. (Code Civ. Proc., § 475; [FN5] *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243.)

FN4. In construing MSA, subsection III(a),

we give no weight to the MSA's recitals relied on by the People. (*Lockyer, supra*, 107 Cal.App.4th at p. 524, 132 Cal.Rptr.2d 151.) In *Lockyer* we declined to "apply the People's proffered analysis based on the theory that the overall general intent of the MSA was to reduce youth smoking and promote public health." (*Ibid.*) In doing so, we noted: "Though the parties' pleadings acknowledged that the MSA's stated goals included reduction of youth smoking and promotion of public health, the MSA was fundamentally a means of settling litigation by striking a balance between competing interests." (*Ibid.*) The parties expressly agreed that although Reynolds's print advertising targeting youth would be prohibited, some print advertising to Reynolds's stated target of adult smokers would nonetheless be allowed even if the advertising also reached youth.

FN5. All statutory references are to the Code of Civil Procedure unless otherwise specified.

[3][4][5] The trial court's analysis was incorrect to the extent it interpreted MSA subsection III(a)'s prohibition against targeting youth as not including the element of intent. Words in a contract are given their ordinary meanings absent evidence the parties intended to use those words in a different sense. (*Moss Dev. Co. v. Geary* (1974) 41 Cal.App.3d 1, 9, 115 Cal.Rptr. 736.) To determine a word's "common meaning, a court typically looks to dictionaries." (*Consumer Advocacy Group, Inc. v. Exxon Mobil Corp.* (2002) 104 Cal.App.4th 438, 444, 128 Cal.Rptr.2d 454; *Tellis v. Contractors' State License Bd.* (2000) 79 Cal.App.4th 153, 163, 93 Cal.Rptr.2d 734; *Blasiar, Inc. v. Fireman's Fund Insurance Co.* (1999) 76 Cal.App.4th 748, 754, 90 Cal.Rptr.2d 374.) " 'The "clear and explicit" meaning of [a contract's words construed] in their "ordinary and popular sense" ... [generally] controls "judicial interpretation" ' " unless the parties used the words in a technical sense or special meaning was given to the words by usage. (*Blasiar*, at p. 754, 90 Cal.Rptr.2d 374, citing *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822, 274 Cal.Rptr. 820, 799 P.2d 1253.)

The common and ordinary meaning of the word "target" as defined in various dictionaries incorporates the concept of a direct purposeful intent to reach a particular goal. (Random House Dict. (2d ed.1993) p.1944; Webster's 3d New Internat. Dict. (1993) p. 2341.) [FN6] Indeed, some dictionary definitions expressly include the phrase "to direct toward a target." (See, e.g., Webster's 3d New Internat. Dict., *supra*, at p. 2341; Random House Dict., *supra*, p.1944.) Considering the common meaning of the word "target," the trial court erred to the extent it interpreted MSA, subsection III(a) as prohibiting "indirect" targeting. The trial court also erred to the extent it concluded the People were not required to prove Reynolds had the intent to target youth. As Reynolds observes, one "cannot 'target' something without intending to do so." The People's opening brief acknowledges that a scienter element is inherent in the word "target" and, in opposing Reynolds's motion for judgment under section 631.8, the People told the trial court they were not proceeding on the theory that targeting was devoid of any element of intent. ***1264** The People acknowledged intent was not irrelevant to the question of targeting, but argued intent was "not limited to primary ****327** purpose or exclusive purpose or anything of that character."

FN6. Media research consultant Gray testified that, as used in the media research industry, targeting has an intentional component (intent and selection) and an empirical component (results and achievement of the intent). However, for purposes of proving a violation of MSA, subsection III(a), our interpretation of the word "targeting" does not depend on evidence of the trade meaning of that word. (§ 1856, subd. (c); *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 853, 89 Cal.Rptr.2d 540; *Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1240, 88 Cal.Rptr.2d 777; *Hayter Trucking, Inc. v. Shell Western E & P, Inc.* (1993) 18 Cal.App.4th 1, 15–16, 22 Cal.Rptr.2d 229.)

The dispositive issue with respect to interpretation of MSA, subsection III(a) is not whether targeting can be *indirect*, because the common meaning of the word "target" excludes indirect results. (*Tellis v. Contractors' State License Bd., supra*, 79 Cal.App.4th at p. 163, 93 Cal.Rptr.2d 734; *Blasiar, Inc. v. Fireman's Fund Ins. Co., supra*, 76 Cal.App.4th at p. 754, 90 Cal.Rptr.2d 374.) Instead, considering the element

of scienter inherent in the word "target," the dispositive issue is whether the People proved by substantial evidence that Reynolds violated subsection III(a) by intentionally targeting youth in its advertising. (Cf. *Cel–Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 172, 83 Cal.Rptr.2d 548, 973 P.2d 527 (*Cel–Tech*).)

[6] In *Cel–Tech, supra*, 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527, the Supreme Court observed: "We have said that' "intent," in the law of torts, denotes not only those results the actor desires, but also those consequences which he knows are substantially certain to result from his conduct.' " (*Id.* at p. 172, 83 Cal.Rptr.2d 548, 973 P.2d 527; cf. *Estate of Kramme* (1978) 20 Cal.3d 567, 572–573, 143 Cal.Rptr. 542, 573 P.2d 1369 (*Kramme*) ["[f]or a result to be caused 'intentionally,' the actor must either desire the result or know, to a substantial certainty, that the result will occur"]; *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 922, 114 Cal.Rptr. 622, 523 P.2d 662 & fn. 10 (*Schroeder*).) Although *Cel–Tech* discussed the concept of intent in the context of tort law, we conclude that the concept is equally applicable to the required intent implicit in MSA, subsection III(a)'s prohibition against targeting youth. If Reynolds intended its print advertising to target young adults but knew to a substantial certainty it would be exposed to youth to the same extent as young adults, then as a matter of law, Reynolds is deemed to have intended to expose, and thus targeted, youth as well as young adults.

[7] The trial court concluded that although Reynolds had access to data showing that the level of exposure of its advertising to youth was about the same as exposure to the targeted young adult smokers, Reynolds "studiously avoided" measuring its advertising exposure to youth or comparing exposure to youth with exposure to young adults, probably because Reynolds "knew the likely result of such analysis." The court also found that Reynolds "willingly engaged in an aggressive print advertising campaign to maximize exposure to targeted groups such as Young adult smokers, simply choosing to ignore the foreseeable consequence of significant Youth exposure." The court further stated, "it is reasonable to conclude that [Reynolds], even without examining all the data it had at its disposal, realized or should have realized that it was reaching Youth at levels at least as great as adults in its print advertising...." Further, as Reynolds acknowledged in seeking judgment under section 631.8, "intent can always be proved through circumstantial ***1265** evidence" if such evidence is "reliable." [FN7] MRI's magazine exposure results and derivative data constituted circumstantial evidence of Reynolds's intent to target youth. The trial court acted within its discretion in overruling Reynolds's objections that the circumstantial evidence was not reliable. We conclude the record ****328** contained substantial evidence that Reynolds violated MSA, subsection III(a) by targeting youth because Reynolds knew to a substantial certainty that its advertising was exposed to youth to the same extent it was exposed to young adults. (*Cel–Tech, supra*, 20 Cal.4th at p. 172, 83 Cal.Rptr.2d 548, 973 P.2d 527; *Kramme, supra*, 20 Cal.3d at pp. 572–573, 143 Cal.Rptr. 542, 573 P.2d 1369; *Schroeder, supra*, 11 Cal.3d at p. 922 & fn. 10, 114 Cal.Rptr. 622, 523 P.2d 662.)

FN7. In its reply brief, Reynolds acknowledges that "where direct evidence is not available to establish" an intent element, "courts accept circumstantial evidence as a potent means of proof."

2

Constitutionality of MSA Interpretation and Injunctive Portions of Judgment

[8][9][10][11] The MSA imposed a variety of express prohibitions and restrictions on Reynolds's marketing and advertising practices while otherwise preserving Reynolds's commercial speech rights to advertise in the print media to adult smokers. (*Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 564, 571, 121 S.Ct. 2404, 150 L.Ed.2d 532 (*Lorillard*); [FN8] cf. *Lockyer, supra*, 107 Cal.App.4th at pp. 531–532, 132 Cal.Rptr.2d 151.) Reynolds asserts it has constitutional free speech and due process rights to target its advertising to young adult smokers even if the advertising resulted in "incidental" exposure to youth, and the trial court violated its rights by issuing an injunction that requires Reynolds to reduce its advertisements to its stated target of young adult smokers. Reynolds asserts that by requiring Reynolds to avoid exposing its tobacco advertising to youth at levels similar to its advertising's exposure to its stated target of young adults, the court's interpretation of MSA, subsection III(a), and the injunctive portions of the court's judgment, imposed obligations on Reynolds beyond those to which it expressly agreed in the MSA. (*Vons Companies, Inc. v. United States Fire*

Ins. Co. (2000) 78 Cal.App.4th 52, 58–59, 92 Cal.Rptr.2d 597 (*Vons*).) [FN9] Reynolds contends the issue is whether subsection III(a) imposed an affirmative obligation on Reynolds to limit ***1266** incidental advertising exposure to youth that is targeted solely at adults. Reynolds characterizes as undisputed its constitutional right to communicate information through advertising to adults despite incidental exposure of the advertising to youth. However, this case does not involve incidental exposure of Reynolds's advertising to youth. Instead, the case involves Reynolds's intentional exposure of its advertising to youth because Reynolds knew to a substantial certainty its advertising was exposed to youth to virtually the same extent it was exposed to young adults.

> FN8. The First Amendment to the United States Constitution "constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information." (*Lorillard, supra,* 533 U.S. at p. 571, 121 S.Ct. 2404.)

> FN9. "A contract extends only to those things ... it appears the parties intended to contract. Our function is to determine what, in terms and substance, is contained in the contract, not to insert what has been omitted. We do not have the power to create for the parties a contract that they did not make and cannot insert language that one party now wishes were there." (*Vons, supra,* 78 Cal.App.4th at pp. 58–59, 92 Cal.Rptr.2d 597.)

[12] Although Reynolds acknowledges that in the MSA it waived any claims that the MSA was unconstitutional, it contends it did so only to the extent that the MSA contained restrictions, limitations or obligations expressly agreed to in the MSA or the Consent Decree.[FN10] Reynolds characterizes****329** the trial court's construction of MSA, subsection III(a) and the language of the permanent injunction as not simply prohibiting targeting youth but instead imposing an enormous and ill-defined affirmative obligation on Reynolds to avoid or reduce the levels of exposure of its advertising to youth, an obligation to which it did not agree. Reynolds asserts the record contains no basis for a finding that it clearly and compellingly intended to relinquish its constitutional rights, and concludes the MSA should be construed to preserve its constitutional rights and against a waiver of those rights. (*City of Glendale v. George* (1989) 208 Cal.App.3d 1394, 1397–1398, 1405, 256 Cal.Rptr. 742.) However, our independent interpretation of MSA, subsection III(a)'s prohibition against targeting youth differs from the interpretation of the trial court. We agree with Reynolds that proof of a violation of subsection III(a) or the Consent Degree requires a showing Reynolds intentionally targeted youth in its print advertising. Our interpretation of subsection III(a) is consistent with the restrictions, limitations and obligations Reynolds expressly assumed under the MSA and Consent Decree. Moreover, the language in the trial court's interpretation of MSA, subsection III(a) and in the permanent injunction, precluding Reynolds from exposing its tobacco advertising to youth at levels similar to its exposure to adult smokers, did not expand the prohibition to which Reynolds agreed in that subsection. ***1267** Instead, the trial court simply set forth a means to measure the existence of prohibited youth targeting on this factual record and on a subsequent alleged violation of the prohibition. The record contains substantial evidence that an advertising vehicle's exposure is the standard for evaluating the ability to reach a target audience. The evidence also suggests the way to avoid targeting a particular group is to minimize exposure of the advertising to that group.[FN11] As observed by the People, subsection III(a)'s prohibition on youth targeting "*is* a limitation on Youth exposure." The record contains evidence that Reynolds could implement alternative advertising schedules using different magazines to avoid targeting youth while maintaining effective targeting of young adult smokers. Reynolds's constitutional challenge to the injunction's language is barred by Reynolds's voluntary waiver set forth in MSA section XV. (*D.H. Overmyer Co. v. Frick Co.* (1972) 405 U.S. 174, 184–188, 92 S.Ct. 775, 31 L.Ed.2d 124; *Lockyer, supra,* 107 Cal.App.4th at p. 533, 132 Cal.Rptr.2d 151; ****330** *cf. Newton v. Rumery* (1987) 480 U.S. 386, 397–398, 107 S.Ct. 1187, 94 L.Ed.2d 405.)

> FN10. MSA section XV provided in relevant part: "Each Participating Manufacturer further acknowledges that it understands that certain provisions of this Agreement may require it to act or refrain from acting in a manner that could otherwise give rise to state

> or federal constitutional challenges and that, by voluntarily consenting to this Agreement, it (and the Tobacco Related Organizations (or any trade associations formed or controlled by any Participating Manufacturer)) waives for purposes of performance of this Agreement any and all claims that the provisions of this Agreement violate the state or federal constitutions. Provided, however, that nothing in the foregoing shall constitute a waiver as to the entry of any court order (or any interpretation thereof) that would operate to limit the exercise of any constitutional right except to the extent of the restrictions, limitations or obligations expressly agreed to in this Agreement or the Consent Decree."
>
> FN11. We note that in an August 2001 press release, Reynolds stated: Reynolds believed its "advertising policy is a responsible way to minimize the number of cigarette ads that minors may see in magazines"; Reynolds was "committed to complying with both the letter and spirit of the MSA" and "confident [its] cigarette advertising and marketing fully comply"; and "[t]he MSA was designed to further limit minors' exposure to cigarette advertising—which has happened—while still allowing limited opportunities to compete for adult smokers' business."

[13] In any event, in exercising de novo review of the language of the permanent injunction entered by the trial court, we are not persuaded by Reynolds's contention that on its face the injunction is impermissibly vague, incomplete, indeterminate, imprecise or overbroad. (*San Diego Unified Port Dist. v. U.S. Citizens Patrol* (1998) 63 Cal.App.4th 964, 969, 74 Cal.Rptr.2d 364; *cf. Schmidt v. Lessard* (1974) 414 U.S. 473, 476, 94 S.Ct. 713, 38 L.Ed.2d 661 ["basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed"]; *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach* (1993) 14 Cal.App.4th 312, 329, 17 Cal.Rptr.2d 861; *Ketchens v. Reiner* (1987) 194 Cal.App.3d 470, 476–477, 239 Cal.Rptr. 549; *City of Indio v. Arroyo* (1983) 143 Cal.App.3d 151, 157, 191 Cal.Rptr. 565; *Foti v. City of Menlo Park* (9th Cir.1998) 146 F.3d 629, 638.) Reynolds faults the trial court for not providing definition or guidance about the meaning of various operative provisions in the injunction, and contends it must guess at the meaning of the injunction's provisions prohibiting Reynolds from exposing its advertising to youth *at levels similar to* the exposure to adult smokers and requiring Reynolds to employ *reasonable measures* in its media planning to demonstrate that the level of exposure of its advertising to youth is *significantly less* than the level of exposure of its advertising to targeted groups of adult smokers. (*Pitchess v. Superior Court* (1969) 2 Cal.App.3d 644, 651, 83 Cal.Rptr. 35.) However, the language of the ***1268** injunction gives Reynolds adequate notice of what it "may and may not do." (*Brunton v. Superior Court* (1942) 20 Cal.2d 202, 205, 124 P.2d 831; *Schmidt*, at p. 476, 94 S.Ct. 713.)

The evidence from which we conclude Reynolds was substantially certain its tobacco advertising was exposed to youth as a targeted audience includes the MRI data showing exposure or reach to the admitted target audience of young adults was essentially the same as to youth. In 1999 exposure to youth was 97.1 percent and exposure to adults was 97.9 percent; in 2000 exposure to youth was 95.2 percent and to adults 96.3 percent. Evidence at trial suggested the methods by which the percentage exposure to youth could be reduced without a comparable reduction in exposure to young adults. Implementation of these methods would be the reasonable measures required by the injunction and the resulting reduction in advertising exposure to youth compared to exposure to young adults would be the significant reduction in exposure to youth required by the injunction.

The permanent injunction contained mandatory provisions ordering Reynolds to "adopt, adhere to, and incorporate as part of its media strategy reasonable measures designed to reduce Youth exposure to its tobacco advertising to a level significantly lower than the level of exposure of targeted groups of adult smokers" and "employ reliable means such as MRI and Simmons data to measure its success in achieving this goal to demonstrate that the exposure of Youth to Reynolds's tobacco advertising is significantly less than the exposure of targeted groups of adult smokers." The mandatory provisions of the injunction do not shift to Reynolds the burden of proof on the issue of prohibited youth targeting. Instead, those mandatory provisions provide Reynolds with means to demonstrate compliance with MSA, subsection III(a)'s prohibition against targeting youth. The burden to prove a violation of that subsection remains with the People,

who must show that Reynolds knew with ****331** substantial certainty that its print advertising exposure to youth would be the same as its exposure to young adults.

Because of our interpretation of MSA, subsection III(a) and the permanent injunction, Reynolds has not established reversible prejudice resulting from any constitutional error by the trial court involving the language of those contractual and remedial provisions. Because the injunction's language is not unconstitutionally vague, we conclude the court acted within its discretion by issuing the injunction. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478–479, 243 Cal.Rptr. 902, 749 P.2d 339; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331, 216 Cal.Rptr. 718, 703 P.2d 58; *Shapiro v. San Diego City Council*, *supra*, 96 Cal.App.4th at p. 912, 117 Cal.Rptr.2d 631.)

***1269** 3

Admissibility of Evidence of Survey Data Measuring Magazine Readership

Based on MRI's data, the trial court found: In the year 1999, magazines containing Reynolds's advertising were exposed to 97.1 percent of youth and 97.9 percent of adults; and in the year 2000, magazines containing Reynolds's advertising were exposed to 95.2 percent of youth and 96.3 percent of adults. From those findings, the court concluded the levels of exposure of Reynolds's advertising to youth and adults were "essentially the same."

Reynolds characterizes MRI's data as forming the entire basis for the People's case that Reynolds violated MSA, subsection III(a) by targeting youth and the trial court's conclusion about the comparable levels of exposure of Reynolds's advertising to youth and adults. Reynolds asserts the trial court's decision "rises and falls" on the "accuracy and reliability" of MRI's data. Reynolds contends MRI's data, especially its youth data, was inadmissible hearsay, unreliable and produced overstated and erratic results. It contends the court abused its discretion by admitting those data for their truth (Evid.Code, § 1340) and as the basis of the testimony of the People's experts (*id.*, § 801, subd. (b)) without the requisite foundational showing by the People.

[14] MRI's data were based on a **survey**. A **survey** conducted to record the recollections of **survey** respondents is **hearsay**. (*Luque v. McLean* (1972) 8 Cal.3d 136, 147–148, 104 Cal.Rptr. 443, 501 P.2d 1163; *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524–1526, 3 Cal.Rptr.2d 833 (*Korsak*).) However, Evidence Code section 1340 sets forth a hearsay exception: "Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule *if the compilation is generally used and relied upon as accurate in the course of a business* as defined in Section 1270." (Italics added.) Evidence Code section 801 provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] ... [¶] (b) *Based on matter* (including his special knowledge, skill, experience, training and education) perceived by or personally known to the witness or made known to him at or before the hearing, *whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates*, unless an expert is precluded by law from using such matter as a basis for his opinion." (Italics added.) We conclude that on this record the trial court properly admitted the challenged MRI data into evidence. ***1270**(*People v. Rowland* (1992) 4 Cal.4th 238, 266, 14 Cal.Rptr.2d 377, 841 P.2d 897; ****332***Shamblin v. Brattain*, *supra*, 44 Cal.3d at pp. 478–479, 243 Cal.Rptr. 902, 749 P.2d 339; *People ex rel. Dept. of Transportation v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066, 1073, 116 Cal.Rptr.2d 240 (*Clauser/Wells*); *Korsak*, at pp. 1524–1526, 3 Cal.Rptr.2d 833.)

(a)

Factual Background Bearing on Admissibility of Evidence of MRI's Data

At trial, the parties presented conflicting expert evidence on the admissibility of the challenged MRI data. With respect to the trial court's foundational ruling to admit MRI's data into evidence, we consider the evidence and reasonable inferences most favorably to the People.

MRI collects and analyzes data from surveys about magazine readership. MRI's surveys are based on the question to survey respondents whether they have read or looked into an identified magazine within a specified recent time frame, generally seven days for weekly and 30 days for monthly magazines. Readership includes anyone who responded to the survey as having read or looked into the magazine. Because

MRI's surveys measure only the opportunities to see the advertisements, its data provide estimates of the number of persons to whom the advertising in the magazine is potentially exposed.[FN12] Thus, the basic underlying unit of data obtained by MRI surveys is the number of people who read or looked into an issue of a magazine and therefore had the opportunity to, but did not necessarily, see an advertisement placed in the magazine.

> FN12. In magazine advertising, "audience" means "the number of persons who are exposed to or potentially exposed to a magazine or to a schedule of magazine insertions."

MRI's surveys seek to measure two universes. MRI conducts in-person interviews of adults age 18 and above (adult study) in which questions are asked about more than 216 magazines. MRI also conducts a mail survey of persons age 12 to 19 (teen study) in which questions are asked about approximately 60 magazines. The teen study is intended to create an integrated data base. MRI combines the data from its adult study and teen study into a single study known as Twelveplus (everyone age 12 and above), used to measure both the adult and teen audience of a magazine. MRI's Twelveplus study includes every magazine measured in its teen study and gives totals for survey respondents age 12 through 17 plus the number of issues (zero to four) read or looked into for each magazine. Based on the Twelveplus data, a media advertising schedule's exposure to youth can be determined.

***1271** MRI's data are considered the acknowledged industry standard for measuring and comparing readership of adults and teens in the same way that Nielsen is the standard for television ratings data and Arbitron the standard for radio listening data. Media planners use MRI's data as their "core essential tool" to measure magazine audiences and to plan and implement media advertising schedules. Most advertising agencies use MRI's data for their magazine audience measurements. Further, because MRI produces the dominant study in the teen measurement field, most advertisers interested in measuring teen audiences for magazines use MRI data as the basis for determining their ability to measure exposure of a magazine to teens.

The average magazine issue audience, referred to in the industry as "vehicle exposure," is the basis of the measurements provided by MRI (and Simmons) and the standard to evaluate the magazine's exposure****333** to a target audience. As the predominant form of data available to the media planning and advertising industries, vehicle exposure is the primary criterion for evaluating magazine audiences. Vehicle exposure suggests how many people in general or in a target group have the opportunity to see a magazine advertisement. Also derived from MRI's vehicle exposure audience data are other measures, including composition, coverage, indices, gross impressions and target impressions. Those derivative numbers, as well as MRI's basic data, are used by media planners to measure and determine whether a media advertising schedule succeeds in reaching a target group.

Reynolds and its media planner use MRI's data to evaluate composition, coverage and indices. Magazine audience is generally measured by composition and coverage. Composition is the percent of a target group or other demographic group within the total audience of a magazine. Coverage is the percentage of a target group potentially exposed to an advertisement in a magazine. MRI's format identifies the composition of youth magazine audience and coverage of the magazine's exposure to youth. Index refers to the skew of a magazine to a demographic group. An index may compare the youth composition of a magazine's audience to the percent of youths in the total United States population.

Impressions are the number of advertising viewing opportunities generated by a media advertising schedule. Gross impressions (also called gross rating points) generally refer to the total audience. Gross impressions are cumulative numbers that are the sum of all the audiences of the various magazines across an entire media advertising schedule and suggest the total number of potential exposures to a media advertising schedule. The total audience of a single issue of a magazine multiplied by the number of insertions of advertising in ***1272** the magazine equals the gross impressions of the magazine. With respect to a target group, the measurements are expressed as target impressions or target rating points. Target rating points express gross impressions as a percentage of the target group with one rating point measuring impressions and equaling one percent of the target group. The total number of impressions divided by the particular population universe equals gross rating points or target

116 Cal.App.4th 1253, 11 Cal.Rptr.3d 317, 04 Cal. Daily Op. Serv. 2378, 2004 Daily Journal D.A.R. 3500
(Cite as: 116 Cal.App.4th 1253, 11 Cal.Rptr.3d 317)

rating points.[FN13] Media planners use target rating points from MRI's readership data to compare one media schedule to another or exposure to one demographic group to exposure to another.

> FN13. For example, if a demographic subgroup has 20 million people and 20 million impressions are delivered, that is equivalent to 100 gross rating points and to reaching everybody in that universe once each. That result could also be achieved by reaching half the people in the group twice or 40 percent 2.5 times each.

Advertisers and media planners use the terms "reach" and "frequency" to measure the exposure of advertising to a defined group and to compare exposure of advertising among various groups. Reach means the percentage of a group potentially exposed to an advertising schedule during a specified time period. Frequency means the average number of times persons in the group are exposed to an advertising schedule during the specified time period. Target rating points are the product of the reach and frequency numbers.

Reach and frequency numbers can be derived from the MRI data. Reach is the percentage of a targeted audience to whom a magazine is exposed and quantifies the target audience covered. It also identifies to whom an advertisement is potentially ****334** exposed based on survey respondents who have read or looked into a magazine containing the advertisement within a designated time period. Because reach is the nonduplicated coverage of a target group, reach models are used to estimate the unduplicated audience of a media advertising schedule. Frequency is the average number of times that a media advertising schedule is exposed to a target group within a designated time period.

In short, reach refers to the percentage of the population to whom the magazine is exposed and frequency means on average how many times the magazine is exposed to them. Further, target rating points are equal to reach multiplied by frequency. MRI's reach and frequency numbers are estimated cumulative measures over a year. A reach of 95 percent means that 95 percent of the target group possibly saw the advertisement during the year. With respect to four-month data, monthly reach and frequency numbers can be based directly on MRI's tabulated data without any projections because they are real empirical data. However, annual reach and frequency numbers require use of extension formulas, including the beta binomial formula, to ***1273** extend the reach over a one-year time frame. MRI uses the beta binomial formula only to distribute the gross impressions between reach and frequency. MRI's methodology for projecting cumulative reach is to take the survey data for one to four issues of magazines and then apply the beta binomial formula to arrive at the projection at the end of 52 weeks. MRI developed software for the purpose of obtaining estimates that would raise fewer concerns involving the overlap of which survey respondents read a magazine issue.

MRI's reach and frequency numbers are based on two different data bases: adult smoker measurements using MRI's adult study and youth measurements derived from MRI's composite Twelveplus data. MRI has sought to ensure that the data produced are as compatible as if they came from a single study. Although MRI's surveys for adults and youths differ from one another, processes exist to equate the two. In measuring magazine readership, MRI's teen study also weights and conforms the survey responses. The purpose of weighting is to ensure that those who respond to the survey are representative of the entire population. MRI's weighting process addresses the issue whether the 77 percent of teens who do not respond to the teen survey are like the 23 percent who do, and compensates for the differences in response rates of different demographic groups. Further, MRI uses a conforming procedure to lower the readership levels in its teen study because MRI's teen data have more overstatement compared to MRI's adult data. Thus, a reason for MRI's conforming adjustment is to reduce teen audience levels to the level of the teens who would have responded had they been administered MRI's adult survey.

Integrated Market Systems (IMS) provides software for various media analyses and has modified MRI's formula in a proprietary way. IMS has a program that compiles MRI data, inputs criteria (the target base) and produces reports based on the criteria. IMS's Modal model inputs a media advertising schedule and estimates how many people saw the magazines in that schedule. To calculate each media advertising schedule's exposure to its stated target, Reynolds used MRI's data on magazine readership as

116 Cal.App.4th 1253, 11 Cal.Rptr.3d 317, 04 Cal. Daily Op. Serv. 2378, 2004 Daily Journal D.A.R. 3500
(Cite as: 116 Cal.App.4th 1253, 11 Cal.Rptr.3d 317)

a source of information. Reynolds then used a computer software program (IMS Modal) to calculate a selected magazine's reach (the percentage of the target audience to whom the magazine is exposed) and frequency (the average number of exposures of the magazine).

****335** MRI's data show considerable consistency over time as to which magazines are high or low for exposure to youth. Further, those data are also reliable with respect to the estimates of youth audience (the percent of the audience who are teens). MRI's data can be used to show who is being ***1274** exposed to magazines containing Reynolds's advertisements. Although from 1999 through 2001 young adult smokers age 21 to 34 generally constituted the stated target of Reynolds's advertising, during those years magazines containing Reynolds's advertising were exposed to youth in about the same percentages and about as often as exposed to young adult smokers. Those virtually identical numbers of advertising exposure to adult smokers and youth were unusual. Further, reaches of 80 percent or above suggested the result was not accidental.

In 1999 the reach of magazines containing Reynolds's advertising was 97.1 percent of youth with a frequency of 68.2 times and 97.9 percent of young adult smokers with a frequency of 62.7 times. In 1999 the reach of magazines containing Reynolds's Camel brand's advertising was 88.5 percent of youth with a frequency of 22.7 times and 88 percent of young adult smokers with a frequency of 16.8 times.

In 2000 the reach of magazines containing Reynolds's advertising was 95.2 percent of youth with a frequency of 54.7 times and 96.3 percent of young adult smokers with a frequency of 54.2 times. In 2000–89 percent of Reynolds's Camel advertisements were placed in magazines with youth audiences above the 10.4 percentage of youth in the United States population and 50 percent of the Camel ads appeared in magazines whose youth audience was above 18.5 percent. In 2001 although Reynolds reduced its overall level of magazine advertising, the target rating points were 1571 for adult smokers age 21 to 34 and 1392 for youth. In 2001 magazines containing Reynolds's advertising were exposed to 85.5 percent of youth an average of 16.3 times.

Reynolds also made an analysis of the distribution of gross impressions, an accepted method of measuring an advertising campaign's success in focusing on its target audience, by comparing its brands' advertising campaigns' exposure to the stated target with their exposure to other groups within the universe of adult smokers age 21 and over. The analysis uses an index with average delivery set at 100. Thus, an index of 200 means the group analyzed receives double the average number of exposures. The distribution index for Reynolds's Camel brand's advertising campaign in 2000 showed exposure to smokers age 21 to 24 was 183, reflecting that group received 83 percent more exposures than the average for all smokers age 21 and over. Those analyses of gross impression distributions showed high exposure to youth and smokers age 18 to 20. In many cases, exposure of advertising to those groups was higher than to Reynolds's stated target audience. If Reynolds had included those two younger age groups in the impressions distributions analyses it used in evaluating its own targeting, Camel's 2000 campaign's high exposure to very young adults would have been a “red flag” to Reynolds that its advertising was exposed to a high number of youth.

***1275** MRI's data can be used for the purpose of magazine selection if the goal is to select magazines with low youth audience and eliminate magazines with high youth audience. Reynolds could identify magazines that would best deliver its advertising to the target group and refine its delivery to ensure its advertising was not exposed to identified groups. By analyzing magazines in terms of composition, ****336** coverage and indices, Reynolds could select a different set of magazines to decrease exposure of its advertising to youth. The reach is a function of which magazines are selected. To reduce exposure to youth while maintaining significant exposure to adults, Reynolds could choose magazines with lower teen composition, lower teen coverage and lower teen audience.[FN14] Were Reynolds making an effort not to target youth, it would concentrate on magazines with a lower youth-to-young-adult ratio. To reduce exposure to youth, Reynolds could also reduce the number of magazines in which it advertised. Instead, in 2000 Reynolds's advertising was distributed fairly randomly in all magazines on its list instead of concentrated in magazines with low youth composition.

FN14. At trial, Reynolds's counsel acknowledged that the most important factor in devising a media plan is the list of magazines

in which it placed advertisements.

The People's media planning expert (Silverman) concluded that Reynolds's media advertising schedule suggested Reynolds was intentionally targeting, or consciously intending not to take positive action to avoid exposure of its advertising to, youth; and Reynolds's failure to do so suggested it knew with substantial certainty that its tobacco advertising was being exposed to youth.

(b)

Analysis of Admissibility of Evidence of MRI's Data

[15] In admitting the People's proffered evidence of MRI's data over Reynolds's objections, the trial court found the testimony demonstrated those data were reliable, generally used and relied on as accurate. However, Reynolds asserts the court erred in admitting the evidence and contends MRI's weighted, conformed and adjusted **survey** results did not meet the requirements of Evidence Code section 1340's **hearsay exception**. Reynolds also contends MRI's teen data did not constitute a proper basis for expert opinion. (Evid.Code, § 801, subd. (b).) Reynolds contends no court could properly accept or reject the expert opinion testimony about the validity of the MRI data because there was assertedly no basis in the record to understand the procedures used to arrive at MRI's data. In effect, Reynolds seeks reweighing ***1276** on appeal of the conflicting evidence presented to the trial court. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881, 92 Cal.Rptr. 162, 479 P.2d 362; *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290, 130 Cal.Rptr.2d 436; *Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832, 227 Cal.Rptr. 1.) On this record the trial court acted within its broad discretion in admitting into evidence MRI's survey data and expert testimony based on those data. (*Korsak, supra*, 2 Cal.App.4th at p. 1523, 3 Cal.Rptr.2d 833.)

MRI's surveys are conducted to obtain sample estimates for the number of people exposed to an average issue of a magazine. MRI's data involve results and statistical projections in terms of sample to population and from one or two weeks to an entire year. However, all surveys are subject to random variability. Except for a complete census of the entire population to which each person responds, no survey is perfect regardless of its size and no survey's results can be deemed accurate with certainty. The data in a survey such as an audience measurement study cannot be guaranteed as 100 percent reliable (expecting the same results if repeated samples are generated using the same methodology) or 100 percent valid (reflecting exactly what is happening in the universe). Instead, degrees of reliability and validity ****337** are recognized. Statistical reliability evaluates the absence of random error, which means the results of subsequent tests are close to the outcome in the initial test. A sample estimate is considered reliable to the extent it does not exhibit substantial random variability. Statistical validity is a measure of whether the test is suitable for its intended purpose, which evaluates whether test results are consistent with reality. Media research consultant Gray testified that in the case of national magazines, MRI's data have been accepted by the industry as providing sufficient reliability and validity to serve as the standard and the criteria for media evaluation.

Further, the People's statistics expert (Javitz) conducted a standard statistical analysis of MRI's readership data, and found MRI's survey was reliable and valid for purposes of measuring estimated adult and youth audiences for media schedules. Javitz found MRI's youth data had very good reliability, with very small margins of error with respect to the projected reach and the calculated frequencies for adult smokers age 21 to 34 and teens. Javitz thus concluded that MRI's studies were very good in terms of their margins of error and MRI's readership data were the most likely estimate of the magazine's exposure. Javitz also characterized the amount of random variability in the estimates of average impressions per teen, reach and frequency as sufficiently small to make the data useful. Moreover, Javitz found that the potential of bias in MRI's data caused by sample selection, weighting, ***1277** nonresponse bias, differences in the form of the questionnaire or problems with conforming was "minimal" if existent at all, and concluded those data were valid as truthfully expressing the real world. This evidence is contrary to Reynolds's contention that "no one in the industry really believes" MRI's data are "accurate."

Evidence supported the conclusion that MRI's weighted, conformed and adjusted **survey** results met the requirements of Evidence Code section 1340's **hearsay exception** and constituted a proper basis for expert opinion for purposes of Evidence Code section 801, subdivision (b). Gray testified that conforming in

general is a common occurrence accepted within the media research industry and MRI's conforming procedure is accepted in that field. Similarly, Javitz found MRI's conforming process was reasonable, consistent with appropriate statistical methods and procedures, and included the action a statistician would take to adjust for differences in survey methods and procedures. Further, Javitz analyzed MRI's weighting process, and found zero potential bias. Moreover, Javitz found that MRI's surveys were conducted in accordance with appropriate and generally accepted methods and procedures followed by social scientists and statisticians, specifically with respect to MRI's sampling procedure and, in particular, MRI's selection of its teen sample. Additionally, the People's survey design expert (Kamins) testified: MRI's teen survey's sample size of more than 3,000 was sufficiently large to support "pretty steady inferences"; MRI's teen study's universe definition and sample size were trustworthy; the design and administration of the survey instrument in MRI's teen study were trustworthy; MRI's teen study's response rate was more than adequate; MRI's teen study was trustworthy; hence, validity and reliability were present; if validity is present, reliability is present by definition; if the observed measure equals truth, random variation is eliminated; and if random variation is eliminated, reliability is present by definition. Finally, with respect to Reynolds's attack on the procedures used to arrive at MRI's data, the record contained the testimony of MRI's vice president of software development ****338** (Safran) that IMS's Modal model is generally used for planning purposes and accepted as a reasonable representation of reach and frequency; and compared to other actual tabulated data, the model produces numbers that are reasonable given that it is a model and is adequate for use for industry practices.

Reynolds also attacks the court's findings that magazines in which Reynolds advertised were exposed to 97.1 percent of youth and 97.9 percent of adults in 1999; magazines in which Reynolds advertised were exposed to 95.2 percent of youth and 96.3 percent of adults in 2000; and those levels of exposure to youth and adults were essentially the same. Reynolds contends that on their face, such high percentages do not pass the common sense test. However, Javitz testified it was plausible that for a year rather than a ***1278** six-month period, Reynolds's advertising could have obtained an exposure in the mid–90's for its 2000 media plan.

Evidence also suggested the utility of MRI's data is not limited to its precise numbers. Instead, MRI's data can be used to show who is exposed to magazines containing Reynolds's advertisements because those data portray the comparison of exposure to various groups. The People's media planning expert (Silverman) testified it was appropriate to compare annual reach and frequency numbers of Reynolds's media plans for youth with the stated adult target because those numbers are an indicator of those to whom the advertisement is really being exposed and how often exposed over the course of a year. Further, target rating points are also valuable for media planners as a comparative measure of one schedule to another or one year to another. Thus, although characterizing as "very fuzzy" the line between using MRI's data for relative comparison and accepting the data at face value, Gray testified that looking at teen-measured magazines' exposure to adult smokers and youth was a way of indicating whether there was targeting to any particular group and the degree to which that occurred.[FN15] Moreover, noting that impressions and target rating points are derived directly from MRI's data and are the input to the computer models while the output is the reach and frequency for the time period a model is asked to calculate, Gray concluded that to put things on a relative per capita basis, it is more meaningful to look at target rating points for purposes of comparing delivery of youth-measured magazines. Similarly, Reynolds's statistics expert (Olkin) acknowledged that MRI's data were not implausible and that any unreliability resulting from application of computerized extension formulas had nothing to do with gross impressions. Further, the relationship between high exposure to adults and youth is the same whether viewed on an annual, quarterly or monthly basis. Thus, for comparison purposes, annual numbers are appropriate. Additionally, the numbers can be used to compare one media advertising schedule to another or one vehicle to another. As observed by Reynolds's senior vice president of marketing (Creighton), relative comparisons over time show whether a media plan is successful.

> FN15. Gray noted that in practice, media planners and buyers are concerned not with probabilities or the standard error but instead with the numbers at face value.

[16][17][18][19] Statements within the hearsay

exception of Evidence Code section 1340 are sufficiently trustworthy to overcome concerns about the reliability of those hearsay statements. (*In re Michael G.* (1993) 19 Cal.App.4th 1674, 1677–1678, 24 Cal.Rptr.2d 260; ****339***Miller v. Modern Business Center* (1983) 147 Cal.App.3d 632, 635, 195 Cal.Rptr. 279 ["[t]rustworthiness is reasonably assured by the fact that the business community generally uses and relies upon the compilation and by the fact that its author knows the work will have no commercial value unless it is accurate"].) In admitting MRI's data into ***1279** evidence, the trial court found MRI is the most widely used and accepted service for measuring magazine exposure in the United States; MRI's adult and teen surveys are conducted in accordance with appropriate and generally accepted methods and procedures followed by social scientists and statisticians; MRI's adult and youth data are valid and reliable; and MRI's adult and youth data are generally used and relied on as accurate in the course of business. "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain*, *supra*, 44 Cal.3d at pp. 478–479, 243 Cal.Rptr. 902, 749 P.2d 339; *Korsak*, *supra*, 2 Cal.App.4th at p. 1523, 3 Cal.Rptr.2d 833.) On this record, substantial evidence and reasonable inferences supported the trial court's foundational ruling to admit MRI's data into evidence. Further, even if MRI's youth data were inadmissible hearsay, the court could have correctly concluded the data constituted a proper basis for expert opinion because advertising experts reasonably rely on those data to determine exposure of magazine advertising to youth. (Evid.Code, § 801, subd. (b); *People v. Gardeley* (1996) 14 Cal.4th 605, 618, 59 Cal.Rptr.2d 356, 927 P.2d 713; *Korsak*, at pp. 1524–1525, 3 Cal.Rptr.2d 833 [experts have "considerable leeway as to the material on which they may rely"].) The court did not abuse its discretion by admitting MRI's data into evidence or permitting the People's experts to give testimony based on those data.

Although Reynolds contends the evidence of MRI's data was inadmissible as unreliable and expert testimony based on those data was also inadmissible, Reynolds essentially concedes that if those matters were properly admitted, there is substantial evidence to support the ultimate judgment favoring the People. Considering our interpretation of MSA, subsection III(a)'s prohibition on youth targeting and our determination upholding the trial court's foundational evidentiary rulings, on this record we conclude substantial evidence and reasonable inferences established that Reynolds violated MSA, subsection III(a) by targeting its tobacco advertising to youth. (*Cel–Tech*, *supra*, 20 Cal.4th at p. 172, 83 Cal.Rptr.2d 548, 973 P.2d 527; *Kramme*, *supra*, 20 Cal.3d at pp. 572–573, 143 Cal.Rptr. 542, 573 P.2d 1369; *Schroeder*, *supra*, 11 Cal.3d at p. 922 & fn. 10, 114 Cal.Rptr. 622, 523 P.2d 662.)

4

Evidence of Violation Within California

[20] To establish violation of the prohibition against targeting youth set forth in MSA, subsection III(a) and Consent Decree, section V(A), the People were required to prove Reynolds targeted youth within the State of California. In its statement of decision, the trial court found, based on MRI's data, that in 1999, "97.1 percent of Youth across the country, including California, were exposed to [Reynolds's] ads 68.2 times."

***1280** In its statement of decision, the trial court also concluded that nothing in the evidentiary record could reasonably support a determination that MRI's nationwide data did not apply to California. In reaching that conclusion, the court noted ****340** that Reynolds did not object at trial to introduction of the nationwide MRI data on the ground the data did not correctly reflect exposure to youth in California. The court also noted Reynolds did not present substantial evidence that MRI's results for California would differ from nationwide results.

Reynolds attacks the court's conclusion as improperly ignoring that it was the People's burden to prove Reynolds violated the youth targeting prohibition in California. Further, characterizing the People's case as built on nationwide MRI data measuring magazine readership, Reynolds contends the People did not attempt to limit the data to California or derive any statewide exposure measurements from MRI's nationwide data. Reynolds asserts that MRI's data did not show Reynolds engaged in any action in California that violated the prohibition on youth targeting set forth in the MSA or Consent Decree, and contends the court could not correctly assume the magazine exposure measured nationwide by MRI was proportionately the same within California. However, on this

record Reynolds cannot establish it was prejudiced by any error in the court's reasoning or analysis on this issue because it is not reasonably likely an outcome more favorable to Reynolds would have resulted absent the error. (§ 475; Evid.Code, § 353, subd. (b); *People v. Watson, supra*, 46 Cal.2d at p. 836, 299 P.2d 243.)

In response to Reynolds's counsel's question, "don't you think that more than 5 percent of teens in California don't read magazines that contain Reynolds's cigarette ads?" the People's survey design expert (Kamins) testified that the MRI data have a range of error and their statistical variation might increase the number to 7 percent. Further, MRI's sample was disproportionately over-allocated within MRI's 10 major media markets, which were "self-representing" and included Los Angeles and San Francisco. The final 1999 media recommendation for Reynolds's Camel brand sought to maintain its market share of sales to the target audience in key Camel brand markets; and that recommendation contained advertising schedules for alternative weeklies in the "core market" of Los Angeles and the "non-core markets" of Oakland, San Diego, San Francisco, San Jose and Sacramento. The final 1999 recommended media plan for Reynolds's Winston brand contained media advertising schedules for alternative publications in Los Angeles, San Diego, San Francisco and San Jose/Santa Cruz. With respect to market selection rationale, the final 2000 media recommendation for Reynolds's Camel brand identified markets—including Los Angeles/Long Beach, Oakland, San Diego, San Francisco, San Jose and Sacramento—as possessing a high percentage of 18–plus population, high Camel market share, and ***1281** alternative weeklies; and that recommendation contained advertising schedules for alternative weeklies in Los Angeles, Oakland, Sacramento, San Diego, San Francisco, and San Jose. The final 2001 print plan for Reynolds's Winston brand contained a recommended publication list that included alternative weekly publications in Los Angeles, Sacramento, San Diego, and San Francisco. We conclude that, regardless of any error in its reasoning or analysis, the trial court's implied finding that Reynolds's advertising targeted youth within California was supported by substantial evidence and reasonable inferences drawn from that evidence.

Evidence Involving Reynolds's Competitors

[21] Philip Morris and B & W are competitors of Reynolds. Over Reynolds's ****341** hearsay objection, the trial court permitted the People to introduce evidence of those competitors' policies regarding advertising to youth. The court's statement of decision contained various references to that evidence.

First, the trial court found as fact: (1) In January 2000, B & W announced a policy that it would not place tobacco advertising in any publication with a youth composition of more than 15 percent; (2) in May 2000, Philip Morris announced a policy that it would not place tobacco advertisements in any publication with a youth composition of more than 15 percent or that is exposed to more than two million youth; and (3) in 2000, "there was a decline in the amount of print advertising, money spent by Philip Morris and B & W and in the amount of Youth exposure to their print advertising...."

The trial court stated that the "actual practice of other tobacco companies, such as Philip Morris, demonstrates that it is possible to reduce Youth exposure in print media advertising to levels below those for targeted adult smokers while maintaining significant exposure to adult smokers."

Finally, in its legal conclusions and findings bearing on the construction of the prohibitions in the MSA and Consent Decree on youth targeting, the trial court stated the evidence established Philip Morris and B & W reduced their advertising exposure to youth after signing the MSA by not advertising in publications having more than 15 percent youth composition, with Philip Morris also deciding not to advertise in publications with exposure to youth of more than two million. The court then characterized the conduct of Philip Morris and B & W as providing "strong circumstantial evidence that they believed that dramatic steps to reduce Youth exposure to tobacco advertising had to be taken to comply with the requirements of the MSA."

***1282** Attacking the trial court's findings and conclusions about Philip Morris and B & W as dependent on inadmissible hearsay evidence, Reynolds contends no witness from those companies testified at trial or deposition, no document created by or from the files of those companies was admitted into evidence, and no testimony or document describing the print

placement policies of those companies was admitted for its truth. Reynolds also notes the court admitted two Reynolds-created documents describing the print policies of Philip Morris and B & W to show Reynolds's state of mind but expressly not to prove the truth of those companies' internal policies.[FN16] Reynolds contends the court abused its discretion by violating its own rulings and relying on those policies for ****342** their truth. (*People v. Rowland, supra*, 4 Cal.4th at p. 266, 14 Cal.Rptr.2d 377, 841 P.2d 897; *Shamblin v. Brattain, supra*, 44 Cal.3d at pp. 478–479, 243 Cal.Rptr. 902, 749 P.2d 339; *Clauser/Wells, supra*, 95 Cal.App.4th at p. 1073, 116 Cal.Rptr.2d 240; *Korsak, supra*, 2 Cal.App.4th at pp. 1524–1526, 3 Cal.Rptr.2d 833.)

> FN16. A June 2000 Reynolds memorandum inviting attendance at a meeting at which the subject would be Reynolds's "recently-revised magazine approval policy" and at which there would also be discussion of "recent announcements by Philip Morris relative to print advertising and what those announcements mean in terms of publications affected" was admitted to show only Reynolds's state of mind. Accompanying the memorandum were Reynolds's descriptions of Philip Morris's policy announcements that Philip Morris advertisements would no longer appear on magazine back covers and would not appear in any publication with a composition greater than 15 percent of readers under age 18 or with more than two million readers under age 18; a list of magazines in which Philip Morris's cigarettes would no longer be advertised; and a list of magazines remaining within Philip Morris's guidelines.
>
> Also admitted to show only Reynolds's state of mind was a January 2000 Reynolds message regarding "coverage of B & W's internal policy of not advertising in" publications with more than "15% readership under the age of 18" and noting that Reynolds had received numbers about "readership breakdowns" of each of the publications.

Reynolds contends that in construing MSA, subsection III(a), the trial court improperly relied on the actions of Philip Morris and B & W in changing their policies. Reynolds asserts the court improperly concluded that Philip Morris and B & W believed the changes were required by MSA, subsection III(a). However, our interpretation of subsection III(a) differs from the trial court's interpretation and does not depend on conclusions about Reynolds's competitors' reasons for their policy changes. Therefore, Reynolds does not demonstrate reversible error by the trial court with respect to those competitors' beliefs about the meaning of MSA, subsection III(a).

Reynolds also contends that in concluding the actions of Reynolds's competitors demonstrated the possibility of reducing levels of print media advertising exposure to youth while maintaining significant exposure to the stated target of young adult smokers, the trial court improperly accepted the truth of the hearsay evidence of the substance and results of those competitors' new policies and practices regarding advertising exposure to youth. However, because there is sufficient other evidence showing other media ***1283** advertising schedules could reduce advertising exposure to youth while maintaining significant exposure to Reynolds's stated target, Reynolds does not demonstrate that the outcome at trial would have been more favorable to Reynolds absent the competitor-related evidence that alternative media advertising schedules were available.

Reynolds's media director/senior manager for media planning (Ittermann) testified that in the period of June 2000 to March 2001 she was aware that Philip Morris had adopted a policy of not advertising in a magazine with more than 15 percent youth composition or with an exposure to more than two million youth. Ittermann had also looked at the application of that Philip Morris policy on the magazines in which Reynolds advertised. Further, as acknowledged by Reynolds, the trial court properly admitted Reynolds-created documents regarding its competitors' policies to the extent probative of Reynolds's state of mind. On this record, those documents were at most cumulative to other evidence that Reynolds targeted its tobacco advertising to youth.

B

Sanction Award

At trial, the parties agreed the Consent Decree entitled the People to seek monetary sanctions for violation of the Consent Decree.[FN17] The trial court's judgment ordered Reynolds to pay the People $20

million in monetary sanctions based on its ****343** finding that Reynolds violated section V(A) of the Consent Decree. Reynolds asserts the trial court abused its discretion and attacks the $20 million sanction award as unsupported by the evidentiary record and without findings supporting the amount imposed. (*Palm Valley Homeowners Assn., Inc. v. Design MTC* (2000) 85 Cal.App.4th 553, 558, 102 Cal.Rptr.2d 350; *Winikow v. Superior Court* (2000) 82 Cal.App.4th 719, 726, 98 Cal.Rptr.2d 413; *Childs v. PaineWebber Incorporated* (1994) 29 Cal.App.4th 982, 996, 35 Cal.Rptr.2d 93; *Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 124, 260 Cal.Rptr. 369.) Reynolds also contends the amount of sanctions awarded for its conduct in California violated due process ***1284** because it was based on Reynolds's spending on nationwide print advertising without evidence of Reynolds's spending on advertising in California. (Cf. *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513, 1521–1522, 155 L.Ed.2d 585 (*State Farm*); *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 571–572, 116 S.Ct. 1589, 134 L.Ed.2d 809 (*BMW*); *White v. Ford Motor Co.* (9th Cir.2002) 312 F.3d 998, 1015–1016, 1018, 1020 (*White*).) The People assert both the imposition and amount of sanctions were reasonable, and contend the award was justified by Reynolds's "knowing, flagrant, and persistent violation of the preexisting injunction, its steadfast refusal to cure its violation voluntarily, and the magnitude of the harm it inflicted." However, although the trial court gave adequate reasons for imposing sanctions, the court improperly based the amount of the sanction award on (1) Reynolds's national advertising spending rather than on Reynolds's advertising spending in California and (2) Reynolds's wealth. We conclude the portion of the judgment awarding sanctions must be reversed.

> FN17. Section VI(A) of the Consent Decree provides in relevant part: "For any claimed violation of this Consent Decree and Final Judgment, in determining whether to seek an order for monetary, civil contempt or criminal sanctions for any claimed violation, the Attorney General shall give good-faith consideration to whether: (1) the Participating Manufacturer that is claimed to have committed the violation has taken appropriate and reasonable steps to cause the claimed violation to be cured, unless that party has been guilty of a pattern of violations of like nature; and (2) a legitimate, good-faith dispute exists as to the meaning of the terms in question of this Consent Decree and Final Judgment. The Court in any case in its discretion may determine not to enter an order for monetary, civil contempt or criminal sanctions."

1

Entitlement to Sanctions

The trial court stated the sanctions against Reynolds were "[b]ased on the evidence presented in this case" and recited in its statement of decision the evidence that entitled the People to sanctions. We summarize the evidence detailed by the court and the court's findings based on that evidence.

(a)

Evidence on Sanctions

After signing the MSA in 1998 and until June 2000, Reynolds made no changes in its print media policies, did not include the goal of reducing tobacco advertising exposure to youth in its marketing plans, avoided conducting media research to determine the extent to which its print advertising was exposed to youth, and otherwise took no action to evaluate whether it was meeting its professed goal of reducing youth smoking. Instead, Reynolds followed its previous pattern of avoiding advertising in magazines with more than a 50 percent composition of youth.[FN18]

> FN18. The court noted that in December 1999 after state attorneys general had expressed concern to Reynolds about youth targeting in magazine advertisement placement, Reynolds's general counsel wrote to the National Association of Attorneys General Tobacco Committee: "We are unwilling to preclude ourselves from advertising in publications which have more than a certain number of 'readers' who are under the age of 18 when that number is less than 50 percent of 'readers.' This would preclude us from one or more of the most popular publications, even if this 'readership' overwhelmingly was adult—a result which would damage us competitively and unacceptably oust us from one of the remaining media through which we can communicate with adults who smoke."

***1285** Although Reynolds subsequently made changes in its media advertising ****344** schedule, those changes had minimal impact in reducing exposure of its advertising to youth. After Reynolds in June 2000 announced a 33 1/3 percent youth composition policy, the only tangible consequence of that change was the removal of one magazine (Vibe) from Reynolds's media advertising schedule. In March 2001 on the date the People filed this lawsuit against Reynolds, Reynolds announced a policy of not advertising in any magazine having a youth composition over 25 percent according to MRI's or Simmons's data. As a result of that change in policy, Reynolds eliminated one publication in which it was advertising (Spin) and removed from its media advertising schedule three publications in which it was not advertising.

Meanwhile, in 1999 through 2001 in devising media plans for its nationwide magazine advertising, Reynolds used MRI's data to measure the quantitative effectiveness and demographic composition of the audience to which its print media campaign was exposed, including reach, frequency and target rating points. Reynolds also used MRI's data to measure the effectiveness of its print advertising in targeting various segments of the adult market.

The stated target of most of Reynolds's print media advertising was young adult smokers age 21 to 34. Reynolds's Camel brand also targeted adults age 21 to 24. MRI's 1997–2001 data indicated exposure of Reynolds's print media advertising to its stated target of young adult smokers and to youth age 12 to 17 was essentially the same. Further, according to MRI's data based on 38 teen-measured magazines, Camel advertising exposure to youth increased after the MSA was signed. Moreover, Reynolds advertised in many magazines exposed to large youth composition, including Sports Illustrated with exposure to about 5 million youth. In addition to advertising in magazines exposed to a higher percentage of youth than young adult smokers, Reynolds also advertised in many magazines exposed to youth at disproportionately higher levels than adult smokers.[FN19]

> FN19. The court noted that 89 percent of Camel advertisements in year 2000 were in magazines with youth composition exceeding the percentage of youth (10.4 percent) in the United States population.

After signing the MSA, Reynolds exposed its tobacco advertising to youth at levels similar to those of targeted groups of adult smokers. Although Reynolds had access to MRI's and Simmons's data that would have revealed the reach and frequency of Reynolds's advertising to youth to be about the same as for the stated target groups of adult smokers, Reynolds did not ***1286** examine those data. Further, it was possible to develop and implement media advertising schedules and measure their success with the purpose of reducing exposure of cigarette advertising to youth while retaining significant exposure to adult smokers. Minimizing exposure to certain groups was also possible because the character of magazine advertising allowed advertisers to identify demographic groups based on age, income and lifestyle. Reynolds could have developed media advertising schedules to achieve effective exposure through print advertising to adult smokers while also significantly reducing exposure to youth.[FN20] However, despite its stated post-MSA policy of avoiding targeting youth in its advertising, Reynolds did not attempt to measure the success of that ****345** goal although it could have done so through use of available data it used to measure its other media-related goals.

> FN20. The court noted the People's media planning expert (McCullough) developed media advertising schedules that achieved effective exposure through print advertising to 87 to 92 percent of adult smokers while demonstrating significant reduction to youth exposure.

(b)

Trial Court's Findings on Entitlement to Sanctions

[22] Federal case law involving punitive damages is instructive with respect to the People's entitlement to sanctions. In *State Farm, supra,* 123 S.Ct. at page 1521, the Supreme Court stated the " 'most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' " Further, the Supreme Court has "instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical [in contrast] to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice,

trickery, or deceit, or mere accident. [Citation.] The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *(Ibid.)* We summarize the trial court's findings bearing on the People's entitlement to sanctions.

In 1999 and 2000, Reynolds did nothing to reduce its tobacco product advertising exposure to youth. In 2001 Reynolds did "very little." Further, Reynolds took action only after being given notice of the People's intent to file this lawsuit, and waited until the day this action was filed to take insufficient remedial action. Moreover, despite access to data by which exposure to youth could have been compared to exposure to adult smokers, ***1287** Reynolds "intentionally avoided" examining those data that would have confirmed whether Reynolds was succeeding in its stated intention to avoid exposure of its tobacco advertising to youth. Reynolds's failure to measure whether it was meeting its stated goal of minimizing exposure to youth "casts doubt" on Reynolds's intent to abide by either the MSA's terms or Reynolds's expressed intention to avoid targeting youth. In "a corporate world where most goals are set and then measured, it strains credibility that [Reynolds] seriously set avoidance of Youth exposure as a goal, and yet, unlike any other goals it set for its performance, refused to measure the attainment of this goal." Examination of available data would have shown that Reynolds's advertising exposed 97.1 percent of youth 68.2 times on average in 1999; 95.2 percent of youth 54.7 times on average in 2000; and 85.5 percent of youth 16.3 times on average in 2001. Those figures were substantially similar to the figures for targeted adult smokers during those periods.

Further, at various times between 1999 and 2001, Reynolds's policy allowed it to advertise in magazines with youth composition of up to 50, 33 1/3 or 25 percent. Although Reynolds's president (Beasley) "professed" not to know that only about 10 percent of the United States population was made up of teenagers, the evidence made it "reasonable to infer" that Reynolds's "knowledgeable and talented marketing people ... knew this fact." Moreover, during those years, Reynolds's policy also allowed it to advertise in magazines in which youth represented two and one-half to five times the proportion of youth in the population. Additionally, between 1998 and 2001, Reynolds devoted a substantial portion of its advertising to magazines with a disproportionately high youth composition, including rock entertainment music****346** magazines (Spin, Vibe and Rolling Stone) and motor magazines (Hot Rod and Car and Driver). Under those circumstances, it was "reasonable to conclude" that Reynolds, even without examining all the data at its disposal, knew with substantial certainty that it was exposing its print advertising to youth at levels at least as great as its exposure to adults.

Additionally, Reynolds was losing market share and believed it had to be more aggressive than other tobacco companies in its advertising to prevent loss of additional market share "even though the likely effect of these efforts" would cause significant exposure of its tobacco advertising to youth. Thus, to achieve its marketing goals in the most direct manner, Reynolds "willingly engaged in an aggressive print advertising campaign to maximize exposure to targeted groups such as Young adult smokers" while "simply choosing to ignore" the substantial certainty of significant exposure to youth. Although in 2001 a Reynolds executive announced that Reynolds understood the MSA sought to effect a dramatic reduction of tobacco advertising exposure to youth ***1288** while allowing limited communications with adult smokers, Reynolds nevertheless "conducted itself in a manner inconsistent with its understanding of the [MSA's] mandate" by pursuing an extensive advertising campaign aimed at young adult smokers without taking any action to effect a reduction of exposure to youth.

Moreover, testimony by media experts suggested that if a specific age group like young adults was targeted, other age groups closest to the targeted age group would also be reached in higher proportion than groups more distant in age from the targeted group. Further, a substantial portion of Reynolds's advertisements appeared in publications in which youth composition was disproportionately higher than young adult composition. The "totality of this evidence leads to the logical conclusion that it was or should have been apparent" to the people managing Reynolds's "multimillion dollar sophisticated print advertising campaign" that its tobacco advertising was exposed to youth at levels substantially similar to targeted adult smokers.

"Taking all of the evidence presented into account, it appears likely [Reynolds] studiously avoided

analyzing" the reach and frequency of its advertising to youth age 12 to 17 or comparing those figures to the reach and frequency of its target group of young adult smokers because Reynolds "knew the likely result of such analysis." That evidence also provides strong circumstantial support for the conclusion of the MRI data that Reynolds succeeded in exposing its advertising to youth at essentially the same levels as the exposure to its targeted young adult smokers and thus violated the MSA's prohibition on targeting youth.

In sum, in its statement of decision the trial court made detailed references to the evidence and numerous findings adequate to support its determination that sanctions were warranted for Reynolds's conduct in not taking appropriate and reasonable steps to cure the claimed violation of MSA, subsection III(a) and Consent Decree, section VI(A). (*State Farm, supra,* 123 S.Ct. at p. 1521.) [FN21]

FN21. Reynolds's contention that sanctions were unwarranted because the parties assertedly had a "legitimate, good-faith disagreement about the proper interpretation" of MSA, subsection III(a) is not on this record persuasive. (Consent Decree, § VI(A).) Reynolds asserts the basis for the sanction award was the trial court's "aggressive interpretation" of subsection III(a), an interpretation characterized by Reynolds as "at best ambiguous." However, consistent with Reynolds's proffered construction of subsection III(a)'s prohibition on youth targeting, we have interpreted the subsection as requiring proof of intent to demonstrate a violation of that prohibition. Based on our review of this record in accordance with our interpretation of subsection III(a), Reynolds violated that subsection by targeting youth because it knew with substantial certainty its tobacco advertising was exposed to youth to the same extent it was exposed to young adults. The sanctions are based on that violation.

Reynolds's contention that the sanction award improperly punished Reynolds's First Amendment communication with adult smokers is also unpersuasive. Reynolds was sanctioned not for its constitutionally protected communication with adult smokers but instead for its violation of MSA, subsection III(a) by targeting youth in its tobacco advertising.

****347 *1289** 2

Amount of Sanction Award

[23] Although on this record the trial court could properly conclude the People were entitled to an award of sanctions, the court did not provide an adequate rationale for the amount of sanctions imposed.

The People based their request for $20 million in sanctions on Reynolds's nationwide advertising spending, not on its California advertising spending. Specifically, in arguing to the court, the People asserted: "The People believe that monetary sanctions of $20 million is reasonable in this case. That represents about 10 percent of the money that Reynolds spent on magazine advertising during the relevant three-year period, and is less than one percent of Reynolds's cash on hand at the end of 2001. This is reasonable." However, the holdings in various federal cases involving punitive damages lead to a conclusion that the award of sanctions for Reynolds's conduct in California could not properly be based on Reynolds's nationwide financial figures without violating Reynolds's due process rights. (*State Farm, supra,* 123 S.Ct. at pp. 1551–1522; *BMW, supra,* 517 U.S. at pp. 571–572, 116 S.Ct. 1589; *White, supra,* 312 F.3d at pp. 1015–1016, 1018, 1020.)

[24][25][26] Punitive damages are "aimed at deterrence and retribution." (*State Farm, supra,* 123 S.Ct. at p. 1519.) "While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. [Citations.] The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." (*Id.* at pp. 1519–1520.) "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." (*Id.* at p. 1520.)

[27][28][29][30] "Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." (*State Farm, supra,* 123 S.Ct. at p. 1522.) However, a

"State cannot punish a defendant for conduct that may have been lawful where it ***1290** occurred." (*Ibid.*) [FN22] Moreover, as a general rule, a ****348** State does not have "a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." (*Ibid.*) Similarly, in *White, supra*, 312 F.3d at page 1018, the court stated that " 'a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' ... conduct in other States,' whether the extraterritorial conduct is lawful or not." (Fn.omitted.) Thus, a "punitive damages award that encompasses a defendant's extraterritorial conduct may be unconstitutional even if the size of the award itself ... is not outside the bounds of due process." (*Id.* at p. 1016, fn. omitted.) [FN23] In our view, the principles applicable to punitive damage awards are applicable to the sanctions imposed in this case.

> FN22. In *State Farm, supra*, 123 S.Ct. at page 1521, the Supreme Court noted: "While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further.... [¶] This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct direct [ed] toward the Campbells."

> FN23. In *White, supra*, 312 F.3d 998, the "evidence focused on the number of vehicles Ford sold nationally, and the number of parking brake failures reported nationally." (*Id.* at p. 1015.) "In essence, the jury was asked to measure damages by Ford's harm to the whole country." (*Ibid.*) Thus, the court reversed a punitive damages award on the ground the "award unconstitutionally allowed a Nevada jury to punish Ford for out-of-state conduct...." (*Id.* at p. 1020.)

[31] Here, the People's request for $20 million in sanctions was based on Reynolds's nationwide spending on print advertising and profitability without evidence of its advertising spending or profitability in California. Similarly, the trial court's statement of decision focused on Reynolds's nationwide financial numbers. (*White, supra*, 312 F.3d at p. 1015.) Specifically, the court found: (1) Between 1999 and 2001, Reynolds spent more than $200 million on print advertising; (2) in 1999 Reynolds earned $195 million; in 2000, $352 or $353 million; and in 2001, $444 million; and (3) at the end of 2001, Reynolds's holding company held cash and short-term investments of more than $2.2 billion. However, the People have not demonstrated that they have any interest in punishing Reynolds for its conduct outside California's jurisdiction. (*State Farm, supra*, 123 S.Ct. at p. 1522; *White*, at pp. 1015–1016, 1018, 1020.) On this record we cannot say that in awarding sanctions based upon Reynolds's nationwide numbers, the trial court was vindicating only California's "interest in protecting its citizens." (*White*, at p. 1015.) Further, Reynolds's "extraordinary wealth" does not support the amount of the sanction award. A defendant's wealth "cannot justify an otherwise unconstitutional punitive damages award." (*State Farm*, at p. 1525.) Accordingly, on this record the award of sanctions in the amount of $20 million must be reversed.

***1291** III

DISPOSITION

The portion of the judgment awarding the People sanctions against Reynolds is affirmed as to entitlement but reversed as to amount and remanded for further proceedings. In all other respects the judgment is affirmed. The parties shall bear their own costs on appeal.

WE CONCUR: McCONNELL, P.J., and HALLER, J.

Cal.App. 4 Dist.,2004.
People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.
116 Cal.App.4th 1253, 11 Cal.Rptr.3d 317, 04 Cal. Daily Op. Serv. 2378, 2004 Daily Journal D.A.R. 3500

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113 Cal.App.4th 456, 6 Cal.Rptr.3d 389, 03 Cal. Daily Op. Serv. 9949, 2003 Daily Journal D.A.R. 12,477
(Cite as: 113 Cal.App.4th 456, 6 Cal.Rptr.3d 389)

H

Court of Appeal, Fourth District, Division 1, California.
The PEOPLE, Plaintiff and Respondent,
v.
Anthony Lee WHITLOCK, Defendant and Appellant.

No. D041020.
Nov. 19, 2003.
Review Denied March 17, 2004.

Background: District attorney filed petition to have prisoner declared committee under Sexually Violent Predators Act (SVPA). The Superior Court, San Diego County, No. SCD100249,Judith F. Hayes, J., sustained petition. Committee appealed.

Holdings: The Court of Appeal, Huffman, Acting P.J., held that:
(1) committee's prior conviction of lewd and lascivious conduct with child under age of 14 qualified as "sexually violent offense" under SVPA, even though committee touched victim's genital area outside her clothing, and
(2) substantial evidence supported finding that such prior conviction involved substantial sexual conduct.

Affirmed.

West Headnotes

[1] Mental Health 257A 454

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak452 Sex Offenders
257Ak454 k. Persons and Offenses Included. Most Cited Cases

Under the Sexually Violent Predators Act (SVPA), when the victim of a potential committee's prior offense is under 14 years old, in order for the offense to qualify as a "sexually violent offense," it either has to involve the use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury, or it has to involve substantial sexual conduct. West's Ann.Cal.Welf. & Inst.Code §§ 6600(b), 6600.1(a).

[2] Mental Health 257A 454

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak452 Sex Offenders
257Ak454 k. Persons and Offenses Included. Most Cited Cases

Committee's prior conviction of lewd and lascivious conduct with child under 14 qualified as prior "sexually violent offense," involving "substantial sexual conduct" under Sexually Violent Predators Act (SVPA), despite lack of skin-to-skin contact, as committee touched victim's genital region over her clothing. West's Ann.Cal.Penal Code § 288(a); West's Ann.Cal.Welf. & Inst.Code §§ 6600(a)(1), (b), 6600.1(a, b).
See 3 Witkin, Cal. Criminal Law (3d ed. 2000) Punishment, § 194; Cal.Jur.3d, Incompetent, Addicted, and Disordered Persons §§ 23, 24.

[3] Statutes 361 188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

To ascertain the common meaning of a word in a statute, a court typically looks to dictionaries.

[4] Mental Health 257A 454

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak452 Sex Offenders

257Ak454 k. Persons and Offenses Included. Most Cited Cases

For purpose of Sexually Violent Predators Act (SVPA), which designates masturbation of victim or offender as "substantial sexual conduct" required to qualify prior offense as "sexually violent offense" where victim is under age of 14, "masturbation" is defined as any touching or contact, however slight, of the genitals of either the victim or the offender, with the requisite intent. West's Ann.Cal.Welf. & Inst.Code §§ 6600(a)(1), (b), 6600.1(a, b).

[5] Mental Health 257A 454

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak452 Sex Offenders
257Ak454 k. Persons and Offenses Included. Most Cited Cases

Evidence that victim of lewd and lascivious conduct with child under age of 14 reported that offender had touched her in "crotch" on outside of her clothing while she was sitting on his lap, together with offender's admission that his touching was intentional and his asking child to keep incident a secret, supported finding that offense involved "substantial sexual conduct" within meaning of Sexually Violent Predators Act (SVPA), and thus qualified as prior "sexually violent offense." West's Ann.Cal.Penal Code § 288(a); West's Ann.Cal.Welf. & Inst.Code §§ 6600(a)(1), (b), 6600.1(a, b).

****390 *458** Chris Truax, San Diego, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, William M. Wood and Holly D. Wilkens, Deputy Attorneys General, for Plaintiff and Respondent.

***459** HUFFMAN, Acting P.J.

Following a court trial, Anthony Lee Whitlock was adjudged to be a sexually violent predator (SVP) within the meaning of Welfare and Institutions Code [FN1] sections 6600 et seq., the Sexually Violent Predators Act (SVPA). The trial court ordered Whitlock committed to the custody of the Department of Mental Health for a period of two years.

FN1. All statutory references are to the Welfare and Institutions Code unless otherwise specified.

Whitlock appeals, contending he is not an SVP because he did not have the requisite qualifying prior convictions.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 16, 2001, the District Attorney of San Diego County filed a petition to have Whitlock committed to the Department of Mental Health for a two-year period under the SVPA because he had been convicted of a sexually violent offense against two victims, and, as a result of a mental disorder, it was likely he would again engage in sexually violent criminal behavior, thereby making him a danger to the health and safety of others.

The petition alleged that on April 27, 1989, Whitlock had pled guilty to committing a lewd and lascivious act upon a child under the age of 14 (Pen.Code, § 288, subd. (a)) and was sentenced to prison for six years. According to the probation report for this case, Whitlock sat down on ****391** the bed next to the victim, a 10–year–old girl who was lying down, and asked her to spread her legs. The victim, who was wearing shorts, refused to do so, and Whitlock placed one of his fingers between her legs and began stroking her right thigh. Whitlock worked his hands up into the right leg of the shorts, near the girl's vagina. Whitlock asked the girl to hug him, but she refused. Whitlock placed his other arm around her and pulled her closer to him. Whitlock continued to rub the area around the girl's vagina and eventually worked his hand into her vagina and rubbed it. The victim protested that the rubbing of the vagina was causing her pain, but Whitlock continued and began kissing the girl's neck. After about 15 minutes, Whitlock stopped. Whitlock told the girl not to tell her mother what had happened and asked her to promise not to do so.

The petition also alleged that on April 26, 1994, Whitlock pled guilty to committing a lewd and lasci-

vious act upon a child under the age of 14 and was sentenced to prison for eight years. According to the probation report in the case, Whitlock invited a five-year-old girl to his apartment to watch a ***460** Superman video. Whitlock asked the girl to sit on his lap and she complied. Whitlock began "touching her vagina over her clothing with his hand."

The five-old-girl told her mother that she was not supposed to tell her about the incident because it was a secret. Whitlock acknowledged that the girl sat on his lap but denied molesting her. Whitlock said he had forgotten it was a condition of his probation not to be alone with children. Whitlock later told a psychologist who evaluated him that he intentionally placed his hand over the child's vaginal area and rubbed the area over the girl's clothing.

Whitlock was diagnosed as suffering from pedophilia, alcohol dependence and post-traumatic stress syndrome by three evaluating psychologists. These psychologists opined that Whitlock was an SVP within the meaning of the SVPA. These psychologists reported that, according to Whitlock's score on the STATIC 99 test, there was a 52 percent likelihood of his re-offending within the next 15 years.

The defense presented an evaluation by another psychologist who opined that Whitlock did not have a diagnosable mental disorder within the meaning of the SVPA that would make him a menace to the health and safety of others. The defense expert also concluded Whitlock was unlikely to re-offend as a result of a mental disorder.

The trial court found beyond a reasonable doubt that (1) Whitlock met the criteria for commitment under section 6600, subdivision (a), and (2) Whitlock was likely to commit sexually violent predator behavior upon release.

DISCUSSION

I.

Overview of the SVPA

[1] The SVPA provides for the continued confinement (in the custody of the Department of Mental Health) of a person identified as an SVP before the completion of his or her prison or parole revocation term. An SVP is "a person who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) A "sexually violent offense" within the meaning of SVPA includes eight enumerated sex crimes "committed by force, violence, duress, menace, or fear of immediate and ****392** unlawful bodily injury on the victim or another ***461** person." (§ 6600, subd. (b).) [FN2] Additionally, "[i]f the victim of an underlying offense that is specified in subdivision (b) of Section 6600 is a child under the age of 14 and the offending act or acts involved substantial sexual conduct, the offense shall constitute a 'sexually violent offense' for purposes of Section 6600." (§ 6600.1, subd. (a).) [FN3] Thus, under the SVPA, when the victim is under 14 years old, a "sexually violent offense" either has to involve the use of force, violence, duress, menace or fear of immediate and unlawful bodily injury, *or* involve "substantial sexual conduct." (See *People v. Superior Court (Johannes)* (1999) 70 Cal.App.4th 558, 563–568, 82 Cal.Rptr.2d 852.)

> FN2. These crimes are: rape of a nonspouse (Pen.Code, § 261, subd. (a)(2)); rape of a spouse (Pen.Code, § 262, subd. (a)(1)); rape in concert (Pen.Code, § 264.1); sodomy (Pen.Code, § 286); lewd and lascivious acts upon a child under age 14 (Pen.Code, § 288, subds. (a) & (b)); oral copulation (Pen.Code, § 288a); and sexual penetration by a foreign object (Pen.Code, § 289, subd. (a)). (§ 6600, subd. (b); *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1145, 81 Cal.Rptr.2d 492, 969 P.2d 584.)

> FN3. "Substantial sexual conduct" is defined as "penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any other foreign object, oral copulation, or masturbation of either the victim or the offender." (§ 6600.1, subd. (b).)

As we explained in *People v. Chambless* (1999) 74 Cal.App.4th 773, 777, 88 Cal.Rptr.2d 444 to 778 *(Chambless)*, the procedure under the SVPA begins when the Department of Corrections

> "determines the inmate approaching sentence completion may be an SVP [and] refers him or her for evaluation to see if the inmate falls under the [SVPA]. (§ 660l, subds. (a), (b), (c) & (d).) When

the evaluation reveals the inmate has suffered the required qualifying prior convictions (§§ 6600, subds. (a) & (b), 6600.1) and two licensed psychologists and/or psychiatrists agree the inmate 'has a diagnosed mental disorder such that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody,' the [Department of Mental Health] transmits a request for a petition for commitment under the [SVPA] to the county in which the alleged SVP was last convicted, with copies of the evaluation reports and other supporting documents. (§ 6601, subds. (d), (h) & (i).) If a designated county's attorney concurs in the request, a petition for commitment is filed in that county's superior court. (§ 6601, subd. (i).)

"Once filed, the superior court holds a hearing to determine whether there is 'probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release.' (§ 6602.) If such is found, the judge 'shall' order that a trial be conducted 'to determine whether the person is, by reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence upon his or her release....' (§ 6602.)" (Fns. omitted.)

***462** II.

Does the 1994 Conviction Qualify as a "Sexually Violent Offense" for SVPA Purposes?

[2] Whitlock contends his 1994 conviction for Penal Code section 288, subdivision (a), involving the five-year-old victim was not a sexually violent offense within the meaning of the SVPA because there was no skin-to-skin contact and hence did ****393** not entail "substantial sexual conduct." The contention is without merit.

The SVPA provides that an SVP's prior conviction of one of the sex crimes listed in section 6600, subdivision (b) (see *ante*, fn. 2) where the victim is under the age of 14 qualifies as prior sexually violent offense if the offense involved "substantial sexual conduct." (§ 6600.1, subd. (a).) Under section 6600.1, subdivision (b), masturbation of the victim or the offender is included in the SVPA's definition of "substantial sexual conduct." (See *ante*, fn. 3.)

As we pointed out in *Chambless*, California statutory law does not provide a formal legal definition of masturbation. (*People v. Chambless, supra*, 74 Cal.App.4th at p. 784, 88 Cal.Rptr.2d 444.) "Rather, such word appears to have been used simply in its commonly understood meaning to describe the touching of one's own or another's private parts without quantitative requirement for purposes of defining conduct that was lewd or sexually motivated." (*Ibid.*, fn. omitted.)

[3] To ascertain the common meaning of a word, "a court typically looks to dictionaries." (*Consumer Advocacy Group Inc. v. Exxon Mobil Corp.* (2002) 104 Cal.App.4th 438, 444, 128 Cal.Rptr.2d 454.) Turning to Merriam–Webster's Collegiate Dictionary, masturbation is defined as "erotic stimulation of the genital organs commonly resulting in orgasm and achieved by manual or other bodily contact exclusive of sexual intercourse, by instrumental manipulation, occas[ionally] by sexual fantasies, or by various combinations of these agencies." (Webster's 9th New Collegiate Dict. (1988) p. 732; see also *People v. Chambless, supra*, 74 Cal.App.4th at p. 784, fn. 16, 88 Cal.Rptr.2d 444 [dictionaries' definitions of masturbation].)

[4] In *Chambless, supra*, after considering common dictionary definitions and basic rules of statutory construction, we concluded that the definition of masturbation "encompasses any touching or contact, however slight, of the genitals of either the victim or the offender, with the requisite intent." (*People v. Chambless, supra*, 74 Cal.App.4th at pp. 783–787, 88 Cal.Rptr.2d 444.) In other words, masturbation describes "any act of genital touching." (*Id.* at p. 785, 88 Cal.Rptr.2d 444.)

***463** Whitlock claims his conduct with the five-year-old girl was not masturbation within the meaning of the SVPA because he did not directly touch or contact the girl's vagina. " 'Contact' with clothing is not 'contact' with a sexual organ as the word 'contact' is normally understood," Whitlock argues. We disagree.

Neither *Chambless* nor the SVPA requires the touching or contact of bare skin. *Chambless* repeatedly refers to masturbation as *any* genital touching. (*People v. Chambless, supra*, 74 Cal.App.4th at pp. 783, 88 Cal.Rptr.2d 444 ["however slight"], 786, 787 ["however slight"].) The focus is not on the amount of the contact but rather whether genital contact was

made. (*Id.* at p. 786, 88 Cal.Rptr.2d 444.) Whether the genital touching occurs over clothing is not determinative. Masturbation as it is defined in *Chambless* and is commonly understood can occur under clothing and over clothing.

Moreover, Whitlock's argument that there is no legal authority that substantial sexual conduct within the meaning of the SVPA can be established when the contact between the offender and the victim occurs through clothing is not persuasive. The lack of case law on this point may simply indicate that the question has not come up before in this particular context.

Further, Whitlock is mistaken when he argues that without a skin-to-skin requirement, it will be deemed masturbation and therefore "substantial sexual conduct" ****394** within the meaning of the SVPA whenever a child victim sits on a perpetrator's lap and there is inappropriate touching. To the contrary, if, for example, a perpetrator inappropriately but not forcefully rubs the chest of a child sitting on his or her lap, the perpetrator may very well be guilty of lewd and lascivious acts on a child under 14, but a conviction of that offense under those facts would not be a qualifying conviction under the SVPA because it did not involve masturbation or any other "substantial sexual conduct." It bears repeating that masturbation, as the term is explained in *Chambless* and is commonly understood, requires the inappropriate contact to involve a genital touching. Thus, contrary to Whitlock's argument, not all prior convictions of Penal Code section 288, subdivision (a) will be qualifying prior convictions under the SVPA if there is no skin-to-skin requirement. (See *People v. Chambless, supra*, 74 Cal.App.4th at pp. 785–786, 88 Cal.Rptr.2d 444.)

We also find Whitlock's skin-to-skin requirement would be contrary to the "Legislature's express intent to provide additional protection under the [SVPA] for underage children from those 'predispose[d] ... to the commission of criminal sexual acts.' [Citations.]" (*People v. Chambless, supra*, 74 Cal.App.4th at p. 787, 88 Cal.Rptr.2d 444.) Children are particularly vulnerable to sex offenders. Requiring skin-to-skin contact for qualifying prior convictions would not advance the Legislature's purpose of protecting children.

***464** We conclude that "masturbation" as it is used in the SVPA can occur when a person's genitals are touched from outside the person's clothes. Skin-to-skin contact is not required.

[5] Was there substantial evidence that Whitlock's 1994 conviction involved "substantial sexual conduct" within the meaning of the SVPA to support the court's finding that he previously committed a sexually violent offense against the victim?

We review the record in the light most favorable to the determination below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could reach that determination beyond a reasonable doubt. (*People v. Mercer* (1999) 70 Cal.App.4th 463, 465–467, 82 Cal.Rptr.2d 723; § 6604.)

We find substantial evidence supported the trial court's finding of "substantial sexual conduct" in relation to the 1994 prior conviction of Penal Code section 288, subdivision (a). The five-year-old victim reported that Whitlock had touched her in the "crotch" on the outside of her clothing while she was sitting on his lap. The girl used "crotch" to refer to her vaginal area. The girl did not provide further details, but she made it clear to the police officer who interviewed her that the touching was not accidental. Further, Whitlock told an evaluating psychologist he intentionally placed his hand over the child's vaginal area and rubbed this area. Finally, Whitlock's instructing the five-year-old girl not to tell anyone what had happened and keep it a secret was circumstantial evidence that he had the requisite sexual intent. In sum, there was ample evidence that Whitlock's 1994 conviction of Penal Code section 288, subdivision (a), involved masturbation and was a qualifying prior conviction under the SVPA.

DISPOSITION

Order affirmed.

WE CONCUR: McDONALD and AARON, JJ.

Cal.App. 4 Dist.,2003.
People v. Whitlock
113 Cal.App.4th 456, 6 Cal.Rptr.3d 389, 03 Cal. Daily Op. Serv. 9949, 2003 Daily Journal D.A.R. 12,477

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113 Cal.App.4th 456, 6 Cal.Rptr.3d 389, 03 Cal. Daily Op. Serv. 9949, 2003 Daily Journal D.A.R. 12,477
(Cite as: 113 Cal.App.4th 456, 6 Cal.Rptr.3d 389)

261 Cal.App.2d 832, 68 Cal.Rptr. 313
(Cite as: 261 Cal.App.2d 832)

EARL W. PORTER, Plaintiff and Respondent,
v.
CITY OF RIVERSIDE et al., Defendants and Appellants.

Civ. No. 8676.

Court of Appeal, Fourth District, Division 2, California.
May 6, 1968.

HEADNOTES

(1) Municipal Corporations § 232(6)--Ordinances--Validity--Harmony With Charter Provisions.

An ordinance stands in the same relationship to a city charter as a statute does to the Constitution of the state; thus, charter provisions constitute the organic law or local constitution of the city and the same presumptions that favor the constitutionality of state legislative enactments apply also to ordinances.

(2) Municipal Corporations § 242--Ordinances--Validity--Presumptions.

Every presumption is in favor of the constitutionality of an ordinance and the invalidity of such legislative act must be clear before it can be declared unconstitutional.
See **Cal.Jur.2d,** Municipal Corporations, § 416; **Am.Jur.,** Municipal Corporations (1st ed §§ 178, 179).

(3) Municipal Corporations § 234--Ordinances--Validity--Province of Courts.

The legislative action of a city council will be upheld by the courts unless beyond its powers, or unless its judgment or discretion is being fraudulently or corruptly exercised.

(4) Municipal Corporations § 242--Ordinances--Validity--Presumptions.

When the right to enact a law or ordinance depends on the existence of a fact, the passage of the act implies, and the conclusive presumption is, that the legislative body performed its duty and ascertained the existence of the fact before enacting and approving the law, a decision which the courts have no right to question or review.

(5) Municipal Corporations § 234, 242--Ordinances--Validity--Province of CourtsPresumptions.

Not only must a legislative act of a city be reviewed by a court in the light of every presumption favorable to its constitutionality, but the court must limit itself to a consideration of such matters as appear on the face of the enactment together with those facts which are matters of judicial cognizance.

(6) Municipal Corporations § 234--Ordinances--Validity--Province of Courts.

Where a statute or ordinance is valid on its face, and there are no other considerations of which the court can take judicial notice tending to establish unconstitutionality, the court will not go behind the statute or ordinance and receive evidence *aliunde* to establish facts that would tend to impeach and overturn the law.

(7a, 7b) Municipal Corporations § 232(6)--Ordinances--Validity--Harmony With Charter Provisions.

In an action to restrain a city from paying a fixed monthly expense allowance to each city councilman without presentation of a claim therefor, the trial court erred in determining that the ordinance authorizing such payment was invalid on the ground that the allowance was in excess of actual expenses and therefore included compensation for services, where the city charter provided that councilmen should be paid no salary but should receive, in addition to council-authorized travel expenses and other expenses when on official duty, an amount to be fixed by ordinance as reimbursement for other out of pocket expenditures and costs imposed on them in serving as councilmen, where the charter was silent as to presentation of claims for such allowance, where, in passing the ordinance, the council found that the councilmen's out of pocket expenditures and costs were and would continue to be at least equal to the sum fixed, and where such legislative finding was entirely reasonable and possible.

(8) Municipal Corporations § 234--Ordinances--Validity--Province of Courts.

261 Cal.App.2d 832, 68 Cal.Rptr. 313
(Cite as: 261 Cal.App.2d 832)

In an action to restrain a city from paying a fixed monthly expense allowance to city councilmen, the trial court exceeded its powers and also went beyond the issues generated by the complaint in admitting evidence *aliunde* for the purpose of contravening the express finding of the city council that each councilman's monthly out of pocket expenditures and costs did and would continue to exceed the amount fixed, where the court, if it did not regard such finding as creating a conclusive presumption of the validity of the enactment, should have confined its review to a consideration of those facts which appeared on the face of the ordinance, together with those facts within its judicial knowledge.

See **Cal.Jur.2d,** Municipal Corporations, § 406; **Am.Jur.,** Municipal Corporations (1st ed § 183).

SUMMARY

APPEAL from a judgment of the Superior Court of Riverside County. Russell S. Waite, Judge. Reversed.

Action by a taxpayer to restrain the City of Riverside from paying an expense allowance to city councilmen. Judgment for plaintiff reversed.

COUNSEL

John Woodhead, City Attorney, O'Melveny & Myers, and Howard J. Deards for Defendants and Appellants.

Henry W. Coil, Sr., as Amicus Curiae on behalf of Defendants and Appellants. ***834**

Thompson & Colegate and Michael R. Raftery for Plaintiff and Respondent.

KERRIGAN, Acting P. J.

The Charter of the City of Riverside was prepared by a Board of Freeholders, adopted by the electors, approved by the Legislature, and became effective in April 1953. The charter provision relating to councilmen's expenses reads as follows:

"Sec. 402. Compensation; reimbursement for expenses. The members of the city council shall receive *no compensation* for their services *as such,* but shall receive reimbursement on order of the city council for council-authorized traveling and other expenses when on official duty. *In addition, each member shall receive such amount as may be fixed by ordinance, which amount shall be deemed to be reimbursement of other out-of- pocket expenditures and costs imposed upon him in serving as a city councilman."* [Italics supplied.]

In May 1953, the council held its inaugural meeting and adopted an ordinance fixing each councilman's expense allowance in the sum of $200 per month. Thereafter, in July 1955, the council adopted Ordinance No. 2226, which increased the councilmen's expense allowance to $250 monthly. Ten years later, in August 1965, the council passed Ordinance No. 3300, which recited that the councilmen's original expense allowance was $200; that it was thereafter increased to $250 monthly; that inflation and greater demands on councilmen had resulted in an increase in out-of-pocket expenses; that the sum of $350 per month represented reasonable costs expenditures incurred by councilmen; that the expense allowance be increased to $350 monthly; and that the $350 "be paid monthly without presentation of any claim."

In September 1965 the plaintiff filed this acton, and the allegations of the complaint may be briefly summarized in the following manner: that Ordinance No. 3300 requires the payment to each councilman of $350 monthly "as purported reimbursement of out-of-pocket expenses without presentation of any claim, voucher, proof of payment or proof of authorization of such expenses by the council"; that such payment "as reimbursement for out-of-pocket expenses not shown to be expended, is, in fact, payment of compensation, as prohibited by the Riverside City Charter"; that such payment "will increase the burden of taxation in an unlawful manner, to wit, the payment of compensation to each City Councilman in direct violation of the Charter provisions of the City of Riverside." ***835** No allegations were contained in the complaint attacking the council's finding that the amount of out-of-pocket expenditures were at least $350 as being so unreasonable as to constitute arbitrary action or constructive fraud. Nor was there an allegation that the council acted in bad faith with improper motives in that $350 per month was in excess of actual expenses. Thus, the attack on the ordinance was based on the premise that section 402 of the charter was violated in the event the $350 additional allowance authorized by Ordinance No. 3300 was paid without requiring the presentation of itemized claims and vouchers showing actual expenditures. The complaint prayed that the city be restrained from paying

the $350 per month to the councilmen "as reimbursement of out-of-pocket expenses, without requiring proof of the nature of said ... expenses, the amount thereof, and that they are actually incurred. ..."

Defendants filed a general and special demurrer to the complaint. The demurrer was overruled and defendants answered.

During trial, the court permitted the introduction of evidence at plaintiff's counsel's request as to the actual monthly expenses incurred by members of the city council. The seven councilmen's expenses ranged from $150 to $555. From the evidence thus presented, the trial court determined that the $350 allowance fixed in Ordinance No. 3300 was "in excess of the actual and allowable out-of-pocket expenses and costs ..." incurred "and does ... include compensation for services rendered by the City Councilmen. ..." Judgment was therefore rendered in favor of the plaintiff wherein its was decreed: (1) Riverside City Ordinance No. 3300 was invalid in its entirety as violative of section 402 of the Riverside City Charter; (2) Ordinance No. 2226 [the prior ordinance authorizing $250 per month allowance] was valid and binding; and (3) defendants be restrained from paying the members of the City Council $350 per month pursuant to Ordinance No. 3300, "but that said injunction shall not, and does not, restrain or enjoin defendants from paying to the members of said City Council the sums provided by said Ordinance No. 2226 or any other sum provided to be paid by any subsequent amendment of said Ordinance No. 2226 or any subsequent ordinance of the City of Riverside. ..."

Defendants' assault on the judgment is stated in varying forms, which may be categorized in the following manner: (1) The complaint fails to state a cause of action; (2) the findings ***836** went beyond the issues framed by the pleadings; (3) the trial court erred in permitting the introduction of evidence relating to the councilmen's actual expenses; (4) insufficiency of the evidence to support the findings; and (5) the action is barred by reason of plaintiff's laches, unclean hands, and political motives.

Stated simply, the sole, crucial issue on appeal is whether Ordinance No. 3300 is valid under section 402 of the charter.

(1) An ordinance stands in the same relationship to a city charter as does a statute to the constitution of the state. Thus, charter provisions constitute the organic law or local constitution of the city. (*In re Pfahler*, 150 Cal. 71, 82 [88 P. 270, 11 Ann.Cas. 911, 11 L.R.A. N.S. 1092]; *Dalton v. Lelande*, 22 Cal.App. 481, 487 [135 P. 54].) The same presumptions that favor the constitutionality of state legislative enactments apply also to ordinances. (11 Cal.Jur.2d, Const. Law, § 74, pp. 407-408.) (2) Every presumption is in favor of constitutionality and the invalidity of a legislative act must be clear before it can be declared unconstitutional. (35 Cal.Jur.2d, Municipal Corporations, § 416, p. 223.) (3) The action of the Legislature will be upheld by the courts unless beyond its powers, "or its judgment or discretion is being fraudulently or corruptly exercised." (*Nickerson v. County of San Bernardino*, 179 Cal. 518, 522-523 [177 P. 465]; *Wine v. Boyar*, 220 Cal.App.2d 375, 381-382 [33 Cal.Rptr. 787].)

(4) When the right to enact a law depends upon the existence of a fact, the passage of the act implies, and the conclusive presumption is, that the Legislature performed its duty and ascertained the existence of the fact before enacting and approving the law-a decision which the courts have no right to question or review. (*Robins v. County of Los Angeles*, 248 Cal.App.2d 1, 6 [56 Cal.Rptr. 853]; *Taylor v. Cole*, 201 Cal. 327, 336-337 [257 P. 40]; *Smith v. Mathews*, 155 Cal. 752, 756 [103 P. 199].) (5) Not only must the legislative act be reviewed in the light of every presumption favorable to its constitutionality, but the court must limit itself to a consideration of such matters as appear on the face of the enactment (*Alameda etc. Water Dist. v. Stanley*, 121 Cal.App.2d 308, 315 [263 P.2d 632]; *People v. Sacramento Drainage Dist.*, 155 Cal. 373, 386 [103 P. 207]), together with those facts which are matters of judicial cognizance. (*Los Angeles County Flood Control Dist. v. Hamilton*, 177 Cal. 119, 125 [169 P. 1028]; *City of Ojai v. Chaffee*, 60 Cal.App.2d 54, 61 [140 P.2d 116]; *Whitcomb v. Emerson*, 46 Cal.App.2d 263, 276 [***837**115 P.2d 892].) (6) Stated in basic terms, where a statute is valid on its face, and there are no other considerations of which the court can take judicial notice tending to establish unconstitutionality, the courts will not go behind the statute or ordinance and receive evidence *aliunde* to establish facts that would tend to impeach and overturn the law. (*Taylor v. Cole, supra*, p. 337; *Stevenson v. Colgan*, 91 Cal. 649, 652 [27 P. 1089, 25 Am.St.Rep. 230, 14 L.R.A. 459].)

(7a) Whether we view the presumption in support of the validity of enactments as a conclusive presumption which the courts have no right to question or review (*Robins v. County of Los Angeles, supra*, 248 Cal.App.2d 1, 6; *Smith v. Mathews, supra*, 155 Cal. 752, 756), or follow the more limited rules to the effect that the enactment is presumed to be constitutional and must be deemed to have been enacted on the basis of any state of facts supporting it that "reasonably can be conceived" (*Higgins v. City of Santa Monica*, 62 Cal.2d 24, 30 [41 Cal.Rptr. 9, 396 P.2d 41]), or "reasonably could be assumed" (*Redevelopment Agency v. Hayes*, 122 Cal.App.2d 777, 806 [266 P.2d 105]), or are "possible" (*Galeener v. Honeycutt*, 173 Cal. 100, 103-104 [159 P. 595]), it inevitably follows that the trial court's determination holding the expense allowance invalid was erroneous.

Section 1 of Ordinance No. 3300 provides that each councilman's out-of- pocket expenditures and costs are "and will continue to be at least $350 per month."

(8) The foregoing finding by the council may be regarded as giving rise to a conclusive presumption sustaining the validity of the enactment (see *Robins v. County of Los Angeles, supra*, 248 Cal.App.2d 1, 6). However in the event the trial court determined that it was acting within its prereogative in questioning the council's determination that $350 monthly was required as an expense allowance, its review should have been confined to a consideration of those facts which appeared on the face of the ordinance, together with those facts within its judicial knowledge. (*Alameda etc. Water Dist. v. Stanley, supra*, 121 Cal.App.2d 308, 315; *Los Angeles County Flood Control Dist. v. Hamilton, supra*, 177 Cal. 119, 125.) Succinctly stated, it was certainly reasonable and possible that the councilmen's expenditures and costs amounted to $350 monthly, and inasmuch as the city's legislative body made such a determination, the court exceeded its powers in admitting evidence *aliunde* for the purposes of contravening such finding. ***838**

Galeener v. Honeycutt, supra, 173 Cal. 100, is a case involving a change of compensation; plaintiff was elected to the officer of supervisor of Madera County at a time when the statute fixing the compensation of supervisors provided that the compensation was $1,200 per year and 25c per mile for all distances traveled by the supervisors in the discharge of their duties as road commissioners, which mileage allowance was not to exceed $600 annually; a subsequent 1915 act changed the compensation to $1,800 per year for services as board members and as road commissioners; the act "found" that the change did not work an increase in compensation and declared that it was intended that it apply to the present incumbents; the enactment was attacked on the ground that it was violative of section 9 of article XI [since repealed] of the California Constitution, which prohibited the increase of compensation to incumbents during their term of office; the Supreme Court held that the Madera County statute was constitutional and explicitly stated: "There is absolutely nothing on the face of the law to show that each supervisor of Madera County is not actually required to travel two thousand four hundred miles per year in the discharge of his duties as road commissioner, and that such was the condition in both the years 1914 and 1915. If such a condition was possible, we must assume in favor of the legislative enactment that it existed, for, as was said ... in *Smith v. Mathews*, 155 Cal. 752, 756 [103 P. 199, 201], the doctrine of *Stevenson v. Colgan*, 91 Cal. 649 [27 P. 1089, 25 Am.St.Rep. 230, 14 L.R.A. 459] ... is that 'when the right to enact a law depends upon the existence of a fact, the passage of the act implies, and the conclusive presumption is, that the Governor and the Legislature have performed their duty and ascertained the existence of the fact before enacting and approving the law. ...' "

The trial court's finding that the councilmen's "actual" out-of-pocket expenses were less than $350 monthly went beyond the issues generated in the complaint, was based upon inadmissible evidence, and was therefore void. (*Simmons v. Simmons*, 166 Cal. 438, 441 [137 P. 20].)

(7b) Finally, under any reasonable interpretation of section 402 of the charter, it manifestly appears that while a councilman is not entitled to receive compensation "as such," he is expressly entitled to receive reimbursement on "order of the City Council for council-authorized travel and other expenses when on official duty." Furthermore, he is ***839** entitled to an additional allowance unconnected with travel and other official-duty expenses by reason of the following proviso: "In addition, each member shall receive such amount as may be fixed by ordinance, which amount shall be deemed to be reimbursement of other

out-of-pocket expenditures and costs imposed upon him in serving as a city councilman." Consequently, by the express provisions of the charter, each councilman is entitled to receive a sum fixed by ordinance as an additional expense allowance. Moreover, councilmen are not required to submit itemized claims or vouchers showing actual expenditures under the last-quoted section of the charter. While the charter precludes a councilman from receiving a salary for his governmental services, and while it has been judicially determined that when a city charter is silent on the subject of compensation of members of the council, an ordinance authorizing the payment of a salary to councilmen is invalid as being violative of the charter (*Woods v. Potter*, 8 Cal.App. 41, 45 [95 P. 1125]), the Riverside Charter unequivocally sanctions the payment of the expense allowance involved in the case under review.

The judgment is reversed.

Tamura, J., concurred.

Cal.App.4.Dist.
Porter v. City of Riverside
261 Cal.App.2d 832, 68 Cal.Rptr. 313

END OF DOCUMENT

RENEE J., Petitioner,
v.
THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; ORANGE COUNTY SOCIAL SERVICES AGENCY et al., Real Parties in Interest.

No. S090730.

Supreme Court of California
Aug. 16, 2001.

SUMMARY

In child dependency proceedings, the trial court denied a mother reunification services, relying in part on Welf. & Inst. Code, § 361.5, subd. (b)(10), which states reunification services need not be provided where past efforts at reunification proved unsuccessful after removal of another child from the parent's custody. (Superior Court of Orange County, No. DP002263, Kim Garlin Dunning, Judge.) The Court of Appeal, Fourth Dist., Div. Three, No. G026981, granted the mother's petition for extraordinary relief.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that the Court of Appeal erred in its interpretation of Welf. & Inst. Code, § 361.5, subd. (b)(10), which states that reunification services need not be provided where past efforts at reunification proved unsuccessful after removal of another child, and where parental rights to another child have been severed. A clause at the end of § 361.5, subd. (b)(10) states that reunification services must nonetheless be afforded if the parent has made a "reasonable effort" to treat the problems that led to the other child's removal. Contrary to the Court of Appeal's construction, that clause applies only to the situation where parental ties to another child were severed, and not to the mother's situation, where prior reunification efforts for another child were unsuccessful. Although the statute was ambiguous and the canons of construction were of little assistance, recent legislative trends toward restricting the circumstances in which reunification services must be provided indicate a legislative intent to deny reunification services to a parent who previously has failed at reunification. This interpretation did not violate the mother's procedural or substantive due process rights. (Opinion by Werdegar, J., with George, C. J., Baxter, Chin, and Brown, JJ., concurring. Dissenting opinion by Kennard, J. (see p. 751).)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Delinquent, Dependent, and Neglected Children § 56--Dependent Children--Denial of Reunification Services--Past Failure to Reunify with Other Child--Application of Exception.

The Court of Appeal erred in granting a mother extraordinary relief from the trial court's order denying her reunification services and in its interpretation of Welf. & Inst. Code, § 361.5, subd. (b)(10), which states that reunification services need not be provided where past efforts at reunification proved unsuccessful after removal of another child, and where parental rights to another child have been severed. A clause at the end of § 361.5, subd. (b)(10) states that reunification services must nonetheless be afforded if the parent has made a "reasonable effort" to treat the problems that led to the other child's removal. Contrary to the Court of Appeal's construction, that clause applies only to the situation where parental ties to another child were severed, and not to the mother's situation, where prior reunification efforts for another child were unsuccessful. Although the statute was ambiguous and the canons of construction were of little assistance, recent legislative trends toward restricting the circumstances in which reunification services must be provided indicate a legislative intent to deny reunification services to a parent who previously has failed at reunification. This interpretation did not violate the mother's procedural or substantive due process rights. (Disapproving *Shawn S. v. Superior Court* (1998) 67 Cal.App.4th 1424 [80 Cal.Rptr.2d 80] and *In re Diamond H.* (2000) 82 Cal.App.4th 1127 [98 Cal.Rptr.2d 715] to the extent they are inconsistent with the court's decision.)

[See 10 Witkin, Summary of Cal. Law (9th ed. 1989) Parent and Child, § 703A; West's Key Number Digest, Infants k. 155.]

(2a, 2b) Statutes § 29--Construction--Language--Legislative Intent.

A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. In

construing a statute, the first task is to look to the language of the statute itself. When the language is clear and there is no uncertainty as to the legislative intent, courts look no further and simply enforce the statute according to its terms. Additionally, however, courts must consider the statutory language in the context of the entire statute and the statutory scheme of which it is a part. Courts are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. When used in a statute, words must be construed in context, keeping in mind the nature and obvious purpose of the statute in which they appear. Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. Where a statute is theoretically capable of more than one construction a court must choose that which most comports with the intent of the Legislature. Principles of statutory construction are not rules of independent force, but merely tools to assist courts in discerning legislative intent.

(3) Statutes § 31--Construction--Language--Words and Phrases--Last Antecedent Rule.

A long-standing rule of statutory construction-the last antecedent rule-provides that qualifying words, phrases, and clauses are to be applied to the words or phrases immediately preceding them and are not to be construed as extending to or including others more remote. Exceptions to the rule, however, have been identified. One provides that when several words are followed by a clause that applies as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all. Another provides that when the sense of the entire act requires that a qualifying word or phrase apply to several preceding words, its application will not be restricted to the last.

(4) Statutes § 22--Construction--Reasonableness.

Courts must give a statute a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity. Significance, if possible, should be attributed to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose, as the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. The court should take into account matters such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction.

(5) Delinquent, Dependent, and Neglected Children § 56--Dependent Children--Denial of Reunification Services--Past Failure to Reunify with Other Child--Application of Exception.

As a general rule, reunification services are offered to parents whose children are removed from their custody in an effort to eliminate the conditions leading to loss of custody and facilitate reunification of parent and child. This furthers the goal of preservation of family, whenever possible. Nevertheless, as evidenced by Welf. & Inst. Code, § 361.5, subd. (b), the Legislature recognizes that it may be fruitless to provide reunification services under certain circumstances. Once it is determined that one of the situations outlined in § 361.5, subd. (b) applies, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources.

(6) Delinquent, Dependent, and Neglected Children § 56--Dependent Children--Reunification Services--Restriction--Past Failure to Reunify with Other Child

The Legislature intended to restrict provision of reunification services in the case of a parent who previously has failed to reunify (Welf. & Inst. Code, § 361.5, subd. (b)(10)). Before this subdivision applies, the parent must have had at least one chance to reunify with a different child through the aid of governmental resources and must have failed to do so. Experience has shown that with certain parents the risk of recidivism is a very real concern. Therefore, when another child of that same parent is adjudged a dependent child, it is not unreasonable to assume that reunification efforts will be unsuccessful. Further, the court may still order reunification services if the court finds, by clear and convincing evidence, that reunification is in the best interests of the child (Welf. & Inst. Code, § 361.5, subd. (c)).

COUNSEL

Carl C. Holmes, Public Defender, Marri Derby and Paul T. DeQuattro, Deputy Public Defenders, for Petitioner.

Bradley A. Bristow for California Public Defenders Association as Amicus Curiae on behalf of Petitioner.

No appearance for Respondent.

Laurence M. Watson, County Counsel, and Ward Brady, Deputy County Counsel, for Real Party in Interest Orange County Social Services Agency.

Law Offices of Harold LaFlamme, Harold LaFlamme and Craig E. Arthur for Real Party in Interest the Minor. ***739**

WERDEGAR, J.

This case calls upon us to construe Welfare and Institutions Code section 361.5, [FN1] which governs orders for reunification services in child dependency proceedings. Pursuant to subdivision (a) of that statute, whenever a child is removed from a parent's or guardian's custody, with certain exceptions not applicable here, the juvenile court shall order the social worker to provide services to the child and the child's parent or guardian. Subdivision (b) of the statute, however, provides that reunification services need not be offered when the court finds, by clear and convincing evidence, that any of a number of conditions exists. Subdivision (b)(10) of section 361.5 provides that services may be denied on a finding "[t]hat (A) the court ordered termination of reunification services for any siblings or half-siblings of the child because the parent or guardian failed to reunify with the sibling or half-sibling after the sibling or half-sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a), or (B) the parental rights of a parent or guardian over any sibling or half-sibling of the child had been permanently severed, *and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half-sibling of that child from that parent or guardian.*" (Italics added.)

FN1 Unless otherwise specified, all further statutory references are to the Welfare and Institutions Code.

(1a) Mother Renee J. was denied reunification services under subdivision (b)(10) of section 361.5. On the facts of this case, the correctness of that ruling hinges on whether the italicized language in the immediately preceding paragraph applies to both subparts (A) and (B), or only the latter. The Courts of Appeal are divided on the question, and the present Court of Appeal joined the court in *Shawn S. v. Superior Court* (1998) 67 Cal.App.4th 1424 [80 Cal.Rptr.2d 80], holding that the language applies to both subparts. (Accord, *In re Diamond H.* (2000) 82 Cal.App.4th 1127 [98 Cal.Rptr.2d 715]; but see *Marshall M. v. Superior Court* (1999) 75 Cal.App.4th 48 [88 Cal.Rptr.2d 891] (*Marshall M.*) [holding "reasonable effort" language applies only to subpart (B)]; *In re Jasmine C.* (1999) 70 Cal.App.4th 71, 76 [82 Cal.Rptr.2d 493] [same]; *In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 475 [73 Cal.Rptr.2d 793] [same]; see also *Marlene M. v. Superior Court* (2000) 80 Cal.App.4th 1139 [96 Cal.Rptr.2d 104] [implicitly concluding same].) Thus, in the absence of the requisite finding, the court granted Renee J.'s petition for extraordinary relief, ordering the juvenile court to vacate its order denying services and directing a new dispositional hearing be held at which services would be offered. ***740**

We find the statute ambiguous in the relevant respect and the canons of construction of little assistance in resolving the question before us. From recent legislative trends toward restricting the circumstances in which reunification services must be provided, however, we discern a legislative intent to deny reunification services to a parent who previously has failed at reunification. We conclude the Court of Appeal erred in its reading of the statute and therefore reverse.

Facts and Procedure

Sayrah R. was born to Renee J. in October 1998. Several of Renee's older children previously had been the subject of dependency proceedings: Anthony R., born in September 1996, Christopher R., born in September 1995, and Dylan J., born in December 1990, had been declared dependents of the Orange County Juvenile Court under section 300, subdivisions (b) and (j) in November 1996, after Anthony was born with a positive toxicology screen for methamphetamine.

Both Renee J. and Robert R., the father of Anthony, Christopher and Sayrah, had long-standing substance abuse problems and an extensive history of domestic violence. In January 1998, after Renee and Robert had received reunification services in the earlier dependency proceeding for 14 months without completing successfully any of the drug programs, testing regimens, parenting classes, housing procurements, domestic violence programs, or visitation schedules that had been prescribed for them by the trial court, the Orange County Juvenile Court terminated reunification services. Later, the court terminated Renee's and Robert's parental rights to Anthony and Christopher, who were in the process of being adopted. Renee's parental rights to Dylan J. were also terminated, and Dylan was in the process of being adopted by Renee's father and stepmother. [FN2]

> FN2 Another sibling, Jesse K., born in July 1993, was living with his father, Brian K.

According to Renee, when she learned she was pregnant with Sayrah, she began to abstain from drugs and thereafter remained abstinent, although she completed no treatment programs. She acknowledged needing help, such as counseling or a program, in the area of substance abuse. Renee obtained prenatal care throughout the pregnancy, and Sayrah was healthy at birth.

From the time Sayrah was two months to four months old, Renee J. lived with Robert R. At that point, however, she stopped living with Robert and ended the relationship because he became emotionally abusive toward her and she feared he would physically abuse her again, as he had in the past. Thereafter, Renee lived with a friend for a short while and then began living ***741** with her friend Leticia Velez, a former schoolteacher. In lieu of rent, Renee provided child care services for Velez's children. Velez told the social worker she had not been very trusting of Renee at first because she had heard Renee had lost custody of her other children, but Velez began to trust her completely after seeing her consistency in disciplining the children. Velez also said she saw no sign of drug use in Renee during the time she lived with her.

In April 1999, Renee was arrested for burglary and forgery. She was convicted of possessing deceptive government identification, possessing a driver's license to commit forgery, receiving stolen property, second degree burglary and two counts of felony possession of bad checks or money orders. Renee was sentenced to 60 days in jail and 36 months' probation. She did not, however, turn herself in to serve her sentence. [FN3]

> FN3 Previously, on February 26, 1998, Renee had been sentenced to 30 days in jail for forgery.
>
> At the jurisdictional hearing in this case, Renee acknowledged she had committed the crimes that led to her arrest, explaining she was trying to get money to get herself and Sayrah away from Robert R. She admitted she was aware of the requirement that she turn herself in to serve 60 days, and of the warrant subsequently issued for her arrest. She testified she had planned to turn herself in, but "was trying to get things together to have a secure, safe place for Sayrah to stay."

On January 6, 2000, police officers on patrol recognized Renee as a person with outstanding warrants and arrested her. The officers found Sayrah in an improperly secured car seat. In a diaper bag in the car, police found a wallet, personal checks and credit cards that had previously been reported stolen. Renee's picture with an unknown male subject was found inside the wallet, along with the owner's identification. Renee asserted she had found the wallet and notified the owner, but had not had time to return it to her. Police confirmed that the owner of the wallet had received a call from a "Renee," who said she would bring the wallet to the owner's workplace but had never showed up. Renee was eventually sentenced to 150 days in jail on old warrants and probation violations. No new charges were filed in connection with Renee's possession of the reportedly stolen wallet. No drugs or paraphernalia were found in Renee's car.

When Sayrah was taken into protective custody, she was dirty and her diaper had not been changed for several hours, but she appeared healthy and developmentally normal. Because Renee could not provide the name of a relative to take custody of Sayrah, Sayrah was initially placed in a series of temporary homes. Later, Sayrah was moved to the home of her maternal grandfather and stepgrandmother, who, as noted, were in the process of adopting Sayrah's half brother, Dylan. The juvenile court established juris-

diction over the case on February 23, 2000, after finding Sayrah was a ***742** person described in section 300, subdivisions (b) (failure to protect due to substance abuse), (g) (no provision for support), and (j) (sibling abuse).

At the dispositional hearing on March 14, 2000, the juvenile court found, by clear and convincing evidence, that the reunification services offered to Renee in the cases of Sayrah's two siblings, Anthony and Christopher, and half sibling Dylan had been terminated because both Renee J. and Robert R. had failed to reunify. The juvenile court further found that Renee's parental rights to those children had been terminated and that neither Renee J. nor Robert R. had made a reasonable effort to treat the problems that had led to the removal of Renee's three other children. The court found that, under both subparts (A) and (B) of section 361.5, subdivision (b)(10), reunification services were not appropriate in this case. Although the Orange County Social Services Agency (SSA) specifically eschewed reliance on subdivision (b)(12) of section 361.5, the court nevertheless concluded that subdivision applied, in that Renee had a history of substance abuse. The court further found, by clear and convincing evidence, that the provisions of subdivision (c)(1) and (5) of section 361 applied and that to vest custody of Sayrah with her parents would be detrimental to her. The court then set the matter for a permanency planning hearing pursuant to section 366.26.

Renee petitioned for extraordinary relief pursuant to California Rules of Court, rule 39.1B. The Court of Appeal agreed with her that the juvenile court had erred in resting its decision on subdivision (b)(12) of section 361.5 because SSA had waived reliance on that provision and Renee had relied on the waiver. With respect to section 361.5, subdivision (b)(10), the Court of Appeal likewise found merit in Renee's arguments and, following *Shawn S. v. Superior Court, supra,* 67 Cal.App.4th 1424, read the "reasonable efforts" clause as applicable to both subparts (A) and (B). The Court of Appeal reasoned that abstinence from drugs, regardless of actual completion of a rehabilitation program, would constitute "the most important evidence that a drug problem is being addressed" and concluded that, in the absence of any evidence Renee was still using drugs or had exposed Sayrah to domestic violence, the juvenile court could not simply assume those conditions continued to exist. Having thus rejected both of the juvenile court's stated bases for denying reunification services to Renee, the Court of Appeal granted relief, ordering the juvenile court to vacate its order denying reunification services and setting the matter for a permanency planning hearing, and directing that court instead to hold a new dispositional hearing at which reunification services would be offered.

We granted SSA's petition for review in order to construe section 361.5, subdivision (b)(10). Renee's answer to the petition for review raised, as an ***743** additional issue for our review, the question whether interpreting section 361.5, subdivision (b)(10) to deny her reunification services would deprive her of due process.

Analysis

(2a) " 'A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citations.] In construing a statute, our first task is to look to the language of the statute itself. [Citation.] When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms. [Citations.] [¶] Additionally, however, we must consider the [statutory language] in the context of the entire statute [citation] and the statutory scheme of which it is a part. "We are required to give effect to statutes 'according to the usual, ordinary import of the language employed in framing them.' [Citations.] " [Citations.] " 'If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.' [Citation.] ... 'When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear.' [Citations.] Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. [Citations.]" ' " (*Phelps v. Stostad* (1997) 16 Cal.4th 23, 32 [65 Cal.Rptr.2d 360, 939 P.2d 760].)

We are directed to no legislative history expressly answering the question before us and, as a matter of English usage, nothing in section 361.5, subdivision (b)(10) clearly compels one reading over the other. To resolve the ambiguity, the parties cite various principles of statutory interpretation. (3) "A longstanding

rule of statutory construction-the 'last antecedent rule'-provides that 'qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.' " (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680 [183 Cal.Rptr. 520, 646 P.2d 191].) Exceptions to the rule, however, have been identified. One provides that when several words are followed by a clause that applies as much to the first and other words as to the last, " ' "the natural construction of the language demands that the clause be read as applicable to all." ' " (*Wholesale T. Dealers v. National etc. Co.* (1938) 11 Cal.2d 634, 659 [82 P.2d 3, 118 A.L.R. 486].) Another provides that when the sense of the entire act requires that a qualifying word or phrase apply to several preceding words, its application will not be restricted to the last. (*White v. County of Sacramento*, ***744** *supra*, at p. 681.) "This is, of course, but another way of stating the fundamental rule that a court is to construe a statute ' "so as to effectuate the purpose of the law." ' (2b) [Citation.] 'Where a statute is theoretically capable of more than one construction [a court must] choose that which most comports with the intent of the Legislature.' [Citation.]" (*Ibid.*, second bracketed insertion in original.) Principles of statutory construction are not rules of independent force, but merely tools to assist courts in discerning legislative intent.

(4) As the court in *Marshall M., supra*, 75 Cal.App.4th at pages 55-56, observed: "We must ... give the provision a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity. [Citation.] Significance, if possible, should be attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose, as 'the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.' [Citation.] ' "The court should take into account matters such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction." ' [Citation.]"

(5) The purpose of section 361.5 was explained in *In re Baby Boy H., supra*, 63 Cal.App.4th at page 478. "As a general rule, reunification services are offered to parents whose children are removed from their custody in an effort to eliminate the conditions leading to loss of custody and facilitate reunification of parent and child. This furthers the goal of preservation of family, whenever possible. [Citation.] Nevertheless, as evidenced by section 361.5, subdivision (b), the Legislature recognizes that it may be fruitless to provide reunification services under certain circumstances. [Citation.] Once it is determined one of the situations outlined in subdivision (b) applies, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources. [Citation.]"

(6) As pertinent, the *In re Baby Boy H.* court went on to infer that the Legislature intended to restrict provision of reunification services in the case of a parent who previously had failed to reunify. "The exception at issue here, section 361.5, subdivision (b)(10), recognizes the problem of recidivism by the parent despite reunification efforts. Before this subdivision applies, the parent must have had at least one chance to reunify with a different child through the aid of governmental resources and fail to do so. ***745** Experience has shown that with certain parents, as is the case here, the risk of recidivism is a very real concern. Therefore, when another child of that same parent is adjudged a dependent child, it is not unreasonable to assume reunification efforts will be unsuccessful. Further, the court may still order reunification services be provided if the court finds, by clear and convincing evidence, that reunification is in the best interests of the child. (§ 361.5, subd. (c).)" (*In re Baby Boy H., supra*, 63 Cal.App.4th at p. 478.)

(1b) We agree with *In re Baby Boy H.*'s understanding of the legislative purpose in enacting section 361.5, subdivision (b)(10) and with its interpretation of the statute. Renee cites factual differences between that case and this one, but any such differences are irrelevant to the pure question of statutory interpretation confronting us here. At the same time that it enacted subdivision (b)(10), moreover, the Legislature shortened from 12 months to six the period for provision of reunification services in the case of a child who was under age three at the time of removal from the physical custody of the parent. (§ 361.5, subd. (a)(2), added by Stats. 1996, ch. 1083, § 2.7.) One might thus characterize both of these amendments as aimed at expediting the dependency process in order to facili-

tate the placement of minors in stable, permanent homes, particularly in the cases of the youngest children and those least likely to benefit from reunification services. Consistent with this aim, we find it probable that the Legislature did not intend, in the case of a minor whose parent in connection with a prior dependency proceeding has already demonstrated an inability to benefit from services, to impose for denial of services an additional and arguably redundant requirement that the parent has made no reasonable effort to treat the underlying problem.

As the *Marshall M.* Court of Appeal reasoned (*supra*, 75 Cal.App.4th at p. 55), our reading of the statute accords significance to all its parts. Had the Legislature intended to require the finding of no reasonable effort in the case both of the parent whose service plan had been ordered terminated and of the parent whose rights over the child had been severed, there would have been no need to affix separate (A) and (B) labels to the two clauses. (Cf. *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117 [81 Cal.Rptr.2d 471, 969 P.2d 564] [separately numbered paragraphing as emphasizing grammatical and analytical independence of clauses within Code Civ. Proc., § 425.16, subd. (e)].) Likewise, had the Legislature meant to require the no-reasonable-effort finding in both cases, it might have set forth that requirement as a preface to the two different scenarios. The Legislature, however, did neither.

Moreover, when viewed in the context of the different ways in which a child is removed from his or her parents, the distinction between subparts ***746** (A) and (B) of section 361.5, subdivision (b)(10) is a reasonable one. As the court in *Marshall M.*, *supra*, 75 Cal.App.4th at page 56, observed, "Subparts (A) and (B) ... are similar in that each involve[s] a court's prior removal of another child of the parent ...." But, as the court explained, "there is also a key distinction between the two subparts. This distinction relates to whether the parent has previously failed when given a chance at reunification services." (*Ibid.*) Thus, under subpart (A), "the parent had an opportunity to reunify and failed. Therefore, the court selected a permanent plan for the sibling. In other words, in the case of subdivision (b)(10)(A), the parent did not make a reasonable effort to treat the problems that led to the sibling's removal because that parent necessarily failed to reunify. [¶] Section 361.5, subdivision (b)(10)(B) anticipates a discrete scenario. Subpart (B) requires a termination of rights but does not condition the termination upon a parent's failure to reunify. Indeed, the fact that the parent's rights over any sibling have been permanently severed ... does not inescapably establish that the parent failed to make a reasonable effort to treat the problems that led to the sibling's removal.... [¶] ... [I]n a case described by ... subpart (A), the court knows as a matter of law that the parent did not make reasonable efforts to treat the problems that led to the sibling's removal. The same cannot be said solely because a parent's rights over another child have been permanently severed." [FN4] (*Marshall M.*, *supra*, at pp. 56-57.)

FN4 SSA offers specific examples illuminating the difference between subparts (A) and (B) of Welfare and Institutions Code section 361.5, subdivision (b)(10). Whereas subpart (A) addresses dependent children whose parents have received reunification services, SSA posits, subpart (B) embraces children whose parents may not have received services. SSA observes that parental rights may be terminated outside the dependency system without provision of services, pursuant to the Family Code, by one parent against another in order to free a child from the burden of an absent or ineffective parent's custody rights, or to free a child for adoption. Thus, under Family Code section 7820, a parent or even a third party could bring an action to sever a parent's rights in the case of abandonment (Fam. Code, § 7822), neglect (*id.*, § 7823), the respondent parent's disability due to substance abuse (*id.*, § 7824), the respondent parent's conviction of a felony (*id.*, § 7825), the respondent parent's developmental disability or mental illness (*id.*, § 7826), or the child's being in an out-of-home placement for a one-year period (*id.*, § 7828). Parental rights also would be severed without provision of services in the case of a parent who voluntarily relinquishes his or her child to a public or private adoption agency pursuant to Family Code section 8700. Thus, for example, a mother who, as a young girl, had relinquished a child for adoption due to her inability to support the child and, years later, becomes involved in the dependency system with a subsequent child, might, under Welfare and Institutions Code section 361.5,

> subdivision (b)(10), subpart (B), argue that she had made a reasonable effort to improve her financial circumstances (i.e., she had treated the problem that led to the removal of the first child) and would benefit from reunification services. We agree with SSA that the Legislature reasonably could conclude that under these scenarios reunification services should be provided, in contrast to the case of a parent who previously had failed to reunify despite the provision of services.

As SSA observes, the legislative history of section 361.5, subdivision (b)(10) reveals that subparts (A) and (B) were originally drafted as ***747** separately numbered paragraphs and were only combined in the shaping of the final form of the amendment to section 361.5. (See Legis. Counsel's Dig., Assem. Bill No. 2679 (1995-1996 Reg. Sess.) as amended Feb. 22, 1996; Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2679 (1995-1996 Reg. Sess.) as amended Apr. 18, 1996; Sen. Rules Com., Office of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2679 (1995-1996 Reg. Sess.) as amended Aug. 22, 1996.) Of the two, only the provision that is now subpart (B) ever included the requirement of the no-reasonable-effort finding. Although the significance of this sequence of events is not free from doubt, we find it reasonable to infer that, in combining into one subdivision the two provisions that are now subparts (A) and (B), respectively, the Legislature meant to group together two thematically related scenarios (i.e., two distinct kinds of court-ordered removal of a child from a parent), while still applying different requirements to each.

The parties devote much of their remaining argument to an examination of technical aspects of the wording and punctuation of the statute, matters that we find less significant than its legislative history and evident purpose, as discussed above.

First, Renee argues that because both subpart (A) and subpart (B) of section 361.5, subdivision (b)(10) refer to a "sibling or half-sibling," and the "reasonable effort" clause also refers to a "sibling or half-sibling," the principle in *Wholesale T. Dealers v. National etc. Co., supra*, 11 Cal.2d at page 659, dictates that the latter clause refers to both subparts. Undercutting this argument, however, is the fact that-as Renee acknowledges-both subpart (A) and the "reasonable effort" clause, but not subpart (B), refer to a "removed" sibling. Obviously, the "reasonable effort" clause must apply, at a minimum, to subpart (B). The repetition (or absence) of certain words or phrases within the various parts of section 361.5, subdivision (b)(10), therefore, does not dictate the interpretation Renee urges.

Citing *Board of Trustees v. Judge* (1975) 50 Cal.App.3d 920, 927-928, footnote 4 [123 Cal.Rptr. 830], Renee further argues that the Legislature's use of a comma to separate the "reasonable effort" phrase from the antecedent phrases signifies it intended the phrase to apply to all antecedents rather than only the last. She also observes that the Legislature, after the enactment of section 361.5, subdivision (b)(10) but before its effective date, amended the statute to add that comma (Stats. 1997, ch. 793, § 18), the initial version of the statute not having included it (Stats. 1996, ch. 1083, § 2.7). We agree generally that the presence or absence of commas is a factor to be considered in interpreting a statute (see *Board of Trustees v. Judge*, *supra*, at p. 928, fn. ***748** 4), but find this principle not to be dispositive in the present case. Inasmuch as a comma properly joins the independent clauses of subpart (B) regardless of the existence of subpart (A), the inference that, by so amending the statute, the Legislature meant the "reasonable effort" clause to apply to both subparts arises only weakly, if at all, and the history of the provision, as discussed above, tends to refute it. [FN5]

> FN5 Of somewhat greater force, as a matter of grammatical interpretation, is the fact the "reasonable effort" clause refers to "*this* parent or guardian" (italics added); as SSA observes, the demonstrative pronoun "this" ordinarily is understood to refer to the nearer of two or more things or persons, hence in this context it arguably would relate to the parent or guardian described in subpart (B) of section 361.5, subdivision (b)(10).

Pointing out that courts are to avoid interpretations that render some words surplusage (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224]), Renee contends SSA's interpretation of section 361.5, subdivision (b)(10) runs afoul of this principle. She reasons that SSA justifies its discrepant treatment of the parent who previously has failed at reunification with other

siblings (i.e., facts triggering the application of subpart (A)), vis-a-vis the parent whose rights over another sibling had been permanently severed (i.e., facts triggering the application of subpart (B)), by equating the parental failure to complete a prior service plan, leading to a court-ordered termination of services (subpart (A)), with the failure to make a reasonable effort to treat the problems that led to the removal of the sibling. But the statute, according to Renee, contemplates that such effort be made "subsequently" to the court order, an impossibility under SSA's reading, inasmuch as the failure to complete the reunification plan necessarily *precedes* the court's order terminating services. Renee's argument, however, commits the fallacy of assuming its conclusion, i.e., only if one accepts the premise that the reasonable effort clause applies to subpart (A) does the referent for "subsequently" become an issue. But even were we to accept that premise, we disagree that the efforts must be made subsequent to the *termination* order. Rather, the statute by its terms refers to efforts subsequently made to treat the problem that led to *removal* of the child from the parents, which removal, in the case of subpart (A) cases, occurs before services are provided or terminated. (See *Marshall M., supra*, 75 Cal.App.4th at p. 57.)

In sum, we interpret the no-reasonable-effort clause as applicable only to subpart (B) of section 361.5, subdivision (b)(10). [FN6] If we have failed to ***749** discern correctly the Legislature's intent in enacting the statute, that body may clarify the statute accordingly. [FN7]

FN6 *Shawn S. v. Superior Court*, *supra*, 67 Cal.App.4th 1424, and *In re Diamond H.*, *supra*, 82 Cal.App.4th 1127, are disapproved to the extent they are inconsistent with our decision in this case.

FN7 California Rules of Court, rule 1456(f)(5), we note, is inconsistent with the interpretation of section 361.5, subdivision (b)(10) endorsed here. As relevant, the rule provides: "Reunification services need not be provided to a mother, statutorily presumed father, or guardian, if the court finds, by clear and convincing evidence, any of the following: [¶] ... [¶] (J) The court: [¶] (i) has terminated reunification services for a sibling or half-sibling of the child because the parent failed to reunify with the sibling or half-sibling, or finds that the parental rights of the parent over any sibling or half-sibling have been terminated; and [¶] (ii) finds that the parent or guardian has not made a reasonable effort to treat the problems that led to the removal of the sibling or half-sibling from that parent or guardian." The rule, as is evident, "does not track the language of section 361.5, subdivision (b)(10)." (*Marshall M., supra*, 75 Cal.App.4th at p. 59.)

Renee contends the interpretation of section 361.5, subdivision (b)(10) that we embrace in this case violates due process. Her argument is twofold: Procedural due process is denied by the statute's failure to place the burden on SSA to demonstrate the parent's unworthiness to receive reunification services, and substantive due process is violated by its exclusive reliance on the parent's problematic history and corresponding failure to require proof of the parent's *current* unfitness. We address each contention in turn.

For her procedural due process claim, Renee relies on *Santosky v. Kramer* (1982) 455 U.S. 745 [102 S.Ct. 1388, 71 L.Ed.2d 599] (*Santosky*), in which the United States Supreme Court held unconstitutional a New York statute permitting termination of parental rights based on a finding of permanent neglect made by a mere preponderance of the evidence. Because of the fundamental nature of the rights at stake and the irreparable harm an erroneous decision to terminate them would cause, as compared with the lesser societal costs of an erroneous decision to postpone their termination, the high court determined that the federal Constitution imposes a heightened standard, that of clear and convincing evidence. (*Santosky*, *supra*, at p. 769 [102 S.Ct. at p. 1403].)

Renee also distinguishes *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242 [19 Cal.Rptr.2d 698, 851 P.2d 1307] (*Cynthia D.*), in which this court rejected a parent's argument that California's child dependency scheme violates due process by allowing termination of parental rights based on a finding by a mere preponderance of the evidence that return of the child to parental custody would create a substantial risk of detriment to the child. In *Cynthia D.*, we held that, in the context of the entire process for terminating parental rights under the dependency statutes, the proof requirements at the selection and implementation

hearing held pursuant to section 366.26 comport with due process "because the precise and demanding substantive and procedural requirements the petitioning agency must have satisfied before it ***750** can propose termination are carefully calculated to constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child, and otherwise protect the legitimate interests of the parents. At this late stage in the process the evidence of detriment is already so clear and convincing that more cannot be required without prejudice to the interests of the adoptable child, with which the state must now align itself." (*Cynthia D., supra*, at p. 256.)

At issue in both *Santosky* and *Cynthia D.* was the quantum of proof required for termination of parental rights, which indisputably are fundamental in nature. (*Santosky, supra*, 455 U.S. at pp. 758-759, 769 [102 S.Ct. at pp. 1397-1398, 1403].) Here, in contrast, Renee's parental rights have not been terminated. Renee assumes, but fails to establish, the foundational premise that she possesses a constitutionally protected liberty interest in the state's providing her with reunification services. The Courts of Appeal that have addressed this question have held to the contrary. (*In re Baby Boy H., supra*, 63 Cal.App.4th at p. 475; *In re Christina A.* (1989) 213 Cal.App.3d 1073, 1078-1079 [261 Cal.Rptr. 903].) Although Renee may be understood to argue that reunification services constitute her only opportunity to reunify with Sayrah, and thus that a denial of services is tantamount to a slow termination of her rights, in our view the present state of the record does not enable this court to draw such a conclusion. For example, a petition pursuant to section 388 remains an available mechanism by which to modify the juvenile court's previous orders, given some sufficiently compelling new evidence or change of circumstances.

In any event, as SSA points out, even in the face of a finding under section 361.5, subdivision (b)(10), the juvenile court may still order reunification services if it finds, by clear and convincing evidence, that reunification is in the best interest of the child. (§ 361.5, subd. (c).) Thus, contrary to Renee's and amicus curiae California Public Defenders Association's substantive due process argument, evidence of a parent's current fitness may, in appropriate circumstances, persuade the juvenile court to order reunification services despite his or her problematic history. [FN8]

FN8 Amicus curiae contends the existence of subdivision (c)'s "bailout" provision cannot save section 361.5 from a due process challenge because, unlike the parental rights termination at issue in *Cynthia D., supra*, 5 Cal.4th 242, the determination to withhold reunification services comes near the inception of the dependency case, before the state has borne the burden of repeatedly demonstrating parental unfitness at the various hearings required at specified stages of the proceedings. Our analysis of the *Santosky* factors, however, leads us to conclude section 361.5, subdivision (b)(10) is constitutionally valid as we have interpreted it. First, considering the private interest affected (*Santosky, supra*, 455 U.S. at p. 759 [102 S.Ct. at pp. 1397-1398]; *Cynthia D., supra*, at p. 254), we observe again that at the stage of the proceedings with which we are concerned, the juvenile court has already found jurisdiction over the child (see § 300), but has not yet reached the point at which a decision to terminate parental rights is to be made. The parent's interest, therefore, while significant, is of a somewhat lesser order than in the decisions on which Renee and amicus curiae rely. Second, the risk of erroneous factfinding (*Santosky, supra*, at p. 762 [102 S.Ct. at p. 1399]; *Cynthia D., supra*, at pp. 254-255) is mitigated by the parent's right to counsel (§ 317, subd. (d)) and access to relevant records maintained by state or local public agencies, hospitals, medical or nonmedical practitioners, and child care custodians (§ 317, subd. (f)). Third, the governmental interest supporting the statutory procedure (*Santosky, supra*, at p. 766 [102 S.Ct. at pp. 1401-1402]; *Cynthia D., supra*, at pp. 255-256)-"the state's *parens patriae* interest in preserving and promoting the welfare of the child, and the state's fiscal and administrative interest in reducing the cost and burden of such proceedings" (*Cynthia D., supra*, at p. 255)-is substantial.

We are satisfied that, given the weighty interests of the state in assuring the proper care and safety of children in the dependency system, and those of ***751** the children themselves, this provision sufficiently

diminishes the risk of erroneous deprivations of services as to satisfy the requirements of due process. (See *Cynthia D., supra*, 5 Cal.4th at pp. 250-256.)

Disposition

The judgment of the Court of Appeal is reversed.

George, C. J., Baxter, J., Chin, J., and Brown, J., concurred.

KENNARD, J., Dissenting.

When a child is removed from a parent's custody as part of a dependency proceeding (Welf. & Inst. Code, § 300), [FN1] the juvenile court must normally order the social services agency to provide reunification services to the child and the parent. Without such services, a parent whose child has been removed has little hope of ever regaining custody of the child.

FN1 Unless otherwise stated, all statutory references are to the Welfare and Institutions Code.

But reunification services need not be provided in certain instances specified by statute. Subdivision (b)(10) of section 361.5 (section 361.5(b)(10)) describes two such instances: When past efforts at reunification proved unsuccessful after removal of another child, and when parental rights to another child have been severed. A clause at the end of section 361.5(b)(10) states that reunification services must nonetheless be afforded if the parent has made a "reasonable effort" to treat the problems that led to the other child's removal. At issue here is whether this clause (the reasonable effort clause) applies only when parental rights to the other child were severed, or whether it also applies when reunification services were unsuccessfully provided after removal of the other child.

The majority concludes that the reasonable effort clause applies only when parental rights were severed. I disagree. ***752**

I. Facts

Petitioner Renee J. and her boyfriend Robert R. had a long history of drug use and domestic violence. As a result, the Orange County Social Services Agency (SSA) removed their children, Anthony and Christopher, and Renee's daughter Dylan. After reunification services proved unsuccessful, the superior court terminated the parental rights of Renee and Robert as to those three children.

Thereafter Renee and Robert had Sayrah R., the subject of this proceeding, who was born in October 1998. According to Renee, she stopped using drugs when she was pregnant with Sayrah; when Sayrah was four months old, Renee broke up with Robert, taking Sayrah with her. Two months later she was charged and convicted of burglary and forgery. Sentenced to 60 days in jail, she failed to turn herself in to serve her sentence, and a bench warrant was issued for her arrest. When arrested on that warrant in January 2000, she was driving a car. Sayrah was in a child safety seat that lacked the required base and was not properly attached. Renee told police she was a transient, and she could not name a responsible adult who would care for Sayrah during incarceration.

SSA filed a petition asking the superior court to declare Sayrah a dependent child. The petition alleged that Renee's negligence in the matter of the safety seat showed a lack of concern for Sayrah's safety; that Renee was unable to care for Sayrah because of her history of drug abuse, her criminal history, her incarceration on the bench warrant, and her lack of a permanent residence; and that Renee had abused or neglected Sayrah's siblings and there was a substantial risk she would abuse or neglect Sayrah. The superior court found the allegations of the petition true.

At the time of the dispositional hearing, Renee was separated from Robert (who had apparently left the state), and there was no evidence that she had resumed using drugs. SSA argued that under section 361.5(b)(10), it need not provide reunification services to Renee because it had afforded them without success after removal of Renee's other children. The superior court construed section 361.5(b)(10) as entitling Renee to reunification services if she had made a reasonable effort to treat the problems that led to the removal of her other children, but it ruled that she had not made such an effort. It therefore refused to order reunification services.

Renee filed a petition for writ of mandate in the Court of Appeal to challenge the superior court's ruling. The Court of Appeal agreed with the superior court that Renee was entitled to reunification services if she had ***753** made a reasonable effort to treat her

problems, but it held that the superior court had abused its discretion when it ruled that Renee had not made such an effort. We granted review, limited to the question of whether a parent who made a reasonable effort to treat the problems that led to the previous removal of a child or children may obtain reunification services when another child is later removed in a dependency proceeding.

II. The Statutory Scheme

Subdivision (a) of section 361.5 sets forth the general rule that a parent whose child has been removed in a dependency proceeding must be afforded reunification services. Subdivision (b) of that section lists the relatively extreme or unusual circumstances in which reunification services are not required. These circumstances include death of a sibling from abuse or neglect, severe sexual abuse or physical harm, repeated physical or sexual abuse, parental conviction of a violent felony, and willful abduction of the child from placement by the parent.

At issue here are the circumstances described in section 361.5(b)(10). That provision states that reunification services need not be afforded if the superior court finds: "That (A) the court ordered termination of reunification services for any siblings or half-siblings of the child because the parent or guardian failed to reunify with the sibling or half-sibling after the sibling or half-sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a), or (B) the parental rights of a parent or guardian over any sibling or half-sibling of the child had been permanently severed, *and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half-sibling of that child from that parent or guardian.*" (Italics added.) The superior court and the Court of Appeal here concluded that the reasonable effort clause, italicized above, applies to both subparts of section 361.5(b)(10). SSA argues that it applies only to subpart (B).

Ordinarily, the removal of a child in the course of dependency proceedings would require reunification services. Thus, subpart (A) of section 361.5(b)(10) applies to *most* parents whose children were removed in dependency proceedings. Subpart (B), however, applies if reunification services for the sibling in a dependency proceeding were denied because of circumstances described in subdivision (b) of section 361.5, which we described earlier. Subpart (B) also applies when parental rights are severed outside of the dependency system. This occurs when a child has been abandoned or ***754** voluntarily relinquished for adoption, or when a third party brings an action to sever parental rights after the parent has been convicted of a felony or is seriously mentally ill. (Fam. Code, § 7800 et seq.)

III. Discussion

At issue here is how to construe section 361.5(b)(10). In performing that task, we are guided by these principles: "The aim of statutory construction is to discern and give effect to the legislative intent. (*Phelps v. Stostad* (1997) 16 Cal.4th 23, 32 [65 Cal.Rptr.2d 360, 939 P.2d 760].) The first step is to examine the statute's words because they are generally the most reliable indicator of legislative intent." (*Summers v. Newman* (1999) 20 Cal.4th 1021, 1026 [86 Cal.Rptr.2d 303, 978 P.2d 1225].) I therefore begin with the language of section 361.5(b)(10).

The majority insists that, "as a matter of English usage," nothing in the words of section 361.5(b)(10) indicates whether the Legislature intended the section's reasonable effort clause to apply only to subpart (B) of that section, or to subparts (A) *and* (B). (Maj. opn., *ante*, at p. 743.) I disagree. As I shall explain, when the words of section 361.5(b)(10) are given their "usual and ordinary meaning" (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601 [7 Cal.Rptr.2d 238, 828 P.2d 140]), the reasonable effort clause at issue here logically applies to both subparts of that section.

Section 361.5(b)(10), as discussed earlier, does not require reunification services if the superior court finds: "*That* (A) the court ordered termination of reunification services for any siblings or half-siblings of the child because the parent ... failed to reunify ... after the sibling or half-sibling had been removed ... or (B) the parental rights of a parent ... over any sibling or half-sibling of the child had been permanently severed, *and that*, according to the findings of the court, this parent ... has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half-sibling of that child from that parent ...." (Italics added.) As a matter of syntax, the second italicized "that" in that passage, which prefaces the reasonable effort clause, logically pairs with the first

italicized "that" at the beginning of the section. Therefore, the reasonable effort clause after the second "that" necessarily applies to the entire section, not merely to subpart (B). Had the Legislature intended the reasonable effort clause to apply only to subpart (B), it could easily have omitted the second italicized "that."

Furthermore, in the reasonable effort clause the Legislature uses the phrase "the problems that led to *removal* ..." (italics added), which suggests that the clause applies to both subparts (A) and (B). As previously ***755** explained (see pt. II, *ante*), some parents fall under the provisions of subpart (B) (termination of parental rights to a sibling of the child without reunification services) not because the sibling was *removed*, but because the parents abandoned the sibling or voluntarily gave the sibling up for adoption. If anything, the word "removal" appears to refer to subpart (A), which uses the word "removed." Had the Legislature intended the reasonable effort clause to refer only to subpart (B), it would most likely have said "the problems that led to *termination of parental rights*," rather than "the problems that led to *removal*," as currently stated in the statute.

Aside from the statutory language, an examination of the policy concerns underlying the Legislature's decision to include the reasonable effort clause in section 361.5(b)(10) shows that it intended the clause to apply to both subparts of that provision. The purpose of the clause is to give a parent who has made a reasonable effort to deal with the problems that led to removal of one child a chance at reunification when a second child is removed. For example, if one child is removed because the parent is addicted to drugs, and the parent later gives up drugs but another child is thereafter removed because the parent has an abusive partner, the parent should, in the Legislature's view, be given a chance to reunify with the second removed child.

This policy applies equally to parents in subpart (A) (parents for whom previous reunification services were unsuccessful) as it does to parents in subpart (B) (parents whose parental rights were severed). As I have explained (see pt. II, *ante*), included in subpart (B) are parents who never received reunification services before losing custody of a child in an earlier proceeding because their treatment of that child was so bad that it fell within one of the statutorily described circumstances in which the court could deny reunification services. (See § 361.5, subd. (b).) I can think of no reason why the Legislature would have chosen to give such parents a chance at reunification when a second child became a dependent of the juvenile court, while denying that opportunity to parents who were unsuccessful in reunifying with a previously removed child. Yet that is the effect of the majority's holding today.

One more point. This court generally construes laws in a manner that avoids doubts about their constitutionality. (See, e.g., *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509 [53 Cal.Rptr.2d 789, 917 P.2d 628].) This rule also applies when one of two possible constructions of a statute raises doubts about the constitutionality of another part of the statutory scheme. That is the case here. The majority's construction of the reasonable effort clause raises doubts about the constitutionality of another part of the Legislature's statutory scheme for the severance of parental rights to dependent children, as I explain below. ***756**

Under California's statutory scheme, parental rights may be permanently severed when a superior court finds by a *preponderance of the evidence* that returning the child to the parent's custody would create a substantial risk of detriment to the child. (See §§ 366.21, subd. (e), 366.22, subd. (a), 366.26, subd. (c)(1).) In *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242 [19 Cal.Rptr.2d 698, 851 P.2d 1307], a majority of this court rejected a due process challenge to that standard. As part of the basis for its decision, the majority noted that before a final determination by the superior court whether to sever a parental relationship, "there have been a *series of hearings involving ongoing reunification efforts* and, at each hearing, there was a statutory presumption that the child should be returned to the custody of the parent." (*Id.* at p. 253, italics added.) I dissented in *Cynthia D.*, reasoning that "the basic requirements of procedural due process do not allow the state to terminate parental rights in such a proceeding without clear and convincing evidence of a substantial risk of detriment to the child." (*Id.* at p. 257 (dis. opn. of Kennard, J.).)

Under the majority's decision today, a parent who, after failing to reunify with one removed child, makes a reasonable effort to treat the problems that caused that child's removal but then suffers the re-

moval of a second child, may not, as to the second child, receive the "series of hearings involving ongoing reunification efforts" that the majority in *Cynthia D. v. Superior Court*, *supra*, 5 Cal.4th at page 253, relied on in upholding the constitutionality of the "preponderance of evidence" standard established by the statutory scheme. Thus, the majority's holding here weakens the underpinnings of *Cynthia D.*, and it raises doubts about the constitutionality of the preponderance of evidence standard that the *Cynthia D.* majority upheld. To avoid those constitutional issues, I would construe the reasonable effort clause broadly, applying it to all parents in section 361.5(b)(10).

Here, the Court of Appeal agreed with the superior court that the reasonable effort clause applied to Renee, but it disagreed with the superior court's finding that she was not entitled to reunification services with Sayrah because she had not made a reasonable effort to treat the problems that had led to the removal of her other children. Were the issue properly before this court, I might well find that the evidence supports the superior court's ruling that Renee did not make a reasonable effort to deal with her problems. But that issue is not before us. In its petition for review, SSA did not challenge the Court of Appeal's conclusion that Renee had made reasonable efforts to treat her problems; instead, it asserted that the reasonable effort clause was inapplicable. Therefore, I would affirm the judgment of the Court of Appeal, ***757** which applied the reasonable effort clause in reversing the superior court's ruling that Renee was not entitled to reunification services with reference to Sayrah. ***758**

Cal. 2001.
Renee J. v. Superior Court
26 Cal.4th 735, 28 P.3d 876, 110 Cal.Rptr.2d 828, 01 Cal. Daily Op. Serv. 7133, 2001 Daily Journal D.A.R. 8755

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ARCHIE TOBE et al., Plaintiffs and Appellants,
v.
CITY OF SANTA ANA et al., Defendants and Respondents.
DAWN ZUCKERNICK et al., Petitioners,
v.
THE MUNICIPAL COURT FOR THE CENTRAL ORANGE JUDICIAL DISTRICT OF ORANGE COUNTY, Respondent; THE PEOPLE, Real Party in Interest.

No. S038530.

Supreme Court of California
Apr 24, 1995.

SUMMARY

Homeless persons and taxpayers petitioned the superior court for a writ of mandate, seeking to bar enforcement of a city ordinance banning "camping" and storage of personal property, including camping equipment, in designated public areas. The superior court struck some language from the ordinance but otherwise denied the petition. (Superior Court of Orange County, No. 696000, James L. Smith, Judge.) In a related action, persons who had been charged in municipal court with violating the ordinance demurred unsuccessfully to the complaints and thereafter sought a writ of mandate to compel the municipal court to sustain their demur rers. (Municipal Court for the Central Orange Judicial District of Orange County, Nos. 93CM02392, 93CM02393, 93CM02361, 93CM02519, 93CM02525, 93CM02358, 93CM02513, 93CM02354, 93CM02516, 93CM02530, 93CM02386 and 93CM02520, Gregory Lewis, Judge.) The Court of Appeal, Fourth Dist., Div. Three, Nos. G014257 and G014536, consolidated the appeal with the writ petition, and, ruling that the ordinance was unconstitutional, reversed the judgment of the superior court and ordered that a writ of mandate be issued directing the municipal court to sustain the demurrers to the counts pleading violations of the ordinance.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that both writ petitions stated only facial and not as applied challenges to the ordinance. The court also held that the three persons who sought to bar enforcement of the ordinance had a sufficient beneficial interest to bring the action, even though two had never been cited under the ordinance and the third was not a homeless person, since, as taxpayers, they had standing under Code Civ. Proc., § 526a, to restrain illegal expenditure or waste of city funds on future enforcement of an unconstitutional ordinance or an impermissible means of enforcement of a facially valid ordinance. However, the court held that, absent a basis for believing that the ordinance would not have been adopted if the public areas of the city had been appropriated for living accommodation by any group other than the homeless, or that it was the intent of the city council the ordinance be enforced only against homeless persons, the ordinance was not subject to attack on the basis that the city council may have hoped its impact would be to discourage homeless persons from moving to the city. Nor could it be assumed that the purpose of the ordinance was simply to drive the homeless out of the city. Further, the Court of Appeal erred in holding that the ordinance impermissibly infringed on the right of the homeless to travel; in holding that the ordinance was invalid because it permitted punishment for the status of being indigent or homeless, and thus permitted cruel and unusual punishment; and in holding that the ordinance was unconstitutionally vague and overbroad. (Opinion by Baxter, J., with Lucas, C. J., Kennard, Arabian and George, JJ., concurring. Separate concurring opinions by Kennard and Werdegar, JJ. Separate dissenting opinion by Mosk, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Constitutional Law § 19--Constitutionality of Legislation-- Raising Question of Constitutionality--Challenge as "Facial" or "As Applied"-- Ordinance Banning "Camping" in Public Areas--Petition by Homeless Persons and Taxpayers for Writ of Mandate to Bar Enforcement of Ordinance.

A petition for a writ of mandate brought by homeless persons and taxpayers, seeking to bar enforcement of a city ordinance banning "camping" and storage of personal property in designated public areas, stated only a facial and not an as applied challenge to the ordinance, and the trial court did not err in

failing to rule on an as applied challenge, since plaintiffs did not perfect a basis for such a ruling. Although the petition alleged in conclusory language that a pattern of constitutionally impermissible enforcement of the ordinance had existed, plaintiffs never identified the particular applications of the law to be enjoined. The only relief sought in the petition was a writ of mandate enjoining any enforcement of the ordinance by defendants, which is the kind of relief sought in a facial attack. Also, since no evidentiary hearing was held, plaintiffs did not create a factual record on which an injunction limited to improper applications of the ordinance could have been fashioned. Even assuming that plaintiffs attempted to challenge the ordinance on the basis that homeless persons whose violation thereof was involuntary could offer a due-process-based necessity defense, declarations submitted by plaintiffs did not demonstrate that the ordinance had been enforced in a constitutionally impermissible manner against such persons.

[See 7 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 56 et seq.]

(2a, 2b, 2c, 2d) Constitutional Law § 19--Constitutionality of Legislation--Raising Question of Constitutionality--Challenge as "Facial" or "As Applied"--Ordinance Banning "Camping" in Public Areas--Petition for Writ of Mandate to Compel Dismissal of Charges for Violation of Ordinance.

A petition for a writ of mandate by persons who had been charged with violation of a city ordinance banning "camping" and storage of personal property in designated public areas, to compel the trial court to sustain their demurrers to the complaints and to dismiss the charges, stated only a facial and not an as applied challenge to the ordinance. None of the complaints included any allegations identifying the charged individuals as involuntarily homeless persons whose violation of the ordinance was involuntary and/or occurred at a time when shelter beds were unavailable. Although the petition for a writ of mandate included allegations regarding the city's past efforts to rid the city of its homeless population, those allegations, even if true, were irrelevant to the legal sufficiency of the complaints. The demurrers and petition for a writ of mandate necessarily constituted only a facial attack on the ordinance since the defendants could not, on a demurrer to the accusatory pleading, offer evidence that the ordinance was invalid as applied to their individual circumstances. Moreover, the People had no opportunity to present evidence regarding the circumstances in which charged individuals had been arrested, as the only issue before the trial court in ruling on the demurrer was the sufficiency of the complaints.

(3) Constitutional Law § 19--Constitutionality of Legislation--Raising Question of Constitutionality--"Facial" and "As Applied" Challenges Compared.

A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. To support a determination of facial unconstitutionality, voiding the statute as a whole, the party challenging the provision cannot prevail by suggesting that, in some future hypothetical situation, constitutional problems may possibly arise as to the particular application of the statute. Rather, the challenger must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions. An as applied challenge may seek (1) relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied, or (2) an injunction against future application of the statute or ordinance in the allegedly impermissible manner it is shown to have been applied in the past. It contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether, in those particular circumstances, the application deprived the individual to whom it was applied of a protected right.

(4a, 4b) Constitutional Law § 19--Constitutionality of Legislation-- Raising Question of Constitutionality--By Criminal Defendant.

When a criminal defendant claims that a facially valid statute or ordinance has been applied in a constitutionally impermissible manner to the defendant, the court evaluates the propriety of the application on a case-by-case basis to determine whether to relieve the defendant of the sanction. However, when a criminal defendant seeks relief from a present application of a criminal statute or ordinance on constitutional grounds, it is not the administrative agency's "application" of the statute that is determinative. Whether the particular application of a statute declaring conduct criminal is constitutionally permissible can be determined only after the circumstances of its application have been established by conviction or

otherwise. Only then is an "as applied" challenge ripe. To obtain mandate or other relief from penalties imposed under a past application of the law, the defendant must presently be suffering some adverse impact of the law which the court has the power to redress.

(5a, 5b) Constitutional Law § 23--Constitutionality of Legislation-- Raising Question of Constitutionality--Burden of Proof--"As Applied" Challenge.

If a plaintiff seeks to enjoin future, allegedly impermissible, applications of a facially valid statute or ordinance, the plaintiff must demonstrate that such application is occurring or has occurred in the past. If instead it is contended that an otherwise valid statute has been applied in a constitutionally impermissible manner in the past and the plaintiff seeks an injunction against future application of the statute in that manner, the plaintiff must show a pattern of impermissible enforcement.

(6) Constitutional Law § 21--Constitutionality of Legislation--Raising Question of Constitutionality--Standing Essential to Raise Question.

In most cases, a plaintiff seeking relief from the constitutionally impermissible application of an otherwise valid statute or ordinance, either by a petition for a writ of mandamus or a complaint for declaratory and injunctive relief, must have a sufficient beneficial interest to have standing to prosecute the action, and there must be a present impermissible application of the challenged statute or ordinance which the court can remedy.

(7) Mandamus and Prohibition § 3--Mandamus--Standing to Obtain Writ.

Under Code Civ. Proc., § 1086, which expresses the controlling statutory requirements for standing to petition for a writ of mandate, the requirement that a petitioner be "beneficially interested" means that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.

(8) Constitutional Law § 21--Constitutionality of Legislation--Raising Question of Constitutionality--Standing Essential to Raise Question--Homeless Persons Challenging Ordinance Banning "Camping" in Public Areas.

Three plaintiffs had a sufficient beneficial interest to bring an action challenging the constitutionality of a city ordinance banning "camping" and storage of personal property in designated public areas, even though two had never been cited under the ordinance and the third was not a homeless person, since, as taxpayers, they had standing under Code Civ. Proc., § 526a, to restrain the illegal expenditure or waste of city funds on future enforcement of an unconstitutional ordinance or an impermissible means of enforcement of a facially valid ordinance.

(9) Indictment and Information § 39--Defects and Objections--Demurrer--Use.

A demurrer to a criminal complaint lies only to challenge the sufficiency of the pleading and raises only issues of law.

(10) Appellate Review § 126--Scope of Review--As Dependent on Procedural Posture of Case.

The procedural posture of a case is not simply a "technicality," but is crucial to determining the proper scope of appellate review. The procedural posture of a case also determines the ability of the parties to exercise their rights to present relevant evidence and to the creation of a full record adequate to enable the reviewing court to make a reasoned decision on the questions before it. When an appellate court fails to limit the scope of review to issues properly presented in the trial court, it denies litigants their right to have appellate questions decided on the basis of a full record which exposes all of the relevant facts and circumstances.

(11) Constitutional Law § 27--Constitutionality of Legislation--Rules of Interpretation--Motives of Legislature--Ordinance Banning "Camping" in Public Areas.

While the intent or purpose of the legislative body must be considered in construing an ambiguous statute or ordinance, the motive of the legislative body is generally irrelevant to the validity of the statute or ordinance. Thus, absent a basis for believing that a city ordinance banning "camping" and storage of personal property in designated public areas would not have been adopted if the public areas of the city had been appropriated for living accommodation by any group other than the homeless, or that it was the intent of the city council that the ordinance be enforced only against homeless persons, the ordinance was not subject to attack on the basis that the city council may have hoped that its impact would be to discourage homeless persons from moving to the city. Nor could

it be assumed that the purpose of the ordinance was simply to drive the homeless out of the city. The ordinance banned use of public property in the city for purposes for which it was not designed. At the time it was adopted, the city had agreed not to engage in discriminatory law enforcement, and the declared purpose of the ordinance did not suggest that it was to be enforced solely against the homeless.

(12) Constitutional Law § 21--Constitutionality of Legislation--Raising Question of Constitutionality--Standing Essential to Raise Question-- Consideration of Hypothetical Situations--Challenge on Basis of Prohibition of Constitutionally Protected Conduct.

One will not be heard to attack a statute on grounds that are not shown to be applicable to himself or herself and a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations. If the statute clearly applies to a criminal defendant's conduct, the defendant may not challenge it on grounds of vagueness. However, in some cases, a defendant may make a facial challenge to the statute if he or she argues that the statute improperly prohibits a substantial amount of constitutionally protected conduct, whether or not its application to his or her own conduct may be constitutional.

(13) Constitutional Law § 52--First Amendment and Other Fundamental Rights of Citizens--Right to Travel.

Although no provision of the federal Constitution expressly recognizes a right to travel among and between the states, that right is recognized as a fundamental aspect of the federal union of states. For all the great purposes for which the federal government was formed, we are one people, with one common country. We are all citizens of the United States, and, as members of the same community, we must have the right to pass and repass through every part of it without interruption, as freely as in our own states. The right to travel, or right of migration, is an aspect of personal liberty which, when united with the right to travel, requires that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations that unreasonably burden or restrict this movement.
[See 7 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, §§ 287, 288.]

(14) Constitutional Law § 52--First Amendment and Other Fundamental Rights of Citizens--Right to Travel--Intrastate Travel--What Constitutes Violation of Right.

The right of intrastate travel, which includes intramunicipal travel, is a basic human right protected by Cal. Const., art. I, §§ 7 and 24. Such a right is implicit in the concept of a democratic society and is one of the attributes of personal liberty under common law. However, a violation of the right of intrastate travel occurs only when there is a direct restriction of the right to travel. Indirect or incidental burdens on travel resulting from otherwise lawful governmental action are not impermissible infringements of the right to travel, and, when legislation creating a burden on the right to travel is subjected to an equal protection analysis, strict scrutiny is not required, nor must a compelling need be demonstrated in order to sustain the legislation. If there is any rational relationship between the purpose of the statute or ordinance and a legitimate government objective, the law must be upheld.

(15a, 15b, 15c) Constitutional Law § 52--First Amendment and Other Fundamental Rights of Citizens--Right of Homeless to Travel--As Violated by Ordinance Banning "Camping" in Public Areas:Parks, Squares, and Playgrounds § 6--Use.

The Court of Appeal erred in holding that a city ordinance banning "camping" and storage of personal property in designated public areas impermissibly infringed on the right of the homeless to travel. The ordinance was nondiscriminatory; it forbade use of the public streets, parks, and property by residents and nonresidents alike for purposes other than those for which the property was designed. The provisions of the ordinance did not inevitably conflict with the right to travel, and it was capable of constitutional application. The ordinance had no impact, incidental or otherwise, on the right to travel except insofar as a person, homeless or not, might have been discouraged from traveling to the city because camping on public property was banned. An ordinance that bans camping and storing personal possessions on public property does not directly impede the right to travel. Even assuming that the ordinance may have constituted an incidental impediment to some individuals' ability to travel to the city, it was capable of applications that did not offend the constitution, and thus it had to be upheld. Further, there is no constitutional mandate that sites on public property be made available for camping to facilitate a homeless person's right to travel, just as there is no right to use public property for camping or

storing personal belongings.

(16) Constitutional Law § 25--Constitutionality of Legislation--Rules of Interpretation--Presumption of Constitutionality.

All presumptions favor the validity of a statute. The court may not declare it invalid unless it is clearly so.

(17) Constitutional Law § 52--First Amendment and Other Fundamental Rights of Citizens--Right to Travel--As Including Right to Live or Stay Where One Will.

The right to travel does not endow citizens with a right to live or stay where they will. While an individual may travel where he or she will and remain in a chosen location, that constitutional guaranty does not confer immunity against local trespass laws and does not create a right to remain without regard to the ownership of the property on which the person chooses to live or stay, be it public or privately owned property.

(18) Constitutional Law § 1--Creation or Recognition of Constitutional Right as Imposing Obligation on Local Government to Provide Means to Enjoy Right.

With few exceptions, such as the right to counsel guaranteed by U.S. Const., 6th Amend., the creation or recognition of a constitutional right does not impose on a state or governmental subdivision the obligation to provide its citizens with the means to enjoy that right.

(19) Criminal Law § 519.2--Punishment--Cruel and Unusual--Ordinance Banning "Camping" in Public Areas--As Unconstitutional Punishment for Status as Indigent or Homeless:Parks, Squares, and Playgrounds § 6--Use.

The Court of Appeal erred in concluding that a city ordinance banning "camping" and storage of personal property in designated public areas was invalid because it permitted punishment for the status of being indigent or homeless, and thus permitted a punishment which violated the prohibition of cruel and unusual punishment under U.S. Const., 8th Amend., and the ban on cruel or unusual punishment of Cal. Const., art. I, § 17. The ordinance permitted punishment for proscribed conduct, not punishment for status. Neither the language of the ordinance nor the evidence submitted by the persons who had been cited under it supported a conclusion that a person could be convicted and punished under the ordinance solely on the basis that he or she had no fixed place of abode. The United States Supreme Court has not held that the Eighth Amendment prohibits punishment of acts derivative of a person's status. Further, homelessness is not readily classified as a "status." Rather, there is a substantial definitional distinction between a "status" and a "condition." Even assuming the accuracy of the declarations submitted by the persons who had been cited under the ordinance with respect to their descriptions of the circumstances in which they had been cited, it was not clear that none had alternatives to either the condition of being homeless or the conduct that led to homelessness and to the citations.
[See 3 **Witkin & Epstein,** Cal. Criminal Law (2d ed. 1989) § 1344.]

(20a, 20b, 20c) Constitutional Law § 115--Substantive Due Process-- Statutory Vagueness--Ordinance Banning "Camping" in Public Areas:Parks, Squares, and Playgrounds § 6--Use.

The Court of Appeal erred in holding that a city ordinance banning "camping" and storage of personal property in designated public areas was unconstitutionally vague. The stated purpose of the ordinance was to make public streets and other areas readily accessible to the public and to prevent use of public property "for camping purposes or storage of personal property" which "interferes with the rights of others to use the areas for which they were intended." The terms which the Court of Appeal considered vague were not so when the purpose clause of the ordinance was considered and the terms were read in that context as they should have been. Thus, there was no possibility that any law enforcement agent would have believed that picnicking in a public park constituted "camping" within the meaning of the ordinance or would have believed that leaving a towel on a beach or an umbrella in a library constituted storage of property in violation of the ordinance. Further, the ordinance gave adequate notice of the conduct it prohibited and did not invite arbitrary or capricious enforcement.
[Vagueness as invalidating statutes or ordinances dealing with disorderly persons or conduct, note, 12 **A.L.R.3d** 1448.]

(21) Constitutional Law § 113--Substantive Due Process--Statutory Vagueness.

A penal statute must define the offense with sufficient precision that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. The constitutional interest implicated in questions of statutory vagueness is that no person be de-

prived of life, liberty, or property without due process of law, as assured by both the federal Constitution (U.S. Const., 5th and 14th Amends.) and the California Constitution (Cal. Const., art. I, § 7). To satisfy the constitutional command, a statute must be sufficiently definite to provide adequate notice of the conduct proscribed and provide sufficiently definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement. Only a reasonable degree of certainty is required, however. The analysis begins with the strong presumption that legislative enactments must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.

(22) Words, Phrases, and Maxims--Camp.

"Camp" means to pitch or occupy a camp, to live temporarily in a camp or outdoors.

(23a, 23b) Constitutional Law § 115--Substantive Due Process--Statutory Overbreadth--Ordinance Banning "Camping" in Public Areas:Parks, Squares, and Playgrounds § 6--Use.

A city ordinance banning "camping" and storage of personal property in designated public areas was not unconstitutionally overbroad, was not facially invalid in that respect, and was capable of constitutional application. The ordinance did not exceed the police power of the city, since there is no fundamental right to camp on public property, persons who do so are not a suspect classification, and the persons challenging the validity of the ordinance did not claim that it was invidiously discriminatory on its face. A city has the power to regulate conduct on a street, sidewalk, or other public place or on or in a place open to the public (Pen. Code, § 647c) and local ordinances governing the use of municipal parks are specifically authorized (Pub. Resources Code, § 5193). Further, a city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws (Cal. Const., art. XI, § 7). A city not only has the power to keep its streets and other public property open and available for the purposes to which they are dedicated, it has a duty to do so. Also, none of the persons challenging the validity of the ordinance had identified a constitutionally protected right that was impermissibly restricted by application or threatened application of the ordinance. [See 8 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 792 et seq.]

(24) Constitutional Law § 113--Substantive Due Process--Effect of Challenge to Law on Grounds of Vagueness or Overbreadth.

A facial challenge to a law on grounds that it is overbroad and vague is an assertion that the law is invalid in all respects and cannot have any valid application, or a claim that the law sweeps in a substantial amount of constitutionally protected conduct. The concepts of vagueness and overbreadth are related, in the sense that if a law threatens the exercise of a constitutionally protected right a more stringent vagueness test applies.

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BAXTER, J.

The Court of Appeal invalidated, on constitutional grounds, an ordinance of the City of Santa Ana (Santa Ana) which banned "camping" and storage of personal property, including camping equipment, in designated public areas. We granted the petitions for review of Santa Ana and the People to consider whether the ordinance is valid on its face and whether either of the actions involved in the consolidated appeal stated an "as applied" challenge to the ordinance.

We conclude only a facial challenge was perfected in the lower courts and that the Santa Ana ordinance is valid on its face. It does not impermissibly restrict the right to travel, does not permit punishment for status, and is not unconstitutionally vague or overbroad, the only constitutional claims pursued by plaintiffs. [FN1]

> FN1 The Tobe petition for writ of mandate stated a cause of action based on an alleged violation of equal protection. The petition alleged in support of the equal protection claim only that the respondents had not and would not arrest nonhomeless persons who engaged in the same conduct for which the plaintiffs had been arrested. They offered no evidence to support that equal protection theory and did not argue an equal protection claim in the Court of Appeal or in this court. We deem that claim to have been abandoned. The Zuckernick petition did not make an equal protection claim.

We shall, therefore, reverse the judgment of the Court of Appeal.

I. Background

In October 1992, Santa Ana added article VIII, section 10-400 et seq. (the ordinance) to its municipal code. The declared purpose of the ordinance was ***1081** to maintain public streets and other public areas in the city in a clean and accessible condition. Camping and storage of personal property in those areas, the ordinance recited, interfered with the rights of others to use those areas for the purposes for which they were intended.

The ordinance provides:

"Sec. 10-402. Unlawful Camping.

"It shall be unlawful for any person to camp, occupy camp facilities or use camp paraphernalia in the following areas, except as otherwise provided:

"(a) any street;

"(b) any public parking lot or public area, improved or unimproved.

"Sec. 10-403. Storage of Personal Property in Public Places.

"It shall be unlawful for any person to store personal property, including camp facilities and camp paraphernalia, in the following areas, except as otherwise provided by resolution of the City Council:

"(a) any park;

"(b) any street;

"(c) any public parking lot or public area, improved or unimproved." [FN2]

> FN2 Section 10-401 of the ordinance defines the terms:
>
> "(a) *Camp* means to pitch or occupy camp facilities; to use camp paraphernalia.

"(b) *Camp facilities* include, but are not limited to, tents, huts, or temporary shelters.

"(c) *Camp paraphernalia* includes, but is not limited to, tarpaulins, cots, beds, sleeping bags, hammocks or non-city designated cooking facilities and similar equipment.

"(d) *Park* means the same as defined in section 31-1 of this Code.

"(e) *Store* means to put aside or accumulate for use when needed, to put for safekeeping, to place or leave in a location.

"(f) *Street* means the same as defined in section 1-2 of this Code."

Plaintiffs in these consolidated actions [FN3] are: (1) homeless persons and taxpayers who appealed from a superior court order which struck "to live ***1082** temporarily in a camp facility or outdoors" from the ordinance, [FN4] but otherwise denied their petition for writ of mandate by which they sought to bar enforcement of the ordinance (Tobe), [FN5] and (2) persons who, having been charged with violating the ordinance, demurred unsuccessfully to the complaints and thereafter sought mandate to compel the respondent municipal court to sustain their demurrers (Zuckernick).

FN3 The Court of Appeal opinion recites that the appeal and the mandate petition had been consolidated. We find no order in the record consolidating the appeal of the Tobe parties and the mandate petition of the Zuckernick parties in that court, however. We deem the recital in the Court of Appeal opinion to be such an order.

FN4 The ordinance has been amended accordingly. That action is not disputed by the parties.

FN5 Although the Tobe petition is denominated a petition for writ of "Mandate/Prohibition," prohibition lies only to restrain "the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." (Code Civ. Proc., § 1102.) None of the named respondents exercises judicial functions in the enforcement of the ordinance. We consider the petition one for mandamus alone therefore. (*Neal v. State of California* (1960) 55 Cal.2d 11, 16 [9 Cal.Rptr. 607, 357 P.2d 839].)

Plaintiffs offered evidence to demonstrate that the ordinance was the culmination of a four-year effort by Santa Ana to expel homeless persons. There was evidence that in 1988 a policy was developed to show "vagrants" that they were not welcome in the city. To force them out, they were to be continually moved from locations they frequented by a task force from the city's police and recreation and parks departments; early park closing times were to be posted and strictly enforced; sleeping bags and accessories were to be disposed of; and abandoned shopping carts were to be confiscated. Providers of free food were to be monitored; sprinklers in the Center Park were to be turned on often; and violations of the city code by businesses and social service agencies in that area were to be strictly enforced. This effort led to a lawsuit which the city settled in April 1990.

Santa Ana then launched an August 15, 1990, sweep of the civic center area arresting and holding violators for offenses which included blocking passageways, drinking in public, urinating in public, jaywalking, destroying vegetation, riding bicycles on the sidewalk, glue sniffing, removing trash from a bin, and violating the fire code. Some conduct involved nothing more than dropping a match, leaf, or piece of paper, or jaywalking. The arrestees were handcuffed and taken to an athletic field where they were booked, chained to benches, marked with numbers, and held for up to six hours, after which they were released at a different location. Homeless persons among the arrestees claimed they were the victims of discriminatory enforcement. The municipal court found that they had been singled out for arrest for offenses that rarely, if ever, were the basis for even a citation.

In October 1990, Santa Ana settled a civil action for injunctive relief, agreeing to refrain from discriminating on the basis of homelessness, from taking action to drive the homeless out of the city, and from

conducting ***1083** future sweeps and mass arrests. That case, which was to be dismissed in 1995, was still pending when the camping ordinance was passed in 1992.

Evidence in the form of declarations regarding the number of homeless and facilities for them was also offered. In 1993 there were from 10,000 to 12,000 homeless persons in Orange County and 975 permanent beds available to them. When National Guard armories opened in cold weather, there were 125 additional beds in Santa Ana and another 125 in Fullerton. On any given night, however, the number of shelter beds available was more than 2,500 less than the need.

The Court of Appeal majority, relying in part on this evidence, concluded that the purpose of the ordinance-to displace the homeless-was apparent. On that basis, it held that the ordinance infringed on the right to travel, authorized cruel and unusual punishment by criminalizing status, and was vague and overbroad. The city contends that the ordinance is constitutional on its face. We agree. We also conclude that, if the Tobe petition sought to mount an as applied challenge to the ordinance, it failed to perfect that type of challenge.

II. Preliminary Considerations

A. *Facial or As Applied Challenge.*

(1a),(2a) Plaintiffs argue that they have mounted an as applied challenge to the ordinance as well as a facial challenge. While they may have intended both, we conclude that no as applied challenge to the ordinance was perfected. The procedural posture of the Zuckernick action precludes an as applied challenge, which may not be made on demurrer to a complaint which does not describe the allegedly unlawful conduct or the circumstances in which it occurred. The Tobe plaintiffs did not clearly allege such a challenge or seek relief from specific allegedly impermissible applications of the ordinance. Moreover, assuming that an as applied attack on the ordinance was stated, the plaintiffs did not establish that the ordinance has been applied in a constitutionally impermissible manner either to themselves or to others in the past.

Because the Court of Appeal appears to have based its decision in part on reasoning that would be appropriate to a constitutional challenge based on a claim that, as applied to particular defendants, the Santa Ana ordinance was invalid, we must first consider the nature of the challenge made by these petitioners. ***1084**

(3) A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. (*Dillon v. Municipal Court* (1971) 4 Cal.3d 860, 865 [94 Cal.Rptr. 777, 484 P.2d 945].) " 'To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute .... Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.' " (*Arcadia Unified School Dist.* v. *State Dept. of Education* (1992) 2 Cal.4th 251, 267 [5 Cal.Rptr.2d 545, 825 P.2d 438], quoting *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180-181 [172 Cal.Rptr. 487, 624 P.2d 1215].)

An as applied challenge may seek (1) relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied, or (2) an injunction against future application of the statute or ordinance in the allegedly impermissible manner it is shown to have been applied in the past. It contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right. (See, e.g., *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 615-616 [37 L.Ed.2d 830, 841-843, 93 S.Ct. 2908]; *County of Nevada v. MacMillen* (1974) 11 Cal.3d 662, 672 [114 Cal.Rptr. 345, 522 P.2d 1345]; *In re Marriage of Siller* (1986) 187 Cal.App.3d 36, 49 [231 Cal.Rptr. 757].) (4a) When a criminal defendant claims that a facially valid statute or ordinance has been applied in a constitutionally impermissible manner to the defendant, the court evaluates the propriety of the application on a case-by-case basis to determine whether to relieve the defendant of the sanction. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 404 [149 Cal.Rptr. 375, 584 P.2d 512].)

(5a) If a plaintiff seeks to enjoin future, allegedly impermissible, types of applications of a facially valid statute or ordinance, the plaintiff must demonstrate that such application is occurring or has occurred in the past. In *Bowen v. Kendrick* (1988) 487 U.S. 589 [101 L.Ed.2d 520, 108 S.Ct. 2562], for instance, the court first distinguished the nature of facial and as applied challenges to a statute which authorized federal grants to organizations for services related to premarital adolescent sexual relations and pregnancy. The plaintiffs had standing as taxpayers to raise an establishment clause challenge to the statute and to its application. The Supreme Court held that the as ***1085** applied challenge could be resolved only by considering how the statute was being administered. Plaintiffs had to show that specific grants were impermissible because the grants went to " 'pervasively sectarian' religious institutions" or had been used to fund " 'specifically religious activit[ies].' " (487 U.S. at p. 621 [101 L.Ed.2d at pp. 548-549].) The matter was remanded because the district court had not identified the particular grantees or the particular aspects of their programs for which constitutionally improper expenditures had been made. Finally, the court held, a remedy should be fashioned to withdraw federal agency approval of such grants.

(4b) When a criminal defendant seeks relief from a present application of a criminal statute or ordinance on constitutional grounds, it is not the administrative agency's "application" of the statute that is determinative, however. Whether the particular application of a statute declaring conduct criminal is constitutionally permissible can be determined only after the circumstances of its application have been established by conviction or otherwise. (See, e.g., *Murgia v. Municipal Court* (1975) 15 Cal.3d 286 [124 Cal.Rptr. 204, 540 P.2d 44].) Only then is an as applied challenge ripe. To obtain mandate or other relief from penalties imposed under a past application of the law, the defendant must presently be suffering some adverse impact of the law which the court has the power to redress.

(5b) If instead it is contended that an otherwise valid statute has been applied in a constitutionally impermissible manner in the past and the plaintiff seeks an injunction against future application of the statute in that manner, the plaintiff must show a pattern of impermissible enforcement. (See, e.g., *Van Atta v. Scott* (1980) 27 Cal.3d 424 [166 Cal.Rptr. 149, 613 P.2d 210]; *White v. Davis* (1975) 13 Cal.3d 757 [120 Cal.Rptr. 94, 533 P.2d 222]; *Wirin v. Horrall* (1948) 85 Cal.App.2d 497 [193 P.2d 470]; cf. *Sundance v. Municipal Court* (1986) 42 Cal.3d 1101 [232 Cal.Rptr. 814, 729 P.2d 80].)

(6) In most cases a plaintiff seeking this relief, either by a petition for writ of mandamus or complaint for declaratory and injunctive relief, must have a sufficient beneficial interest to have standing to prosecute the action, and there must be a present impermissible application of the challenged statute or ordinance which the court can remedy. (7) "[Code of Civil Procedure] [s]ection 1086 expresses the controlling statutory requirements for standing for mandate: 'The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested.' The requirement that a petitioner be 'beneficially interested' has been generally interpreted to mean that one may obtain the writ only if the person has ***1086** some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796 [166 Cal.Rptr. 844, 614 P.2d 276].)

(8) We need not decide if the Tobe plaintiffs have such a beneficial interest even though two have never been cited under the ordinance and one is not a homeless person, because as taxpayers they have standing under Code of Civil Procedure section 526a to restrain illegal expenditure or waste of city funds on *future* enforcement of an unconstitutional ordinance or an impermissible means of enforcement of a facially valid ordinance. (*White v. Davis, supra*, 13 Cal.3d 757, 764.) We must determine, therefore, whether the petitions at issue in this case stated and have perfected an as applied challenge to the Santa Ana ordinance.

1. *The Tobe petition.*

(1b) The first of these actions (Tobe) has been prosecuted as a petition for writ of mandate by two homeless residents of Santa Ana, each of whom intends to remain in the city, and neither of whom can find affordable housing. The third plaintiff is a resident of Santa Ana. All are taxpayers. Respondents are Santa Ana, its mayor, its city manager, and its police chief.

Plaintiffs allege that they have been convicted in the past for violating the ordinance and expect to be arrested in the future for sleeping in public and conducting other ordinary and necessary daily activities in public areas. The allegations of the petition do not describe the circumstances of the past arrests and the petition does not allege or describe either the arrests or convictions of other persons that are claimed to have been unconstitutional applications of the ordinance.

The petition alleges that respondents' "pattern of arresting, detaining, harassing and incarcerating involuntarily homeless persons such as petitioners, for sleeping and engaging in other ordinary and essential activities of daily life" violates the rights of homeless persons. The only allegations that describe the pattern of enforcement that is claimed to be constitutionally impermissible are ones which state that respondents have caused plaintiffs and other homeless persons to risk arrest and/or detention without probable cause and other "abuses, indignities and punishment" for their homeless status and presence in Santa Ana. Although the petition alleges in conclusory language that a pattern of constitutionally impermissible enforcement of the ordinance existed, plaintiffs never identified the particular applications of the law to be enjoined. The only relief sought in the petition is a writ of ***1087** mandate enjoining *any* enforcement of the ordinance by respondents. That relief is the kind of relief sought in a facial attack.

Moreover, no alternative writ was issued and no evidentiary hearing was held. Plaintiffs did not create a factual record on which an injunction limited to improper applications of the ordinance could have been fashioned.

Thus, notwithstanding the contrary conclusion of the dissent, the allegations of the petition did not clearly state an as applied challenge to the ordinance and the petition did not seek relief from constitutionally impermissible applications or methods of enforcing the ordinance. The petition sought to enjoin *any* application of the ordinance to *any* person in *any* circumstance. And, contrary to the view of the dissent, which relies on "concessions" of the parties and the reporter's transcript, rather than the actual judgment of the court, the superior court did not rule on the petition as one encompassing an as applied challenge. The order of that court which directed issuance of a peremptory writ invalidating one sentence of the ordinance as vague, did not identify or dispose of any such challenge. Instead, the court found only that "enforcement of Santa Ana Ordinance NS-2160 ... does not violate the rights of homeless persons to freedom of movement" and that "petitioners' challenges to the constitutionality of the remaining portions of Santa Ana Ordinance NS-2160 are without merit."

The petition sought to enjoin enforcement of the ordinance on the ground that it was invalid because it violated the rights of the homeless. The court ruled that enforcement did not violate those rights. The court made no findings related to a pattern of enforcement of the ordinance and the judgment makes no mention of the manner in which the ordinance has been applied.

Moreover, even assuming that plaintiffs attempted to allege and prosecute an as applied challenge, and that the superior court did entertain plaintiffs' argument that they had mounted an as applied challenge to the ordinance, the superior court did not err in failing to rule on an as applied challenge as plaintiffs did not perfect a basis for ruling on such a challenge.

The only documents in the record that describe the manner in which the ordinance has been applied are declarations submitted six months after the petition was filed in conjunction with the superior court's hearing on plaintiffs' motion for issuance of a peremptory writ. Some of the declarations were by persons other than plaintiffs who stated that they had been arrested or cited for violation of the ordinance. None of those declared that he or she had ever been convicted and had a sentence imposed for violation of the ***1088** ordinance. None stated facts to support a conclusion that citations were given solely for the purpose of harassment and were not prosecuted thereafter, and none stated facts to support either the claim that the ordinance had been enforced discriminatorily against the homeless or the claim that a pattern of constitutionally impermissible enforcement existed. The declarations, which were the only evidence offered in the case, [FN6] reflected only that persons who were homeless engaged in conduct that violated the ordinance and were arrested or cited for so doing. [FN7] The declarations described the conduct which led to citations only from the perspective of the person cited. They left unclear whether it may have appeared to the officer who issued the citation that the

individual was using or storing camp paraphernalia, or living temporarily, on public property.

> FN6 Santa Ana did not offer evidence to rebut the declarants' description of the circumstances in which they were cited for violating the ordinance, believing the declarations to be irrelevant to the issues raised by the petition.

> FN7 We do not understand plaintiffs to be arguing that a person who chooses voluntarily to camp on public property has a constitutionally protected right to do so, or that it would be improper to cite and convict such persons for violating the ordinance.

Moreover, assuming that persons whose violation of the ordinance is involuntary may offer a due-process-based necessity defense, the declarations did not demonstrate an impermissible pattern of enforcement against such persons. [FN8]

> FN8 Unlike the dissent, we cannot conclude that the city intends to enforce the ordinance against persons who have no alternative to "camping" or placing "camp paraphernalia" on public property. (Dis. opn., *post*, p. 1123, fn. 14.) A senior deputy district attorney expressed his opinion at oral argument before this court that a necessity defense might be available to "truly homeless" persons and said that prosecutorial discretion would be exercised.

Two of the declarants were plaintiffs. One was not homeless. The other conceded, contrary to the allegations of the petition, that he had never been cited under the ordinance.

Only one of the remaining seven declarants explained why he had not been able to find lawful shelter on the night he was cited for violation of the ordinance. That declarant was unable to get on the bus to the armory shelter on the night he was cited. His declaration, like those of most of the other declarants, did not indicate that he had applied for public assistance that might have made it possible to find housing. Among the reasons given by the other declarants for "camping" on public property at the time they were cited were that the civic center area was "safer," that the declarant had been turned away from a shelter a few weeks earlier and had not returned, that the civic center was convenient to food and there was safety in numbers, that the declarant had missed the bus to the armory, that shelters were so noisy and overcrowded that the declarant could not sleep there, and that the declarant ***1089** did not like the armory because there was too much noise and he liked to be by himself.

While one of the declarants claimed to be schizophrenic, and stated that she had applied for and was awaiting Social Security assistance, she did not state whether she had sought public assistance from the county or that she had been turned away by a homeless shelter on the night she was cited.

Assuming that plaintiffs attempted to mount an as applied challenge to the ordinance on this basis, therefore, they simply did not demonstrate that the ordinance had been enforced in a constitutionally impermissible manner against homeless persons who had no alternative but to "camp" on public property in Santa Ana.

As discussed above, an as applied challenge assumes that the statute or ordinance violated is valid and asserts that the manner of enforcement against a particular individual or individuals or the circumstances in which the statute or ordinance is applied is unconstitutional. All of the declarants who had been cited under the ordinance described conduct in which they had engaged and that conduct appears to have violated the ordinance. None describes an impermissible means of enforcement of the ordinance or enforcement in circumstances that violated the constitutional rights the petition claimed had been violated. None demonstrated that the circumstances in which he or she was cited affected the declarant's right to travel. None states facts to support a conclusion that any punishment, let alone cruel and unusual punishment proscribed by the Eighth Amendment, had been imposed. Since no constitutionally impermissible pattern, or even single instance, of constitutionally impermissible enforcement was shown, no injunction against such enforcement could be issued and none was sought by plaintiffs.

Because the Tobe plaintiffs sought only to enjoin *any* enforcement of the ordinance and did not demonstrate a pattern of unconstitutional enforcement, the petition must be considered as one which presented

only a facial challenge to the ordinance.

2. *The Zuckernick petition.*

(2b) The second action (Zuckernick) has been prosecuted as a petition for writ of mandate to compel the municipal court in which petitioners are charged with violation of the ordinance to sustain their demurrers to the complaints and to dismiss the charges. The petition was filed in the Court of Appeal after the municipal court overruled the demurrers. ***1090**

The Zuckernick petition arises out of an order overruling a demurrer to a criminal complaint. (9) A demurrer to a criminal complaint lies only to challenge the sufficiency of the pleading and raises only issues of law. (*People v. McConnell* (1890) 82 Cal. 620 [23 P. 40]; *Ratner v. Municipal Court for the Los Angeles Judicial District* (1967) 256 Cal.App.2d 925, 929 [64 Cal.Rptr. 500]; see also, 4 Witkin, Cal. Criminal Law (2d ed. 1989) § 2127, p. 2498.) Penal Code section 1004 expressly limits demurrers to defects appearing on the face of the accusatory pleading:

"The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, *when it appears upon the face thereof* either:

"1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, or, if an information or complaint that the court has no jurisdiction of the offense charged therein;

"2. That it does not substantially conform to the provisions of Sections 950 and 952, and also Section 951 in case of an indictment or information;

"3. That more than one offense is charged, except as provided in Section 954;

"4. That the facts stated do not constitute a public offense;

"5. That it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution." (Italics added.)

(2c) The Zuckernick petitioners demurred to the complaints on the ground that they did not conform to the provisions of Penal Code sections 950 and 952; [FN9] that the facts alleged did not constitute a public offense; that the complaints contained matters constituting a legal justification or excuse ***1091** or other legal bar to the prosecution; and that the offense charged was unconstitutionally vague and overbroad, and violated the right to travel. The demurrer recited in addition that it was "based upon the fact that the ordinances and penal statutes allegedly violated are unconstitutionally overbroad and vague in violation of the Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution; unconstitutionally infringe on the defendant's right to travel and freedom of travel [*sic*]." Elsewhere the demurrer also asserted that the ordinance violates the Eighth Amendment prohibition against cruel and unusual punishment and the state constitutional prohibition against cruel or unusual punishment. (Cal. Const., art. I, § 17.) [FN10]

FN9 Penal Code section 950:

"The accusatory pleading must contain:

"1. The title of the action, specifying the name of the court to which the same is presented, and the names of the parties;

"2. A statement of the public offense or offenses charged therein."

Penal Code section 952: "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

FN10 We assume, and respondents do not contend otherwise, that if a statute under which a defendant is charged with a crime is

> invalid, the complaint is subject to demurrer under subdivisions 1, 4 and 5 of Penal Code section 1004 on the ground that the court lacks jurisdiction because the statute is invalid, the facts stated do not constitute a public offense, and the complaint contains matter which constitutes a legal bar to the prosecution. (See *Dillon v. Municipal Court, supra*, 4 Cal.3d 860, 865; *In re Cregler* (1961) 56 Cal.2d 308, 310 [14 Cal.Rptr. 289, 363 P.2d 305]; *Mandel v. Municipal Court* (1969) 276 Cal.App.2d 649, 652 [81 Cal.Rptr. 173].)
>
> We do not agree with the Court of Appeal in *People v. Jackson* (1985) 171 Cal.App.3d 609, 615 [217 Cal.Rptr. 540], that grounds other than those specified in Penal Code section 1004 may be urged in support of a "common law demurrer" raising "constitutional and other attacks on the sufficiency of an accusatory pleading." Penal Code section 1002 specifies: "The only pleading on the part of the defendant is either a demurrer or a plea." Penal Code section 1004 specifies the grounds on which a demurrer may be made, and we have recognized that if a constitutional challenge is based on matters not appearing on the face of the accusatory pleading a demurrer will not lie. (*In re Berry* (1968) 68 Cal.2d 137, 146 [65 Cal.Rptr. 273, 436 P.2d 273].)

None of the complaints in the Zuckernick proceedings included any allegations identifying the defendant as an involuntarily homeless person whose violation of the ordinance was involuntary and/or occurred at a time when shelter beds were unavailable. [FN11] Although the petition for writ of mandate included allegations regarding Santa Ana's past efforts to rid the city of its homeless population, those allegations, even if true, were irrelevant to the legal sufficiency of the complaints. (*Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 166 [101 Cal.Rptr. 880, 496 P.2d 1248]; *People v. Williams* (1979) 97 Cal.App.3d 382, 391 [158 Cal.Rptr. 778].)

> FN11 The allegations charging violation of the ordinance recited only that: "On or about [date] said defendant, in violation of Section 10-402 of the Santa Ana Municipal Code, a Misdemeanor, did willfully and unlawfully, camp, use camp facilities, or camp paraphernalia in a public street or a public parking lot or other public area."

The Zuckernick demurrers and petition for writ of mandate necessarily constituted only a facial attack on the ordinance since the defendants could not, on a demurrer to the accusatory pleading, offer evidence that as applied ***1092** to their individual circumstances the ordinance was invalid. (See *Dillon v. Municipal Court, supra*, 4 Cal.3d 860, 865.) Those allegations are also irrelevant in determining the facial validity of the ordinance insofar as petitioners alleged that it violated their right to travel and constituted cruel and unusual punishment for status, since they do not establish that there were no circumstances in which the ordinance could be constitutionally applied.

Therefore, while we are not insensitive to the importance of the larger issues petitioners and amici curiae [FN12] seek to raise in these actions, or to the disturbing nature of the evidence which persuaded the Court of Appeal to base its decision on what it believed to be the impact of the ordinance on homeless persons, the only question properly before the municipal and superior courts and the Court of Appeal for decision was the facial validity of the ordinance.

> FN12 Many of those issues are the result of legislative policy decisions. The arguments of many amici curiae regarding the apparently intractable problem of homelessness and the impact of the Santa Ana ordinance on various groups of homeless persons (e.g., teenagers, families with children, and the mentally ill) should be addressed to the Legislature and the Orange County Board of Supervisors, not the judiciary. Neither the criminal justice system nor the judiciary is equipped to resolve chronic social problems, but criminalizing conduct that is a product of those problems is not for that reason constitutionally impermissible. (See *Sundance v. Municipal Court, supra*, 42 Cal.3d 1101, and conc. opn. of Grodin, J., *id.* at p. 1139.)

(10) We emphasize that the procedural posture of a case is not simply a "technicality." The procedural posture of a case is crucial to determining the proper scope of appellate review. (See, e.g., *Sebago, Inc.* v.

City of Alameda (1989) 211 Cal.App.3d 1372, 1379 [259 Cal.Rptr. 918].) The procedural posture of a case also determines the ability of the parties to exercise their right to present relevant evidence and to the creation of a full record adequate to enable the reviewing court to make a reasoned decision on the questions before it. When an appellate court fails to limit the scope of review to issues properly presented in the trial court, it denies litigants their right to have appellate questions decided on the basis of a full record which exposes all of the relevant facts and circumstances.

(2d) The importance of these considerations is most clearly demonstrated in the Zuckernick matter. There the People had no opportunity to present evidence regarding the circumstances in which the petitioners had been arrested, as the only issue before the municipal court in ruling on the demurrer was the sufficiency of the complaints. That court properly ruled that the complaints were sufficient. How then can a reviewing court find error in that ruling on the basis of evidence unrelated to the sufficiency of the complaint which the People had no opportunity to rebut in the municipal court? ***1093**

In the Tobe matter, notwithstanding the declarations that were submitted by the plaintiffs, there was no evidence that the ordinance had been applied to any person in a constitutionally impermissible manner.

This court's consideration will, therefore, be limited to the facial validity of the ordinance.

B. *Motive of Legislators.*

The Court of Appeal also considered the evidence of Santa Ana's past attempts to remove homeless persons from the city significant evidence of the purpose for which the ordinance was adopted. It then considered that purpose in assessing the validity of the ordinance. (11) While the intent or purpose of the legislative body must be considered in construing an ambiguous statute or ordinance (Code Civ. Proc., § 1859; *People v. Pieters* (1991) 52 Cal.3d 894, 898-899 [276 Cal.Rptr. 918, 802 P.2d 420]), the motive of the legislative body is generally irrelevant to the validity of the statute or ordinance. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 145 [130 Cal.Rptr. 465, 550 P.2d 1001]; *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 913 [120 Cal.Rptr. 707, 534 P.2d 403]; *County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 726-727 [119 Cal.Rptr. 631, 532 P.2d 495]; *Sunny Slope Water Co. v. City of Pasadena* (1934) 1 Cal.2d 87, 99 [33 P.2d 672]; *In re Sumida* (1918) 177 Cal. 388, 390 [170 P. 823]; *Hadacheck v. Alexander* (1915) 169 Cal. 616, 617 [147 P. 259]; *Odd Fellows' Cem. Assn. v. City and County of San Francisco* (1903) 140 Cal. 226, 235-236 [73 P. 987]; *Dobbins v. City of Los Angeles* (1903) 139 Cal. 179, 184 [72 P. 970], revd. on other grounds (1904) 195 U.S. 223 [49 L.Ed. 169, 25 S.Ct. 18]; *People v. County of Glenn* (1893) 100 Cal. 419, 423 [35 P. 302].) [FN13]

FN13 While the Court of Appeal considered Santa Ana's past actions and the documents suggesting that the city had mounted a concerted effort to remove homeless persons, it did not acknowledge that, as part of the settlement of a lawsuit seeking to enjoin further unlawful attempts to remove homeless persons, Santa Ana had agreed to take no further action to drive the homeless from the city. The Court of Appeal nonetheless assumed that the adoption of a facially neutral ordinance prohibiting camping and storing personal possessions on public property was a renewed effort to do so and a violation of the settlement agreement. Had it been a violation of the settlement agreement, however, the Tobe plaintiffs' appropriate recourse would have been through an action to enforce the settlement.

The Court of Appeal relied in part on *Pottinger v. City of Miami* (S.D. Fla. 1992) 810 F.Supp. 1551, 1581, for its assumption that consideration of the motives of the Santa Ana City Council may be considered in assessing the validity of the ordinance. That is not the rule in this state, but even were it so, *Pottinger* was not a challenge to the facial validity of the Miami ***1094** ordinance in question there. Moreover, the district court's conclusion that the ordinance was invalid as applied was not based on the motives of the legislators in enacting the ordinance. The court considered internal memoranda and evidence of arrest records as evidence of the purpose underlying *enforcement* of the ordinance against homeless persons.

Absent a basis for believing that the ordinance would not have been adopted if the public areas of Santa Ana had been appropriated for living accom-

modation by any group other than the homeless, or that it was the intent of that body that the ordinance be enforced only against homeless persons (see, e.g., *Parr v. Municipal Court* (1971) 3 Cal.3d 861 [92 Cal.Rptr. 153, 479 P.2d 353]), the ordinance is not subject to attack on the basis that the city council may have hoped that its impact would be to discourage homeless persons from moving to Santa Ana.

We cannot assume, as does the dissent, that the sole purpose of the Santa Ana ordinance was to force the homeless out of the city. The city had agreed to discontinue such attempts when it settled the prior litigation. The record confirms that the city faced a problem common to many urban areas, the occupation of public parks and other public facilities by homeless persons. Were we to adopt the approach suggested by the dissent, any facially valid ordinance enacted by a city that had once acted in a legally impermissible manner to achieve a permissible objective could be found invalid on the basis that its past conduct established that the ordinance was not enacted for a permissible purpose. Absent evidence other than the enactment of a facially valid ordinance, we cannot make that assumption here.

The dissent relies on *Parr v. Municipal Court, supra,* 3 Cal.3d 861, as supporting invalidation of a facially valid ordinance on the ground that it is motivated by impermissible legislative intent. The Santa Ana ordinance and the circumstances of its adoption are distinguishable from the Carmel ordinance at issue in *Parr*, however. There, the city had not entered into a court-approved settlement in which it stipulated that it would not engage in discriminatory enforcement of the law against "undesirables," and, unlike the Santa Ana ordinance, the Carmel ordinance banned a customary use of the city park-sitting or lying on the lawn. A "Declaration of Urgency" which accompanied the Carmel ordinance stated that its purpose was to regulate the use of public property, parks, and beaches by transient visitors.

The Carmel ordinance was challenged as facially invalid on grounds that it discriminated against undesirable and unsanitary persons, referring to them as "hippies" and "transients." In *Parr v. Municipal Court, supra,* 3 Cal.3d 861, we rejected the People's argument that only the operative language of ***1095** the ordinance should be considered because the declaration of purpose suggested that the operative sections were intended to be limited in their application to the group it described. On that basis we concluded that the Carmel ordinance had a discriminatory purpose.

The ordinance, by contrast, bans use of public property in the city for purposes for which it was not designed. At the time it was adopted the city had agreed not to engage in discriminatory law enforcement. And no declaration of purpose comparable to that which accompanied the Carmel ordinance was made. The declared purpose of the ordinance did not suggest that it was to be enforced solely against the homeless. We cannot, for those reasons, join the assumption of the dissent that the purpose of the ordinance is simply to drive the homeless out of Santa Ana. FN14

FN14 We also decline to join the conclusion of the dissent that enactment of an ordinance like that adopted by Santa Ana, whose purpose is to preserve public property for its intended use, is constitutionally impermissible because it may lead to the adoption of similar ordinances in other cities with the result that the homeless are everywhere excluded from living on public property.

C. *Facial Challenges on Vagueness Grounds.*

The Court of Appeal granted relief to the Zuckernick petitioners without regard to either the limitations on a demurrer to a criminal complaint or vagueness challenges by criminal defendants.

(12) "The rule is well established ... that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations." (*In re Cregler, supra,* 56 Cal.2d 308, 313.) If the statute clearly applies to a criminal defendant's conduct, the defendant may not challenge it on grounds of vagueness. (*Parker v. Levy* (1974) 417 U.S. 733, 756 [41 L.Ed.2d 439, 457-458, 94 S.Ct. 2547]; *People v. Green* (1991) 227 Cal.App.3d 692, 696 [278 Cal.Rptr. 140].) However, in some cases, a defendant may make a facial challenge to the statute, if he argues that the statute improperly prohibits a " 'substantial amount of constitutionally protected conduct,' " whether or not its application to his own conduct may be constitutional. (

Kolender v. Lawson (1983) 461 U.S. 352, 358-359, fn. 8 [75 L.Ed.2d 903, 909-910, 103 S.Ct. 1855].) [FN15]

FN15 Because we conclude that the ordinance is not overbroad, we need not decide whether the overbreadth doctrine is applicable outside the area of freedoms protected by the First Amendment. The Supreme Court has stated that overbreadth challenges will be entertained only if a First Amendment violation is alleged. "[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad." (*Schall v. Martin* (1984) 467 U.S. 253, 268, fn. 18 [81 L.Ed.2d 207, 220, 104 S.Ct. 2403].)

Other decisions of the United States Supreme Court suggest that this limitation is not invariably observed. (See *Kolender v. Lawson, supra*, 461 U.S. 352, 358-359, fn. 8 [75 L.Ed.2d 903, 909-910.) We will assume arguendo that the overbreadth doctrine may be applied outside the First Amendment context.

The Zuckernick petitioners argued in support of their demurrers that the ordinance failed to give fair and adequate notice of prohibited conduct, had ***1096** vague enforcement standards which encourage arbitrary and discriminatory arrests and convictions, and reached constitutionally protected conduct. The vagueness aspect of their challenge to the ordinance is governed by the rule stated in *In re Cregler, supra*, 56 Cal.2d 308, 313. The last ground, an overbreadth, not a vagueness, argument, is governed by *Kolender v. Lawson, supra*, 461 U.S. 352, 358-359, fn. 8 [75 L.Ed.2d 903, 909-910].)

The Zuckernick petitioners' vagueness challenge was addressed to the terms "camp," "camp facilities," and "camp paraphernalia," as defined in the ordinance, and the term "temporary shelter," which is not defined. The definitions in the ordinance include terms which those petitioners do not claim are vague and which may apply to petitioner's conduct. Thus the People may seek to establish violation of the ordinance on the basis that one or more of the petitioners pitched or used a tent on a public street or parking lot. Because the Zuckernick challenge to the ordinance was brought by demurrer and the nature of their conduct has not been determined, those petitioners cannot show at this stage of the proceedings that the ordinance did not clearly apply to their conduct. To that extent, therefore, the vagueness challenge of the Zuckernick petitioners is premature.

The Tobe plaintiffs are not persons presently charged with violating the ordinance, however. Their actions do not seek to avoid prosecution for criminal acts. They are suing as taxpayers to restrain expenditure of public funds on the enforcement of an allegedly unconstitutional ordinance. (Code Civ. Proc., § 526a.) The restrictions applicable to vagueness challenges by criminal defendants do not apply to their action.

With these considerations in mind, we now turn to the constitutional bases for the decision of the Court of Appeal.

III. Facial Validity of the Santa Ana Ordinance

A. *Right to Travel.*

(13) Although no provision of the federal Constitution expressly recognizes a right to travel among and between the states, that right is recognized ***1097** as a fundamental aspect of the federal union of states. "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." (*Passenger Cases* (1849) 48 U.S. (7 How.) 283, 492 [12 L.Ed. 702, 791] (dis. opn. of Taney, C. J.).)

In the *Passenger Cases, supra*, 48 U.S. 283, the court struck down taxes imposed by the States of New York and Massachusetts on aliens who entered the state from other states and countries by ship. The basis for the decision, as found in the opinions of the individual justices, was that the tax invaded the power of Congress over foreign and interstate commerce. The opinion of Chief Justice Taney, in which he disagreed with the majority on the commerce clause issue, also addressed the tax as applied to citizens of the United States arriving from other states. That tax he believed to be impermissible. Some later decisions of the court trace recognition of the constitutional right of unburdened interstate travel to that opinion. (See, e.g., *Shapiro v. Thompson* (1969) 394 U.S. 618, 630 [22 L.Ed.2d 600, 612-613, 89 S.Ct. 1322].) And, relying on the dissenting opinion of the Chief Justice in the *Passenger Cases*, the court struck down a tax on

egress from the State of Nevada in *Crandall v. Nevada* (1867) 73 U.S. (6 Wall.) 35 [18 L.Ed. 745], holding that the right of interstate travel was a right of national citizenship which was essential if a citizen were to be able to pass freely through another state to reach the national or a regional seat of the federal government.

Other cases find the source of the right in the privileges and immunities clause. In *Paul v. Virginia* (1868) 75 U.S. (8 Wall.) 168 [19 L.Ed. 357], the court rejected a challenge predicated on the privileges and immunities clause made by a corporation to a tax imposed by the State of Virginia on out-of-state insurance companies. In so doing, it recognized interstate travel as a right guaranteed to citizens. "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; *it gives them the right of free ingress into other States, and egress from them*; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws." (*Id.* at p. 180 [19 L.Ed at p. 360], italics added.)

In the *Slaughter-House Cases* (1872) 83 U.S. (16 Wall.) 36 [21 L.Ed. 394], the court equated the rights protected by the privileges and immunities ***1098** clause to those in the corresponding provision of the Articles of Confederation which provided that the inhabitants of each state were to have " 'the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State ....' " (83 U.S. at p. 75 [21 L.Ed. at p. 408].)

The privileges and immunities clause was also the source of the right of interstate travel as an incident of national citizenship recognized by the court in *Twining v. New Jersey* (1908) 211 U.S. 78, 97 [53 L.Ed. 97, 105, 29 S.Ct. 14] and *United States v. Wheeler* (1920) 254 U.S. 281, 293 [65 L.Ed. 270, 273, 41 S.Ct. 133]. In *Williams v. Fears* (1900) 179 U.S. 270, 274 [45 L.Ed. 186, 188-189, 21 S.Ct. 128], the right was held to be one protected by the Fourteenth Amendment as well as other provisions of the Constitution. "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution." (*Ibid.*) Again, in *Kent v. Dulles* (1958) 357 U.S. 116, 127 [2 L.Ed.2d 1204, 1211, 78 S.Ct. 1113], freedom to travel was recognized as "an important aspect of the citizen's 'liberty.' " (See also *Edwards v. California* (1941) 314 U.S. 160, 177, 183 [86 L.Ed. 119, 127, 62 S.Ct. 164] (conc. opns. of Douglas, J. and Jackson, J.).)

The right to travel, or right of migration, now is seen as an aspect of personal liberty which, when united with the right to travel, requires "that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." (*Shapiro v. Thompson*, *supra*, 394 U.S. 618, 629 [22 L.Ed.2d 600, 612]; see also *United States v. Guest* (1966) 383 U.S. 745, 757-758 [16 L.Ed.2d 239, 248-250, 86 S.Ct. 1170].)

In a line of cases originating with *Shapiro v. Thompson*, *supra*, 394 U.S. 618, the court has considered the right to travel in the context of equal protection challenges to state laws creating durational residency requirements as a condition to the exercise of a fundamental right or receipt of a state benefit. In those cases the court has held that a law which *directly* burdens the fundamental right of migration or interstate travel is constitutionally impermissible. Therefore a state may not create classifications which, by imposing burdens or restrictions on newer residents which do not apply to all residents, deter or penalize migration of persons who exercise their right to travel to the state.

In *Shapiro*, where public assistance was denied residents who had lived in the state for less than one year, the court held that durational residence as a ***1099** condition of receiving public assistance constituted invidious discrimination between residents, and that if a law had no other purpose than chilling the exercise of a constitutional right such as that of migration of needy persons into the state the law was impermissible. (*Shapiro v. Thompson*, *supra*, 394 U.S. 618, 627, 631 [22 L.Ed.2d 600, 613].) Further, "any classification which serves to penalize the exercise of [the right of migration], unless shown to be necessary

to promote a *compelling* governmental interest, is unconstitutional." (*Id.* at p. 634 [22 L.Ed.2d at p. 615].)

Next, durational residence requirements for voting were struck down by the court in *Dunn v. Blumstein* (1972) 405 U.S. 330 [31 L.Ed.2d 274, 92 S.Ct. 995]. Again the question arose as an equal protection issue. The court held that the state must have a compelling reason for the requirement because it denied residents the right to vote, a fundamental political right, and because the law "classif[ies] ... residents on the basis of recent travel, penalizing those persons ... who have gone from one jurisdiction to another during the qualifying period. Thus, the durational residence requirement directly impinges on the exercise of a second fundamental personal right, the right to travel." (*Id.* at p. 338 [31 L.Ed.2d at pp. 281-282].) The court emphasized the imposition of a "direct" burden on travel: "Obviously, durational residence laws single out the class of bona fide state and county residents who have recently exercised this constitutionally protected right, and penalize such travelers directly." (*Ibid.*) It also took care to point out, as it had in *Shapiro v. Thompson*, *supra*, 394 U.S. 618, 638, fn. 21 [22 L.Ed.2d 600, 617]), that a law which did not penalize residents on the basis of recent travel would not be vulnerable to a similar challenge. The court explained: "Where, for example, an interstate migrant loses his driver's license because the new State has a higher age requirement, a different constitutional question is presented. For in such a case, the new State's age requirement is not a *penalty* imposed solely because the newcomer is a new resident; instead, all residents, old and new, must be of a prescribed age to drive." (405 U.S. at p. 342, fn. 12 [31 L.Ed.2d at p. 284].)

The court's focus on whether the law directly burdened, by penalizing, interstate travel continued in *Memorial Hospital v. Maricopa County* (1974) 415 U.S. 250 [39 L.Ed.2d 306, 94 S.Ct. 1076], in which a durational residence requirement for indigent, nonemergency medical care at county expense was challenged. The court held that the restriction denied newcomers equal protection, impinged on the right to travel by denying basic necessities of life, and penalized interstate migration. (*Id.* at pp. 261-262 [39 L.Ed.2d at pp. 316-317]; see also *Benson v. Arizona State Bd. of Dental Examiners* (9th Cir. 1982) 673 F.2d 272, 277 [licensing requirement that did not disadvantage newcomers vis-a-vis previous residents did not penalize exercise of right to travel].) ***1100**

In each of these cases the court had before it a law which denied residents a fundamental constitutional right (voting) or a governmental benefit (public assistance, medical care) on the basis of the duration of their residence. The law created two classes of residents. In *Zobel v. Williams* (1982) 457 U.S. 55 [72 L.Ed.2d 672, 102 S.Ct. 2309], where the right to share in oil revenues was based on the duration of residence in Alaska, the court noted that the right to travel analysis in those cases, which did not create an actual barrier to travel, was simply a type of equal protection analysis. "In addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents. In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents." (*Id.* at p. 60, fn. 6 [72 L.Ed.2d at pp. 677-678].)

(14) The right of intrastate travel has been recognized as a basic human right protected by article I, sections 7 and 24 of the California Constitution. (*In re White* (1979) 97 Cal.App.3d 141 [158 Cal.Rptr. 562].) There the court concluded that a condition of probation which barred a defendant convicted of prostitution from designated areas in the City of Fresno should be modified to avoid an overly restrictive impact on the defendant's right to travel. The court held that "the right to intrastate travel (which includes intramunicipal travel) is a basic human right protected by the United States and California Constitutions as a whole. Such a right is implicit in the concept of a democratic society and is one of the attributes of personal liberty under common law. (See 1 Blackstone, Commentaries 134; U.S. Const., art. IV, § 2 and the 5th, 9th and 14th Amends.; Cal. Const., art. I, § 7, subd. (a) and art. I, § 24 ....)" (*Id.* at p. 148.) In *White*, as in the early United States Supreme Court cases, the court addressed a direct burden on travel.

Neither the United States Supreme Court nor this court has ever held, however, that the incidental impact on travel of a law having a purpose other than

restriction of the right to travel, and which does not discriminate among classes of persons by penalizing the exercise by some of the right to travel, is constitutionally impermissible.

By contrast, in a decision clearly relevant here, a zoning law which restricted occupancy to family units or nonfamily units of no more than two persons was upheld by the Supreme Court, notwithstanding any incidental impact on a person's preference to move to that area, because the law was ***1101** not aimed at transients and involved no fundamental right. (*Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 7 [39 L.Ed.2d 797, 803, 94 S.Ct. 1536].)

Courts of this state have taken a broader view of the right of intrastate travel, but have found violations only when a direct restriction of the right to travel occurred. (*Adams v. Superior Court* (1974) 12 Cal.3d 55, 61-62 [115 Cal.Rptr. 247, 524 P.2d 375].) In *In re White*, *supra*, the petitioner had been barred directly from traveling to specified areas. In *In re Marriage of Fingert* (1990) 221 Cal.App.3d 1575 [271 Cal.Rptr. 389], a parent had been ordered to move to another county as a condition of continued custody of a child. Indirect or incidental burdens on travel resulting from otherwise lawful governmental action have not been recognized as impermissible infringements of the right to travel and, when subjected to an equal protection analysis, strict scrutiny is not required. If there is any rational relationship between the purpose of the statute or ordinance and a legitimate government objective, the law must be upheld. (*Adams v. Superior Court*, *supra*, 12 Cal.3d 55, 61-62.)

This court has also rejected an argument that any legislation that burdens the right to travel must be subjected to strict scrutiny and sustained only if a compelling need is demonstrated. In *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038], an initiative ordinance which banned issuance of new building permits until support facilities were available was challenged as an impermissible burden on the right to travel. We rejected the argument because the impact of the ordinance was only an indirect burden on the right to travel. The ordinance did not penalize travel and resettlement, although an incidental impact was to make it more difficult to establish residence in the place of one's choosing. (*Id.* at pp. 602-603; see also *R.H. Macy & Co. v. Contra Costa County* (1990) 226 Cal.App.3d 352, 367-369 [276 Cal.Rptr. 530].)

We do not question the conclusion of the Court of Appeal that a local ordinance which forbids sleeping on public streets or in public parks and other public places may have the effect of deterring travel by persons who are unable to afford or obtain other accommodations in the location to which they travel. (15a) Assuming that there may be some state actions short of imposing a direct barrier to migration or denying benefits to a newly arrived resident which violate the right to travel, the ordinance does not do so. It is a nondiscriminatory ordinance which forbids use of the public streets, parks, and property by residents and nonresidents alike for purposes other than those for which the property was designed. It is not constitutionally invalid because it may have an incidental impact on the right of some persons to interstate or intrastate travel. ***1102**

As we have pointed out above, to succeed in a facial challenge to the validity of a statute or ordinance the plaintiff must establish that " 'the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional provisions.' " (*Arcadia Unified School Dist. v. State Dept. of Education*, *supra*, 2 Cal.4th 251, 267, quoting *Pacific Legal Foundation v. Brown*, *supra*, 29 Cal.3d 168, 180-181.) (16) All presumptions favor the validity of a statute. The court may not declare it invalid unless it is clearly so. (*Calfarm Ins. Co.* v. *Deukmejian* (1989) 48 Cal.3d 805, 814-815 [258 Cal.Rptr. 161, 771 P.2d 1247].)

(15b) Since the Santa Ana ordinance does not on its face reflect a discriminatory purpose, and is one which the city has the power to enact, its validity must be sustained unless it cannot be applied without trenching upon constitutionally protected rights. The provisions of the Santa Ana ordinance do not inevitably conflict with the right to travel. The ordinance is capable of constitutional application. The ordinance prohibits "any person" from camping and/or storing personal possessions on public streets and other public property. It has no impact, incidental or otherwise, on the right to travel except insofar as a person, homeless or not, might be discouraged from traveling to Santa Ana because camping on public property is banned. An ordinance that bans camping and storing personal possessions on public property does not directly impede the right to travel. (*People v. Scott* (1993) 20

Cal.App.4th Supp. 5, 13 [26 Cal.Rptr.2d 179].) Even assuming that the ordinance may constitute an incidental impediment to some individuals' ability to travel to Santa Ana, since it is manifest that the ordinance is capable of applications which do not offend the Constitution in the manner suggested by petitioners and the Court of Appeal, the ordinance must be upheld.

Our conclusion that the Santa Ana ordinance does not impermissibly infringe on the right of the homeless, or others, to travel, finds support in the decision of the United States District Court in *Joyce v. City and County of San Francisco* (N.D.Cal. 1994) 846 F.Supp. 843. The plaintiffs, on behalf of a class of homeless individuals, sought a preliminary injunction to prevent implementation of a program of enforcement (the Matrix Program) of state and municipal laws which were commonly violated by the homeless residents of the city. Among the laws to be enforced were those banning "camping" or "lodging" in public parks and obstructing sidewalks. It was claimed, inter alia, that the Matrix Program infringed on the right to travel. The court rejected that argument and refused to require the city to show a compelling state interest to justify any impact the program might have on the right of the class members to travel. It noted that the program was not facially discriminatory as it did not distinguish between persons who were ***1103** residents of the city and those who were not. In so doing, the court suggested that the opinion of the Court of Appeal in this case was among those which constituted extensions of the right to travel that appeared to be "unwarranted under the governing Supreme Court precedent." (*Id.* at p. 860.) We agree.

(17) The right to travel does not, as the Court of Appeal reasoned in this case, endow citizens with a "right to live or stay where one will." While an individual may travel where he will and remain in a chosen location, that constitutional guaranty does not confer immunity against local trespass laws and does not create a right to remain without regard to the ownership of the property on which he chooses to live or stay, be it public or privately owned property.

(18) Moreover, lest we be understood to imply that an as applied challenge to the ordinance might succeed on the right to travel ground alone, we caution that, with few exceptions, [FN16] the creation or recognition of a constitutional right does not impose on a state or governmental subdivision the obligation to provide its citizens with the means to enjoy that right. (*Harris v. McRae* (1980) 448 U.S. 297, 317-318 [65 L.Ed.2d 784, 804-806, 100 S.Ct. 2671]; *Maher v. Roe* (1977) 432 U.S. 464, 471-474 [53 L.Ed.2d 484, 492-495, 97 S.Ct. 2376].) (15c) Santa Ana has no constitutional obligation to make accommodations on or in public property available to the transient homeless to facilitate their exercise of the right to travel. (*Lindsey v. Normet (*1972) 405 U.S. 56, 74 [31 L.Ed.2d 36, 50-51, 92 S.Ct. 862].) Petitioners' reliance on *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288 [82 L.Ed.2d 221, 104 S.Ct. 3065], for the proposition that Santa Ana is obliged to provide areas in which camping is permitted on public property is misplaced. The issue in *Clark* was whether the refusal of the National Park Service to permit demonstrators who wished to call attention to the plight of the homeless to sleep in Lafayette Park and on the Mall in the nation's capital violated the First Amendment rights of the demonstrators. The court held that it did not, as other areas were available for the purpose. *Clark* dealt with an affirmative right-that of free speech -which could be restricted in public fora only by reasonable, content-neutral time, place and manner restrictions. (*Id.* at p. 293 [82 L.Ed.2d at p. 293-294].) The court expressly recognized the authority of the National Park Service "to promulgate rules and regulations for the use of the parks in ***1104** accordance with the purposes for which they were established." [FN17] (468 U.S. at p. 289 [82 L.Ed.2d at p. 224].) Petitioners in this case make no claim that the right they seek, to camp on public property in Santa Ana, is expressive conduct protected by the First Amendment. There is no comparable constitutional mandate that sites on public property be made available for camping to facilitate a homeless person's right to travel, just as there is no right to use public property for camping or storing personal belongings. [FN18]

FN16 E.g., the right to counsel guaranteed by the Sixth Amendment to the United States Constitution.

FN17 The ordinance mirrors the National Park Service rules and regulations governing camping in several respects. Those rules prohibit camping by using park lands as living accommodations and storing personal belongings on them. (36 C.F.R. §§ 2.22, 2.61 (1994).)

FN18 Petitioners' argument that Santa Ana may not deny homeless persons the right to live on public property anywhere in the city unless it provides alternative accommodations also overlooks the Legislature's allocation of responsibility to assist destitute persons to counties. (Welf. & Inst. Code, §§ 17000-17001.5.) If the inability of petitioners and other homeless persons in Santa Ana to afford housing accounts for their need to "camp" on public property, their recourse lies not with the city, but with the county under those statutory provisions.

The Court of Appeal erred in holding that the Santa Ana ordinance impermissibly infringes on the right of the homeless to travel.

B. *Punishment for Status.*

(19) The Court of Appeal invalidated the ordinance for the additional reason that it imposed punishment for the "involuntary status of being homeless." [FN19] On that basis the court held the ordinance was invalid because such punishment violates the Eighth Amendment prohibition of cruel and unusual punishment, and the ban on cruel or unusual punishment of article I, section 17 of the California Constitution. We disagree with that construction of the ordinance and of the activity for which punishment is authorized. The ordinance permits punishment for proscribed conduct, not punishment for status.

FN19 In reaching that decision, the Court of Appeal did not distinguish between involuntarily being homeless, and involuntarily engaging in conduct that violated the ordinance. The court assumed that an involuntarily homeless person who involuntarily camps on public property may be convicted or punished under the ordinance. That question, which the Court of Appeal and the dissent address, and which might be raised in an as applied challenge to the ordinance, is not before us because plaintiffs offered no evidence that the ordinance was being applied in that manner. We express no opinion on the proper construction of the ordinance, in particular on whether the conduct it prohibits must be "willful," or on whether or in what circumstances a necessity defense is available.

The holding of the Court of Appeal is not limited to the face of the ordinance, and goes beyond even the evidence submitted by petitioners. Neither the language of the ordinance nor that evidence supports a conclusion that a person may be convicted and punished under the ordinance solely ***1105** on the basis that he or she has no fixed place of abode. No authority is cited for the proposition that an ordinance which prohibits camping on public property punishes the involuntary status of being homeless or, as the Court of Appeal also concluded, is punishment for poverty. *Robinson v. California* (1962) 370 U.S. 660 [8 L.Ed.2d 758, 82 S.Ct. 1417], on which the court relied, dealt with a statute which criminalized the status of being addicted to narcotics. The court made it clear, however, that punishing the conduct of using or possessing narcotics, even by an addict, is not impermissible punishment for status. (370 U.S. at pp. 664, 666 [8 L.Ed.2d at pp. 761-763].)

A plurality of the high court reaffirmed the *Robinson* holding in *Powell v. Texas* (1968) 392 U.S. 514 [20 L.Ed.2d 1254, 88 S.Ct. 2145], where it rejected a claim that punishment of an alcoholic for being drunk in public was constitutionally impermissible. "The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.' " (*Id.* at p. 533 [20 L.Ed.2d at p. 1268].)

As the district court observed in *Joyce v. City and County of San Francisco, supra*, 846 F.Supp. 843, 857, the Supreme Court has not held that the Eighth Amendment prohibits punishment of acts derivative of a person's status. Indeed, the district court questioned whether "homelessness" is a status at all within the meaning of the high court's decisions. "As an analytical matter, more fundamentally, homelessness is not readily classified as a 'status.' Rather, as expressed for the plurality in *Powell* by Justice Marshall, there is a 'substantial definitional distinction between a "status " ... and a " condition" ....' 392 U.S. at 533, 88 S.Ct. at

2155. While the concept of status might elude perfect definition, certain factors assist in its determination, such as the involuntariness of the acquisition of that quality (including the presence or not of that characteristic at birth), *see* *Robinson*, 370 U.S. at 665-69 & [fn.] 9, 82 S.Ct. at 1420-21 & [fn.] 9, and the degree to which an individual has control over that characteristic." (846 F.Supp. at p. 857.)

The declarations submitted by petitioners in this action demonstrate the analytical difficulty to which the *Joyce* court referred. Assuming arguendo the accuracy of the declarants' descriptions of the circumstances in which they were cited under the ordinance, it is far from clear that none had alternatives to either the condition of being homeless or the conduct that led to homelessness and to the citations. ***1106**

The Court of Appeal erred, therefore, in concluding that the ordinance is invalid because it permits punishment for the status of being indigent or homeless.

C. *Vagueness and Overbreadth.*

The Court of Appeal concluded that the ordinance was vague and overbroad. It based its vagueness conclusion on the nonexclusive list of examples of camping "paraphernalia" and "facilities" in the definitions of those terms. Those definitions were so unspecific, the court reasoned, that they invited arbitrary enforcement of the ordinance in the unfettered discretion of the police. The overbreadth conclusion was based on reasoning that the ordinance could be applied to constitutionally protected conduct. In that respect the court held that the verb "store" was overbroad as it could be applied to innocent conduct such as leaving beach towels unattended at public pools and wet umbrellas in library foyers.

1. *Vagueness.*

(20a) The Tobe respondents and the People, real party in interest in the Zuckernick matter, argue that the Court of Appeal failed to apply the tests enunciated by the United States Supreme Court and this court in applying the vagueness doctrine. It has isolated particular terms rather than considering them in context. We agree.

(21) A penal statute must define the offense with sufficient precision that "ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (*Kolender v. Lawson*, *supra*, 461 U.S. 352, 357 [75 L.Ed.2d 903, 909]; see also *Papachristou v. City of Jacksonville* (1972) 405 U.S. 156, 162 [31 L.Ed.2d 110, 115-116, 92 S.Ct. 839]; *United States v. Harriss* (1954) 347 U.S. 612, 617 [98 L.Ed. 989, 996, 74 S.Ct. 808]; *Thornhill v. Alabama* (1940) 310 U.S. 88, 97-98 [84 L.Ed. 1093, 1099-1100, 60 S.Ct. 736].) "The constitutional interest implicated in questions of statutory vagueness is that no person be deprived of 'life, liberty, or property without due process of law,' as assured by both the federal Constitution (U.S. Const., Amends. V, XIV) and the California Constitution (Cal. Const., art. I, § 7)." (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 567 [20 Cal.Rptr.2d 341, 853 P.2d 507].)

To satisfy the constitutional command, a statute must meet two basic requirements: (1) The statute must be sufficiently definite to provide adequate notice of the conduct proscribed; and (2) the statute must provide sufficiently definite guidelines for the police in order to prevent arbitrary and ***1107** discriminatory enforcement. (*Williams v. Garcetti*, *supra*, 5 Cal.4th 561, 567; *Walker v. Superior Court* (1988) 47 Cal.3d 112, 141 [253 Cal.Rptr. 1, 763 P.2d 852]; *People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381, 389-390 [250 Cal.Rptr. 515, 758 P.2d 1046].) Only a reasonable degree of certainty is required, however. (46 Cal.3d at p. 391.) The analysis begins with "the strong presumption that legislative enactments 'must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. [Citations.] A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.' " (*Walker v. Superior Court*, *supra*, 47 Cal.3d at p. 143.)

(20b) The Court of Appeal erred in holding that the ordinance is unconstitutionally vague. The terms which the Court of Appeal considered vague are not so when the purpose clause of the ordinance is considered and the terms are read in that context as they should be. (*Williams v. Garcetti*, *supra*, 5 Cal.4th 561, 569; see also *Clark v. Community for Creative Non-Violence*, *supra*, 468 U.S. 288, 290-291 [82 L.Ed.2d 221, 224-226]; *United States v. Musser* (D.C. Cir. 1989) 873 F.2d 1513 [277 App.D.C. 256]; *United States v. Thomas* (D.C. Cir. 1988) 864 F.2d 188,

197-198 [274 App.D.C. 385]; *ACORN v. City of Tulsa, Okl.* (10th Cir. 1987) 835 F.2d 735, 744-745.) Contrary to the suggestion of the Court of Appeal, we see no possibility that any law enforcement agent would believe that a picnic in a public park constituted "camping" within the meaning of the ordinance or would believe that leaving a towel on a beach or an umbrella in a library constituted storage of property in violation of the ordinance.

The stated purpose of the ordinance is to make public streets and other areas readily accessible to the public and to prevent use of public property "for camping purposes or storage of personal property" which "interferes with the rights of others to use the areas for which they were intended." No reasonable person would believe that a picnic in an area designated for picnics would constitute camping in violation of the ordinance. The ordinance defines camping as occupation of camp facilities, living temporarily in a camp facility or outdoors, or using camp paraphernalia. The Court of Appeal's strained interpretation of "living," reasoning that we all use public facilities for "living" since all of our activities are part of living, ignores the context of the ordinance which prohibits living not in the sense of existing, but dwelling or residing on public property. Picnicking is not living on public property. It does not involve occupation of "tents, huts, or temporary shelters" "pitched" on public property or residing on public property.

Nor is the term "store" vague. Accumulating or putting aside items, placing them for safekeeping, or leaving them in public parks, on public ***1108** streets, or in a public parking lot or other public area is prohibited by the ordinance. When read in light of the express purpose of the ordinance - to avoid interfering with use of those areas for the purposes for which they are intended - it is clear that leaving a towel on a beach, an umbrella in the public library, or a student backpack in a school, or using picnic supplies in a park in which picnics are permitted is not a violation of the ordinance.

Unlike the Court of Appeal, we do not believe that *People v. Mannon* (1989) 217 Cal.App.3d Supp. 1 [265 Cal.Rptr. 616], and *People v. Davenport* (1985) 176 Cal.App.3d Supp. 10 [222 Cal.Rptr. 736], which upheld application of similar ordinances, were wrongly decided.

(22) In *Mannon* the appellate department rejected a claim that the defendants were not "camping" within the definition of a Santa Barbara city ordinance. The court reasoned: "There is nothing ambiguous about the meaning of the word 'camp.' The definition is 'to pitch or occupy a camp ... to live temporarily in a camp or outdoors.' (Webster's Third New Intern. Dict. (1965) p. 322.) The illustrations of the word 'camp' utilized in the municipal code do not vary the traditional meaning of that word, they merely supplement it. The illustrations are consistent with the ordinary meaning of the word, i.e., living temporarily in the outdoors.... [A] reasonable person would understand 'camp' to mean to temporarily live or occupy an area in the outdoors, and would not be deceived or mislead by the undertaking of further explanation in the municipal code." (217 Cal.App.3d at pp. Supp. 4-5.)

(20c) The ordinance is not vague. It gives adequate notice of the conduct it prohibits. It does not invite arbitrary or capricious enforcement. The superior court properly rejected that basis of the Tobe plaintiffs' challenge to the ordinance. The Court of Appeal erred in reversing that judgment on that ground.

2. *Overbreadth.*

(23a) The Court of Appeal reasoned that the ordinance was broader than necessary since it banned camping on all public property. There is no such limitation on the exercise of the police power, however, unless an ordinance is vulnerable on equal protection grounds or directly impinges on a fundamental constitutional right.

If the overbreadth argument is a claim that the ordinance exceeds the police power of that city, it must also fail. There is no fundamental right to camp on public property; persons who do so are not a suspect classification; ***1109** and neither of the petitions claims that the ordinance is invidiously discriminatory on its face. The Legislature has expressly recognized the power of a city "to regulate conduct upon a street, sidewalk, or other public place or on or in a place open to the public" (Pen. Code, § 647c) and has specifically authorized local ordinances governing the use of municipal parks. (Pub. Resources Code, § 5193.) Adoption of the ordinance was clearly within the police power of the city, which may "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general

laws." (Cal. Const., art. XI, § 7; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 676 [209 Cal.Rptr. 682, 693 P.2d 261]; *Birkenfeld v. City of Berkeley, supra*, 17 Cal.3d 129, 159-160.) As the more than 90 cities and the California State Association of Counties that have filed an amicus curiae brief in this court have observed, a city not only has the power to keep its streets and other public property open and available for the purpose to which they are dedicated, it has a duty to do so. (*San Francisco Street Artists Guild v. Scott* (1974) 37 Cal.App.3d 667, 674 [112 Cal.Rptr. 502].)

(24) The Court of Appeal also failed to recognize that a facial challenge to a law on grounds that it is overbroad and vague is an assertion that the law is invalid in all respects and cannot have *any* valid application (*Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 494, fn. 5 [71 L.Ed.2d 362, 369, 102 S.Ct. 1186]), or a claim that the law sweeps in a substantial amount of constitutionally protected conduct. The concepts of vagueness and overbreadth are related, in the sense that if a law threatens the exercise of a constitutionally protected right a more stringent vagueness test applies. (*Id.* at p. 499 [71 L.Ed.2d at p. 372]; *Kolender v. Lawson, supra*, 461 U.S. 352, 358-359, fn. 8 [75 L.Ed.2d 903, 909-910].)

(23b) Neither the Tobe plaintiffs nor the Zuckernick petitioners have identified a constitutionally protected right that is impermissibly restricted by application or threatened application of the ordinance. There is no impermissible restriction on the right to travel. There is no right to use of public property for living accommodations or for storage of personal possessions except insofar as the government permits such use by ordinance or regulation. Therefore, the ordinance is not overbroad, and is not facially invalid in that respect. It is capable of constitutional application.

Since the ordinance is not unconstitutionally overbroad, and the facial vagueness challenge must fail, the Court of Appeal erred in ordering dismissal of the complaints in the Zuckernick prosecution and enjoining enforcement of the ordinance. ***1110**

IV. Disposition

The judgment of the Court of Appeal is reversed.

Lucas, C. J., Kennard, J., Arabian, J., and George, J., concurred.

KENNARD, J.,

Concurring.-I join in the majority opinion. I write separately to clarify a point.

The concurring opinion of Justice Werdegar states that the majority "evidently reject[s] on its merits, the claim that a homeless person may not constitutionally be punished for publicly engaging in harmless activities necessary to life, such as sleeping." (Conc. opn. of Werdegar, J., *post*, at p. 1111.) Because that issue is not properly before us in this facial challenge to the ordinance, the majority does not address it, and it expressly says so: "[T]he Court of Appeal did not distinguish between involuntarily being homeless, and involuntarily engaging in conduct that violated the ordinance. The court assumed that an involuntarily homeless person who involuntarily camps on public property may be convicted or punished under the ordinance. That question, which the Court of Appeal and the dissent address, and which might be raised in an 'as applied' challenge to the ordinance, is not before us because plaintiffs offered no evidence that the ordinance was being applied in that manner. We express no opinion on the proper construction of the ordinance, in particular on whether the conduct it prohibits must be 'willful,' or on whether or in what circumstances a necessity defense is available." (Maj. opn., *ante*, at p. 1104, fn. 19.)

Thus, the majority does *not* decide whether a person who by reason of necessity falls asleep in a public park may constitutionally be successfully prosecuted. Moreover, the majority does not address, much less reject on its merits, a claim that there are no constitutional limits on punishing conduct regardless of the circumstances. Nor does it determine whether or not homelessness is a "status" as that term is described in *Robinson v. California* (1962) 370 U.S. 660 [8 L.Ed.2d 758, 82 S.Ct. 1417], and in *Powell v. Texas* (1968) 392 U.S. 514 [20 L.Ed.2d 1254, 88 S.Ct. 2145]. What the majority does decide is the issue before it: that the challenged *camping* ordinance does not on its face constitute prohibited punishment based on status. (Maj. opn., *ante*, at pp. 1104-1106.)

WERDEGAR, J.,

Concurring.-I concur in the result and much of the reasoning of the majority. Specifically, I agree the procedural history of both ***1111** cases (Tobe and

Zuckernick) dictates they be treated as purely facial challenges to the ordinance, and that the ordinance survives such a challenge. I write separately because in the process of rejecting plaintiffs' attack on the ordinance as cruel or unusual punishment, the majority enters into the merits of an as applied attack, an issue not properly before us. I would leave the question to another day, when we are presented with a case that requires its resolution.

To succeed, a *facial* attack on the anticamping ordinance as cruel and unusual punishment (U.S. Const., 8th Amend.) or as cruel or unusual punishment (Cal. Const., art. I, § 17) would require showing punishment under the ordinance, in *all its possible applications*, is cruel, unusual or both. Plaintiffs have not seriously advanced that proposition, and it could be rejected in few words. Clearly, *some* acts of camping in public places-pitching a tent in the middle of a street, for example-may constitutionally be punished.

The majority unnecessarily goes far beyond that reasoning, however, to consider, and evidently reject on its merits, the claim a homeless person may not constitutionally be punished for publicly engaging in harmless activities necessary to life, such as sleeping. Apparently the majority would reject this claim for two reasons: first, because, in its view, *conduct* may always be constitutionally punished no matter how inseparable it is, causally or logically, from a person's status or condition (maj. opn., *ante*, at pp. 1104-1105); and second, because it questions whether homelessness is a "status" at all within the meaning of the United States Supreme Court's decision in *Robinson v. California* (1962) 370 U.S. 660 [8 L.Ed.2d 758, 82 S.Ct. 1417] (maj. opn., *ante*, at p. 1105.)

Not surprisingly, since it has disavowed the intent to consider the merits of an as applied challenge, the majority treats these issues cursorily. In so doing, it fails to consider the legal arguments actually made, or the authorities cited, by petitioners and their allied amici curiae. This portion of the majority opinion is pure dictum and should be read as such.

MOSK, J.

I dissent.

By addressing only the facial challenges to the Santa Ana ordinance now before us and looking only to its neutral language, the majority sidestep the pressing and difficult issues raised in this case. In the process, they erect new procedural barriers that will make future as applied challenges to the ordinance costly and protracted, while shielding the ordinance from meaningful review. Unlike the majority, I decline to ignore the purpose and effect of the ordinance, whether it is assessed on its face or as applied. ***1112**

The City of Santa Ana (hereafter the City or Santa Ana) enacted the challenged ordinance as the latest offensive in its five-year campaign to banish the homeless. Under its broad provisions, a person who "camps" in any public area or "stores" any personal property in any public area is subject to citation and arrest for a criminal offense punishable by six months in jail. (Santa Ana Ord. No. NS-2160, adding art. VIII, § 10-400 et seq. to Santa Ana Mun. Code (hereafter the ordinance), §§ 10-402, 10-403.) It has been enforced against homeless persons whose sole "crime" was to cover themselves with a blanket and rest in a public area. Homeless persons with no alternative but to temporarily leave their personal belongings in public places are also subject to repeated citation and arrest for violation of the ordinance's prohibition against "storing" property.

The City has conceded that the purpose of the ordinance is to address the "problem" of the homeless living in its parks and other public areas. The ordinance has, moreover, been enforced in a manner that specifically targets the homeless.

For those reasons, I conclude that the ordinance is unconstitutional both on its face and as applied to the homeless residents of Santa Ana. Although a city may reasonably control the use of its parks and other public areas, it cannot constitutionally enact and enforce an ordinance so sweeping that it literally prevents indigent homeless citizens from residing within its boundaries if they are unable to afford housing and unable to find a space in the limited shelters made available to them. The City cannot solve its "homeless problem" simply by exiling large numbers of its homeless citizens to neighboring localities.

Although not unconstitutionally vague, the ordinance fails under our decision in *Parr v. Municipal Court* (1971) 3 Cal.3d 861 [92 Cal.Rptr. 153, 479 P.2d 353] (hereafter *Parr*), because it violates the guaranty of equal protection under both the United States Constitution (14th Amend.) and the California

Constitution (art. I, § 7, subd. (a)). It also impermissibly impairs the fundamental right of the homeless, under both the United States and California Constitutions, to travel freely within the state. [FN1]

FN1 Because I believe the ordinance is invalid on these grounds, I find it unnecessary to reach the issue whether the ordinance also punishes the homeless on the basis of their status in violation of the Eighth Amendment or article I, section 17, of the California Constitution. (But see *Robinson v. California* (1962) 370 U.S. 660, 665-667 [8 L.Ed.2d 758, 762-763, 82 S.Ct. 1417]; *Powell v. Texas* (1968) 392 U.S. 514, 551 [20 L.Ed.2d 1254, 1278, 88 S.Ct. 2145] (conc. opn. of White, J.); *id.* at pp. 567, 570 [20 L.Ed.2d at pp. 1286-1287, 1288] (dis. opn. of Fortas, J.); *Pottinger v. City of Miami* (S.D.Fla. 1992) 810 F.Supp. 1551, 1561-1565 [city's practice of arresting homeless persons for such activities as sleeping, standing, and congregating in public places violated the Eighth Amendment].)

I. *Facial and As Applied Claims*

The majority conclude that this action raises only facial claims. I disagree. ***1113**

a. *Pleadings and Proceedings Below*

The Tobe plaintiffs expressly pleaded both facial and as applied claims in their petition for writ of mandate. [FN2] They also submitted factual evidence to support both the as applied and facial claims, including expert declarations and declarations by individual plaintiffs and others.

FN2 Thus the petition alleged that the City had a "custom, practice, and policy of harassing, arresting, and otherwise interfering with petitioners and other homeless individuals for engaging in ordinary and essential activities of daily life in the public areas where petitioners are forced to live." Plaintiffs specifically pleaded, inter alia, that respondents "abused their discretion in enacting and *selectively enforcing Ordinance NS-2160 against homeless persons* in violation of their right to equal protection in that the ordinance abridges the fundamental right of the homeless to travel and to freedom of movement." (Italics added.) The petition expressly challenged particular applications of the ordinance, including the practice of arresting homeless persons for sleeping and possessing property in public areas. In their prayer for relief plaintiffs requested issuance of a peremptory writ of mandate compelling the City to refrain from enforcing the ordinance, i.e., the equivalent of an injunction against *future application* of the ordinance.

In opposing the writ, the City expressly acknowledged and addressed the Tobe plaintiffs' as applied claims. Thus, it conceded in its memorandum in opposition to the petition that "the present case involves a constitutional attack on a municipal ordinance, *both as applied and as written*, which, inter alia, prohibits camping on public property." (Italics added.) The City also conceded that "petitioners contend that the ordinance, *as applied to them*, abridges their right to travel" and that "petitioners contend that the Ordinance, *as applied* to homeless persons, punishes the status and condition of homelessness." (Italics added.)

At the hearing on their petition in the trial court, plaintiffs again expressly argued that the ordinance violated the Eighth Amendment and abridged the right to travel both on its face *and as applied*. [FN3] The trial court repeatedly acknowledged that the claims included both facial and as applied challenges. Thus it stressed that the "thrust of this case" was the contention that the ordinance "is designed and enacted *and implemented* as an effort to address a perceived problem by the authorities of the City of Santa Ana that regards the people who have been classified generically as, quote, 'homeless,' end quote." (Italics added.) The court expressly observed that the claims based on the right to travel and on the Eighth Amendment involved the "*application* of the statute," and it expressly considered how the ordinance "*in* ****1114*** *application* ... has a tendency to impact certain classes of people more than others." (Italics added.)

FN3 Thus counsel for plaintiffs argued: "If the court were to conclude that the Ordinance on its face does not abridge the right to travel then I would submit to the court by way of our declarations and exhibits ... that in fact *as applied* this ordinance abridges the right to travel of petitioners and homeless residents

of the City of Santa Ana." (Italics added.)

The trial court properly addressed the vagueness and overbreadth claims solely as facial challenges; they were brought as such. By contrast, however, in rejecting the right to travel and Eighth Amendment claims the court did not indicate that it was limiting itself to a facial analysis or that it was precluded from considering the factual evidence submitted by plaintiffs. Indeed, as the City has repeatedly conceded, the court expressly considered and rejected plaintiffs' as applied arguments, together with the portions of the evidence that plaintiffs brought to its attention in support of those arguments. [FN4]

FN4 Again, during oral argument before this court the City was pressed on the question whether plaintiffs raised as applied claims; it candidly admitted that plaintiffs challenged the ordinance both facially and as applied and that the Court of Appeal properly addressed the as applied claims. In supplemental briefing, the City once more conceded that plaintiffs raised both facial and as applied claims in the writ petition, that both parties addressed facial and as applied claims in their memoranda, and that they "argued *both aspects* of the right to travel/equal protection issue" at the hearing in the trial court. (Italics added.) As the City also conceded: "It is clear from a review of the reporter's transcript of the April 8, 1993 hearing that Judge Smith upheld the constitutionality of the ordinance, *both as written and as applied*. In rejecting appellants' 'as applied' attack, Judge Smith rejected appellants' supporting evidence." (Italics added.) These frank concessions by the City, which it documented with specific citations to the record, squarely refute the majority's conclusions that the allegations of the petition did not clearly state an as applied challenge and that the trial court did not rule on the petition as one encompassing an as applied challenge. (See maj. opn., *ante*, p. 1087.)

The City did not submit evidence or attempt to dispute or rebut the evidence submitted by plaintiffs, much of it derived from the City's own records. At oral argument before this court the City conceded that it was not precluded in the trial court from presenting evidence or disputing the declarations submitted by plaintiffs; it had the opportunity to present and rebut evidence but chose not to do so. As the record clearly shows, the City's strategy was to argue that the ordinance, both facially and as applied, was a valid exercise of its police power. It therefore regarded the evidence submitted by plaintiffs as essentially irrelevant. I have no trouble concluding that the City's strategy in this regard resulted in a waiver.

In its order directing issuance of a peremptory writ of mandate, the trial court ruled that "*enforcement* of Santa Ana Ordinance NS-2160 ... does not violate the rights of *homeless persons* to freedom of movement.... The Court further finds that petitioners' challenges to the constitutionality of the remaining portions of Santa Ana Ordinance NS-2160 are without merit. The Court finds that with the exception of the second clause of Santa Ana ***1115** Municipal Code § 10-401(a), Santa Ana Ordinance NS-2160 is constitutionally valid." (Italics added.)

Nothing quoted in the order demonstrates that the trial court intended to, or did, address only the facial claims. [FN5] On the contrary, the order appears on its face to reject both facial *and* as applied claims: the court expressly and specifically refers to "enforcement" of the ordinance and to its constitutionality vis-a-vis the "rights of homeless persons."

FN5 The majority purport to rely only on the "actual judgment of the court" and not on the concessions of parties and the reporter's transcript of the hearing on the writ. (Maj. opn., *ante*, p. 1087.) The judgment, however, does not refer to the grounds of the ruling. It provides in its entirety: "It Is Hereby Ordered, Adjudged and Decreed that: [¶] 1. Judgment is entered for petitioners granting the Peremptory Writ of Mandate. [¶] 2. The Court reserves jurisdiction over the issues of attorney's fees and costs. Any motion for attorney's fees and costs shall be filed in this Department."

The majority nonetheless conclude-despite the order, the transcript of the hearing, and the concessions of the parties-that no as applied challenge to the ordinance was "perfected." But they point to no deficiency in the pleadings. Instead, they merely note that "plaintiffs never identified the particular applications

of the law to be enjoined," and the "only relief sought in the petition is a writ of mandate enjoining *any* enforcement of the ordinance by respondents." (Maj. opn., *ante*, pp. 1086-1087.) [FN6] The City made no objection on that ground, nor is there any indication in the record that the trial court declined to address the as applied claims on that basis. Certainly, had the trial court found merit in the as applied claims, it could readily have fashioned appropriate relief. [FN7] ***1116**

FN6 Although the majority observe that "the petition alleges in conclusory language that a pattern of unconstitutionally impermissible enforcement of the ordinance existed" (maj. opn., *ante*, p. 1086), there can be no doubt that under California's liberal pleading rules the petition was adequately pleaded: it gave notice of the claims and clearly alleged a pattern of constitutionally impermissible enforcement. The undisputed declarations in support of the petition show with specificity that the ordinance was repeatedly enforced against persons who were homeless. The prayer seeks relief as follows: "That a peremptory writ of mandate issue pursuant to Code of Civil Procedure Section 1085 compelling respondents to refrain from enforcement of Santa Ana Municipal Code Section NS02160 ... [S]uch other and further relief as the Court may deem just and proper." The majority fail to identify any requirement of the Code of Civil Procedure or local rules that plaintiffs further delineate the relief sought on their as applied claims. Indeed, it is a rule of long standing that when an answer is filed a court may grant any relief consistent with the issues raised. (See, e.g., *Wright v. Rogers* (1959) 172 Cal.App.2d 349, 367-368 [342 P.2d 447].)

FN7 For example, the court could have required that the City enforce the provisions of the ordinance prohibiting sleeping or storing personal property only against those persons who are *not* homeless. An ordinance that prevented only those *with* homes from "camping" in public areas might be constitutional; it would, of course, be of limited practical utility.

b. *Justiciability and Standing*

Plaintiffs include persons who have been cited under the ordinance and who, because they are homeless, are likely to be cited again. They thus have a direct personal stake in the outcome of this action. [FN8]

FN8 The majority question whether plaintiffs are "truly"-or even sufficiently-homeless, concluding that the declarations they submitted did not establish that the conduct for which they were cited was "involuntary." I am satisfied that the undisputed sworn statements of plaintiffs and others cited under the ordinance that they lack the present means to house themselves are sufficient to establish standing and to demonstrate a pattern of enforcement of the ordinance against homeless persons. We need not inquire into the "voluntariness" of all the acts or decisions that might have led to their current plight. As many of the briefs and expert submissions point out, the question whether the homeless, particularly the large proportion of homeless who are mentally ill or addicted to drugs or alcohol, are "voluntarily" living in the streets is complex. Even when services or welfare benefits are available, it may be beyond the resources of many homeless persons to avail themselves of such assistance.

In any event, in light of the shortage of services and beds for the homeless, including the mentally ill and unaccompanied children, the question of "voluntariness" is almost academic. The undisputed fact is that Santa Ana has only 332 beds for a population of approximately 3,000 homeless. The vast majority of homeless in Santa Ana do not have the alternative of sleeping in a bed, off the streets. (See also Vernez et al., Review of California's Program for the Homeless Mentally Disabled (1988) pp. 1, 13, 15 [RAND study prepared for California Department of Mental Health, reporting, inter alia, that about 30 percent of Orange County homeless suffer from severe mental disorders]; Stats. 1988, ch. 1517, § 1, p. 5382 [legislative finding that the extreme shortage of mental health services in California has led to redirection of long-term psychiatric patients

"into a state of homelessness"]; Stats. 1985, ch. 1286, § 1.5, p. 4415 [legislative finding that "large numbers of mentally disordered adults are homeless"]; State of Cal., Department of Youth Authority, Policy Review and Update: Statewide Needs Assessment of Youth Shelters and Youth Centers (1993) pp. 1, II.2-3 [indicating that Orange County has only 31 beds for unaccompanied children, although there are an estimated 3,000 to 4,000 unaccompanied children in the county]; United States Conference of Mayors, A Status Report on Hunger and Homelessness in America's Cities: 1993-A 26 City Survey (Dec. 1993) p. 29 [children, including unaccompanied children or "runaways," account for an estimated 30 percent of the homeless population].)

In addition, plaintiffs address their as applied claims broadly to the unlawful implementation of the ordinance against *all* homeless persons. Plaintiffs thus have sufficient interest as citizens of Santa Ana, under our "public right/public duty" doctrine, to bring claims on behalf of other homeless persons who have, as a group, been targeted by the ordinance. (See *Green v. Obledo* (1981) 29 Cal.3d 126, 144-145 [172 Cal.Rptr. 206, 624 P.2d 256]; *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439 [261 Cal.Rptr. 574, 777 P.2d 610].) The case "poses a question which is of broad public interest, is likely to recur, and should receive uniform resolution throughout the state." (*Ramirez v. Brown* (1973) 9 Cal.3d 199, 203 [107 Cal.Rptr. 137, 507 P.2d 1345].)

Our courts have repeatedly applied the "public right/public duty" exception to the general rule that ordinarily a writ of mandate will issue only to ***1117** persons who are "beneficially interested." (Code Civ. Proc., § 1086.) Thus in *Green v. Obledo, supra*, 29 Cal.3d 126, recipients of welfare benefits petitioned for writ of mandate challenging the compliance of a regulation with the Social Security Act. We held that " ' "where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced .... " ' " (*Id.* at p. 144; accord, *Common Cause v. Board of Supervisors, supra*, 49 Cal.3d at p. 439.) [FN9]

FN9 (See also *Parr*, *supra*, 3 Cal.3d 359 [plaintiff had standing to challenge an anti-"hippie" ordinance although she was herself manifestly not a "hippie" but a resident and merchant in the city]; *Timmons v. McMahon* (1991) 235 Cal.App.3d 512, 518 [286 Cal.Rptr. 620] [applying public interest exception in case involving eligibility rights for welfare benefits]; *Driving Sch. Assn. of Cal. v. San Mateo Union High Sch. Dist.* (1992) 11 Cal.App.4th 1513 [14 Cal.Rptr.2d 908] [applying public interest exception in case seeking to prevent school district from charging high school students tuition for a drivers' training class].)

Furthermore, plaintiffs show a sufficient beneficial interest as citizens who seek to restrain the illegal expenditure or waste of city funds to implement an ordinance in an unconstitutional manner. (See Code Civ. Proc., § 526a; *Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-269 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206] [an action to restrain county or city officials from continuing to enforce provisions of an unconstitutional law presents a true case or controversy, regardless of whether the plaintiff and the defendant each have a special, personal interest in the outcome of the action]; *Van Atta v. Scott* (1980) 27 Cal.3d 424, 450, fn. 28 [166 Cal.Rptr. 149, 613 P.2d 210] [an action that "meets the criteria of section 526a satisfies case or controversy requirements"]; *Ames v. City of Hermosa Beach* (1971) 16 Cal.App.3d 146, 150 [93 Cal.Rptr. 786].) As we have emphasized, "it has never been the rule in this state that parties in [taxpayer suits] must have a personal interest in the litigation.... '[N]o showing of special damage to the particular taxpayer has been held necessary.' " (*Blair v. Pitchess, supra*, 5 Cal.3d at pp. 269-270.)

Because the City has used, and continues to use, taxpayer funds to cite and prosecute persons who store belongings or sleep in public places in violation of an ordinance challenged as unconstitutional, these citizen-plaintiffs have a sufficient interest to confer standing. Consequently, plaintiffs' as applied claims challenging the implementation of the ordinance against homeless persons present "a true case or controversy." (*Blair v. Pitchess, supra*, 5 Cal.3d at p. 269.)

The majority also conclude that an as applied claim challenging a criminal statute is justiciable only after "the circumstances of its application have ***1118** been established by conviction or otherwise." (Maj. opn., *ante*, p. 1085.) But in analogous cases we have not required conviction as a prerequisite to standing. Thus in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286 [124 Cal.Rptr. 204, 540 P.2d 44], we concluded that the defendants, members of a particular union, could obtain discovery to determine whether various penal statutes were being discriminatorily enforced against them in violation of equal protection. The defendants had been charged with, but not yet convicted of, violations of the statutes. (*Id.* at p. 291, fn. 2.) Indeed, we implicitly acknowledged that the defense of discriminatory enforcement did not reach the question of guilt or innocence: "Because the particular defendant, unlike similarly situated individuals, suffers prosecution simply as the subject of invidious discrimination, such defendant is very much the direct victim of the discriminatory enforcement practice. Under these circumstances, discriminatory prosecution becomes a compelling ground for dismissal of the criminal charge, since prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities." (*Id.* at p. 298, fn. omitted.) [FN10]

FN10 Similarly, under the Eighth Amendment it is not essential to have a formal adjudication of guilt to challenge a provision that makes status a criminal offense. In *Joyce v. City and County of San Francisco* (N.D.Cal. 1994) 846 F.Supp. 843, 853, the district court expressly rejected the defendants' contention that a claim under the Eighth Amendment could be made only by a party convicted of a criminal offense. As *Joyce* emphasized, that proposition was refuted by the United States Supreme Court in *Ingraham v. Wright* (1977) 430 U.S. 651, 666-668 [51 L.Ed.2d 711, 726-728, 97 S.Ct. 1401], which expressly provided that in addition to proscribing certain types of punishments to those convicted of crimes, the amendment "imposes substantive limits on what can be made criminal." Like *Joyce*, this case alleges discrimination on the basis of the status of homelessness-i.e., it challenges the ordinance under the substantive provisions of the Eighth Amendment. Moreover, "fines ... traditionally have been associated with the criminal process" and subjected to the limitations imposed by the Eighth Amendment. (*Ingraham v. Wright*, *supra*, 430 U.S. at p. 664 [51 L.Ed.2d at pp. 725-726].)

The majority also plainly imply that an as applied challenge must necessarily be restricted to a case-by-case showing by each individual who is convicted under the ordinance that he or she was "truly homeless" and that the ordinance was improperly applied in each case. Such a requirement-which is tantamount to requiring an individual trial of a "necessity" defense for each person cited under the ordinance-is unwarranted. (See, e.g., *Ramirez v. Brown*, *supra*, 9 Cal.3d 199 [holding that challenged provisions were unconstitutional as applied to all ex-felons]; *Van Atta v. Scott*, *supra*, 27 Cal.3d at pp. 433, 452-453 [holding that San Francisco's manner of applying statutes for pretrial release of criminal defendants violated due process].) It would needlessly subject large numbers of homeless persons to the criminal justice system for wholly innocuous conduct and overwhelm ***1119** our already strained judicial resources, while effectively insulating the ordinance from meaningful review. [FN11]

FN11 We have recognized that mandamus review is appropriate where, as here, important issues would be effectively removed from judicial review if standing is not conferred. (See *Driving Sch. Assn. of Cal. v. San Mateo Union High Sch. Dist.*, *supra*, 11 Cal.App.4th at p. 1519 ["High school students who take this brief 24-hour class are unlikely to have the financial resources or the economic interest necessary to maintain the protracted litigation necessary to test the School District's authority to charge tuition for the class."].) In this case, similarly, the targets of the ordinance are unlikely to have the financial resources to test the City's authority on a case-by-case basis. Because the City may cite, arrest, and detain homeless residents repeatedly without "actually convicting" them in a full-blown judicial proceeding, even under the majority's construction it would be justiciable as an issue "evading review."

Significantly, federal courts recently addressing similar challenges to "anti-camping" measures have

consistently done so by examining ordinances as applied to the homeless in general, *not* on a case-by-case basis, and have not required conviction to establish standing. (See *Pottinger v. City of Miami, supra*, 810 F.Supp. at p. 1554 [challenging manner in which city "applies these laws to homeless individuals"]; *Joyce v. City and County of San Francisco, supra*, 846 F.Supp. at p. 846 [challenging ordinance "only insofar as it specifically penalizes certain 'life sustaining activities' engaged in by the homeless"]; *Johnson v. City of Dallas* (N.D.Tex. 1994) 860 F.Supp. 344, 346 [addressing constitutionality of city ordinances "enacted, enforced, or both, allegedly to remove homeless persons from public view"].)

In sum, there is ample authority to conclude that these plaintiffs have standing and state justiciable claims, both facial and as applied. Most of the plaintiffs have been cited and fined for violations of the ordinance, and most are taxpayers. Moreover, because Santa Ana has effectively criminalized sleeping and storing personal property in any public places, plaintiffs and other homeless persons in Santa Ana-who have no legal alternative but to sleep and store personal property in public short of leaving the city altogether-will necessarily be subject to future citation and/or arrest. The as applied claims are therefore properly before us.

II. *Equal Protection*

In my view the ordinance violates equal protection under the rule of our decision in *Parr, supra*, 3 Cal.3d 861, because it intentionally discriminates against homeless persons who have no alternative but to sleep and store their property in public areas of the City. [FN12] ***1120**

> FN12 The majority incorrectly assert that plaintiffs did not pursue an equal protection theory. The writ petition expressly pleaded equal protection claims, including violations of the right to travel. *Parr, supra*, 3 Cal.3d 861, a case devoted to equal protection analysis, was extensively briefed by the parties and amici curiae. Moreover, as discussed below, the right to travel is properly analyzed under an equal protection test.

a. *Scope of Analysis*

As amici curiae for the City concede, "Neither we nor the Court can or should avoid that [*sic*] this case involves questions about the homeless, although the text of the Ordinance is neutral and does not single out the homeless in any manner." Although I believe we can construe the ordinance both facially and as applied, in either case we must look beyond the neutral face of the measure to its underlying purpose and its impact on particular groups.

There is ample precedent for doing so. In *Shapiro v. Thompson* (1969) 394 U.S. 618, 628 [22 L.Ed.2d 600, 611-612, 89 S.Ct. 1322], the Supreme Court examined the legislative history of the statutes there challenged and found "weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific object of these provisions." [FN13]

> FN13 (See also *Arlington Heights v. Metropolitan Housing Corp.* (1977) 429 U.S. 252, 265-266 [50 L.Ed.2d 450, 464-465, 97 S.Ct. 555] [recognizing the relevance of discriminatory purpose in assessing the validity of a rezoning decision]; *Parr, supra*, 3 Cal.3d 861; *Serrano v. Priest* (1976) 18 Cal.3d 728, 740-741, 747 [135 Cal.Rptr. 345, 557 P.2d 929] [invalidating California's facially neutral school financing scheme in its entirety on the basis of evidence showing it had a discriminatory effect]; see generally, *California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844 [157 Cal.Rptr. 676, 598 P.2d 836] ["both the legislative history of the statute and the wider historical circumstances of its enactment are legitimate and valuable aids in divining the statutory purpose"].)

In *Parr, supra*, 3 Cal.3d 861, we addressed a challenge to a facially neutral ordinance enacted by the City of Carmel-by-the-Sea that was similarly aimed at "an extraordinary influx of undesirable and unsanitary visitors to the City, sometimes known as 'hippies.' " (*Id.* at p. 863.) We determined that despite the neutral terms of the ordinance, we were required to look beyond its literal language to determine its purpose. We stressed that " '[a] state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective [citations] and for its ultimate effect [citations].' " (*Id.* at p. 864.)

Among other precedents, we cited Justice Stephen J. Field's perceptive opinion in *Ho Ah Kow v.*

Nunan (D.Cal. 1879) 12 F. Cas. 252 (No. 6,546), which invalidated a facially neutral San Francisco ordinance requiring every male entering the county jail to have his hair cut to a uniform length of one inch. Under the ordinance a Chinese man convicted of a misdemeanor violation was subjected to loss of his traditional queue.

Justice Field based his ruling on a conclusion that the purpose and effect of the ordinance-although not expressed on the face of the provision-was ***1121** to punish the then racially unpopular Chinese: "The class character of this legislation is none the less manifest because of the general terms in which it is expressed." (*Ho Ah Kow v. Nunan, supra*, 12 F. Cas. at p. 255.) He referred to statements of supervisors in debate on the passage of the ordinance for the purpose of ascertaining the "general object of the legislation proposed, and the mischiefs sought to be remedied." (*Ibid.*) He added, "When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly." (*Ibid.*)

Guided by Justice Field, we declined in *Parr* to "blind ourselves to official pronouncements of hostile and discriminatory purpose solely because the ordinance employs facially neutral language." (3 Cal.3d at p. 865.) We examined the purpose expressed by the Carmel City Council in enacting the measure and concluded that "[t]he irrefragable implication is that the Carmel City Council sought, through Municipal Code section 697.02, to rid the city of the blight it perceived to be created by the presence of the hippies." (*Ibid.*)

In construing the Carmel ordinance we also examined its probable impact: "Those officials responsible for the enforcement of the law are put on notice that the public property in the city is in imminent danger because of the influx of a particular class against which the ordinance is unmistakably directed. The inevitable effect must be discriminatory enforcement consistent with the discriminatory purpose expressed by the council ...." (*Parr, supra*, 3 Cal.3d at p. 868.) On these grounds we held that the ordinance violated equal protection by stigmatizing a particular group. In the present case as well, we are obligated to look behind the neutral facade of the ordinance.

b. *Purpose and Effect of the Ordinance*

As in *Parr, supra*, 3 Cal.3d 861, although the ordinance is neutral on its face we need not go far afield to determine the purpose that the City sought to achieve. Over the past four years, Santa Ana has engaged in what the Court of Appeal aptly called a "crusade against the homeless."

In a memorandum titled "Vagrants," dated June 16, 1988, the City's executive director of the recreation and community services agency informed the City Park Superintendent: "A task force has been formed in an ***1122** effort to deal with the vagrants. The City Council has developed a policy that the vagrants are no longer welcome in the City of Santa Ana.... In essence, the mission of this program will be to move all vagrants and their paraphernalia out of Santa Ana by continually removing them from the places that they are frequenting in the City."

The City's vagrancy task force developed and implemented a plan that included discouraging food providers-such as the Orange County Rescue Mission and the Salvation Army-from feeding the homeless, turning on sprinklers in public parks, and confiscating and destroying the personal property of homeless residents. After a legal challenge to that plan the City agreed to a settlement in April 1990 that included posting maintenance hours, ceasing to conduct maintenance "sweeps" in public areas, and providing for storage and retrieval of confiscated property.

Only a few months later, however, in August 1990, the Santa Ana police mounted "Operation Civic Center," described in an internal memorandum as follows: "Eddie West Field [an open-air football stadium adjacent to the Civic Center] was used as the command post because it supplied a secured area where we could house multiple arrestees. In addition, it also allowed access to restroom facilities and water for the persons arrested. Four Police Service Officers were assigned to the command post to process all arrestees. This included photographing, fingerprinting, documentation and running record and warrant checks. Two officers were also assigned to the command post for care and custody of the arrestees. Five 2-man observer teams were assigned throughout the

plaza area looking for criminal activity. Each of the five 2-man teams was completely concealed and was able to observe the violations from a safe and secure location. Five 2-man arrest teams were called into the plaza area by the observers and the arrest teams took the violators into custody. The violators were then transported to the command post at Eddie West Field where they were processed."

There were 28 arrests for littering, 2 for drinking in public, 7 for urinating in public, 18 for jaywalking, 2 for destroying vegetation, 2 for riding bicycles on a sidewalk, 1 for glue sniffing, 1 for removing trash from a bin, and 2 for an obscure violation of the City's fire code. Two persons who proved they had homes were released. The homeless arrestees were handcuffed, transported to an athletic field for booking, chained to benches for up to six hours, and identified with numbers written on their arms with markers. At the conclusion of the detention, the police loaded the homeless into vans, drove them to the edge of the Central Command Area of the Santa Ana Police Department, and dropped them off.

The homeless brought a further civil action against the City for injunctive relief, asserting they were victims of discriminatory law enforcement. The ***1123** trial court agreed, ruling that the homeless were a cognizable class who had been singled out for arrest for offenses that rarely, if ever, even drew citations in Santa Ana. The trial court concluded: "In short, this Court finds that the Santa Ana Police Department deliberately and intentionally implemented a program which targeted those persons living in the Civic Center, the homeless."

In October 1990 the City apparently settled the action. It agreed that "it shall be [] the policy of [the City of Santa Ana] to refrain from discriminating against individuals on the basis of their homelessness" and it shall not "take individual or concerted action to drive homeless individuals from Santa Ana." The stipulation was made an order of the court, but no judgment has been entered. The case is to be dismissed during this year.

The ordinance before us reflects the same purpose as Santa Ana's previous official policies: to drive "vagrants" out of Santa Ana. There can be no doubt that it was enacted to resolve what the City refers to in its brief as "the homeless problem." As that brief explains: "The City is directly impacted by the homeless problem because homeless persons attempt to live on property it owns or controls, thereby causing the myriad of public health and police related concerns which the City must combat in the face of constantly diminishing financial resources." The City again expressly conceded at oral argument that the purpose of the ordinance was to address the problem of homeless persons "camping" in public areas, including the parking lot across from city hall. [FN14]

> FN14 The majority expressly venture no opinion on whether and in what circumstances a necessity defense might be available. (Maj. opn., *ante*, p. 1104, fn. 19.) They nonetheless note that a deputy district attorney "expressed his opinion at oral argument" that a necessity defense "might" be available to "truly homeless" persons. (Maj. opn., *ante*, p. 1088 fn. 8.) Because of that "opinion" the majority refuse to conclude that the City intends to enforce the ordinance against persons who have no alternative to "camping" or storing "camp paraphernalia" on public property. Nothing in the ordinance provides an exception for homeless persons, however, and the district attorney's "opinion" does not purport to bind the City or even to express the *City's* intent in implementing the ordinance. Moreover, even if a necessity defense were available, it would not prevent the City from repeatedly citing and arresting homeless persons and subjecting them to an endless round of costly and complex judicial proceedings. Thus the effect of the ordinance would continue to be to drive the homeless from Santa Ana, as it is clearly intended to do.

Even if the City had not so candidly admitted its purpose, however, the inevitable effect of the ordinance is to target the homeless. Because there are beds in local shelters for only about one in ten homeless persons in Santa Ana, an ordinance outlawing "camping" in all public areas effectively accomplishes the purpose of driving out the homeless, despite its neutral wording. Although the City and amici curiae observe that the ordinance ***1124** would also apply to the mayor and the Girl Scouts, it is unlikely that any significant number of Santa Ana residents or visitors other than the homeless would choose to sleep, pro-

tected only by a blanket, in a public parking lot or to store personal property in the open. [FN15]

FN15 (See Waldron, *Homelessness & the Issue of Freedom* (1991) 39 UCLA L.Rev. 295, 313 [Anticamping ordinances "have and are known and even intended to have a specific effect on the homeless which is different from the effect they have on the rest of us.... [E]veryone is perfectly well aware of the point of passing these ordinances, and any attempt to defend them on the basis of their generality is quite disingenuous."].)

We concluded in *Parr, supra*, 3 Cal.3d at page 870, that "we cannot be oblivious to the transparent, indeed the avowed, purpose and the inevitable effect of the ordinance in question: to discriminate against an ill-defined social caste whose members are deemed pariahs by the city fathers. This court has been consistently vigilant to protect racial groups from the effects of official prejudice, and we can be no less concerned because the human beings currently in disfavor are identifiable by dress and attitudes rather than by color." That vigilance is even more important now. Today's pariahs are no longer the relatively carefree "hippies," many of whom chose that lifestyle, but persons who are homeless largely by necessity and who face far greater restrictions under this ordinance than merely keeping off the grass. [FN16]

FN16 The majority attempt to distinguish *Parr* on its facts, arguing that the Carmel ordinance "banned a customary use of the city park." (Maj. opn., *ante*, p. 1094.) But their discussion of *Parr* is merely dictum, because they decline to acknowledge or address the equal protection claims on the merits. It is also unpersuasive. The Carmel ordinance made it unlawful to "[c]limb any tree; or walk, stand or sit upon monuments, vases, fountains, railings, fences, planted areas, or upon any other property *not designed or customarily used for such purposes*, or to sit on any sidewalks or steps, or to lie or sit on any lawns." (*Parr, supra*, 3 Cal.3d at p. 862, italics added.) Thus, *Parr* did not turn on the issue of the "customary" use of the public areas in Carmel, but, as here, on whether a city could prohibit innocuous behavior for the constitutionally impermissible purpose of driving a disfavored group from its bounds. The majority also argue unpersuasively that we must ignore the obvious purpose of the Santa Ana ordinance because, two years previously, Santa Ana had agreed to discontinue attempts to force the homeless to leave. Their approach permits the City to continue to discriminate against the homeless so long as it does not expressly articulate an impermissible purpose. We have explicitly rejected the notion that the mere appearance of neutrality can be used to shield discriminatory legislation. (*Parr, supra*, 3 Cal.3d at p. 870; see also *Mulkey v. Reitman* (1966) 64 Cal.2d 529 [50 Cal.Rptr. 881, 413 P.2d 825], affd. *sub nom. Reitman v. Mulkey* (1967) 387 U.S. 369 [18 L.Ed.2d 830, 87 S.Ct. 1627].)

A century ago Anatole France exposed the cruel hypocrisy of such "neutral" laws against the indigent: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." (France, Le Lys Rouge (1894) ch. 7.) Even under a facial analysis we cannot blind ourselves to the evident intent of the Santa Ana ordinance. Recognizing that intent, I would hold that the ordinance ***1125** impermissibly discriminates against the homeless and thereby violates equal protection. [FN17]

FN17 We need not hold, therefore, that homeless persons are members of a "suspect class" in order to invalidate the ordinance on equal protection grounds. As in *Parr, supra*, 3 Cal.3d 861, the purpose of the ordinance-to banish a disfavored group-is plainly not a legitimate state interest. (See also *U. S. Dept. of Agriculture v. Moreno* (1973) 413 U.S. 528, 534 [37 L.Ed.2d 782, 787-789, 93 S.Ct. 2821] [invalidating a federal statute that discriminated against "hippies" and "hippie" communes: "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."]; *Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 448 [87 L.Ed.2d 313, 325-326, 105 S.Ct. 3249] [holding city's denial of building permit invalid because the decision

discriminated against the "mentally retarded"].)

III. *Right to Travel*

The ordinance also impermissibly penalizes the fundamental right of indigent homeless persons to travel to or remain in Santa Ana, by denying them the basic necessities of sleeping and storing personal belongings in any public areas.

a. *Constitutional Freedom to Travel and Abide*

Both the United States Supreme Court and the courts of California have expressly recognized a fundamental constitutional right to travel, "a basic human right protected by the United States and California Constitutions as a whole." (*In re White* (1979) 97 Cal.App.3d 141, 148 [158 Cal.Rptr. 562]; see, e.g., *Shapiro v. Thompson, supra*, 394 U.S. at p. 629 [22 L.Ed.2d at p. 612].) [FN18] A law implicates the right to travel when it either penalizes travel or is intended to impede travel. (*Attorney General of N.Y. v. Soto-Lopez, supra*, 476 U.S. at p. 903 [90 L.Ed.2d pp. 905-906] ["A state law implicates the right to travel when it actually deters such travel [citations], when impeding travel is its primary objective [citations], or when it ' "uses any classification which serves to penalize the exercise of that right." ' "].)

FN18 Although the Supreme Court has never reached a consensus concerning the specific constitutional source of the right to travel, it has often either relied upon or recognized the equal protection clause as a potential source of the right. (See, e.g., *Shapiro v. Thompson, supra*, 394 U.S. at pp. 630, 634 [22 L.Ed.2d at pp. 612-613, 614-615]; *Zobel v. Williams* (1982) 457 U.S. 55, 66-67 [72 L.Ed.2d 672, 681-682, 102 S.Ct. 2309] (conc. opn. of Brennan, J.); *Memorial Hospital v. Maricopa County* (1974) 415 U.S. 250, 253-270 [39 L.Ed.2d 306, 312-322, 94 S.Ct. 1076]).) " '[T]he right to travel receives its most forceful expression in the context of equal protection analysis.' " (*Attorney General of N.Y. v. Soto-Lopez* (1986) 476 U.S. 898, 902, fn. 2 [90 L.Ed.2d 899, 905, 106 S.Ct. 2317], (plur. opn. of Brennan, J.).)

The United States Supreme Court has repeatedly rejected statutes designed to exclude the indigent. Thus in *Edwards v. California* (1941) 314 U.S. 160, 174 [86 L.Ed. 119, 125-126, 62 S.Ct. 164], the court struck down ***1126** a California statute that prohibited the transportation of indigent nonresidents into California. The court explained that a community may not "gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world." (*Id.* at p. 173 [86 L.Ed. at p. 125].) Similarly, in *Shapiro v. Thompson, supra*, 394 U.S. at page 629 [22 L.Ed.2d at p. 612], the court held that the right to travel was triggered by any attempt to "fence out" indigents. (See also *Memorial Hospital v. Maricopa County, supra*, 415 U.S. 250 [indigents' right to travel and settle in Arizona was impermissibly penalized by durational residency requirements for nonemergency medical care for indigents at county expense].)

The right to travel includes the right to *stay* as well as the right to go. (See, e.g., *Kent v. Dulles* (1958) 357 U.S. 116, 126 [2 L.Ed.2d 1204, 1210, 78 S.Ct. 1113] ["Freedom of movement is basic in our scheme of values."]; *Dunn v. Blumstein* (1972) 405 U.S. 330, 338 [31 L.Ed.2d 274, 281-282, 92 S.Ct. 995] [right to travel ensures "freedom to enter *and abide*"], italics added; *Attorney General of N.Y. v. Soto-Lopez, supra*, 476 U.S. at p. 903 [90 L.Ed.2d at pp. 905-906] [right encompasses burdens on freedom to enter and abide in states]; *Papachristou v. City of Jacksonville* (1972) 405 U.S. 156 [31 L.Ed.2d 110, 92 S.Ct. 839] [vagrancy ordinance offends freedom of movement].) Our courts, too, have recognized that the right to travel includes the "concomitant right *not* to travel." (*In re Marriage of McGinnis* (1992) 7 Cal.App.4th 473, 480 [9 Cal.Rptr.2d 182], italics added; see also *In re White, supra*, 97 Cal.App.3d at pp. 148-149 [banishment violates constitutional right to freedom of travel]; *In re Barbak S.* (1993) 18 Cal.App.4th 1077, 1084-1086 [22 Cal.Rptr.2d 893] [same]; *People v. Bauer* (1989) 211 Cal.App.3d 937, 944 [260 Cal.Rptr. 62] [same].)

b. *Intrastate Travel*

This case involves *intra*state travel. In California we have expressly recognized that the constitutional right to freedom of movement necessarily embraces intrastate travel. "[T]he right to intrastate travel (which includes intramunicipal travel) is a basic human right protected by the United States and California Constitutions." (*In re White, supra*, 97 Cal.App.3d at p. 148; see also *In re Marriage of Fingert* (1990) 221 Cal.App.3d 1575, 1581 [271 Cal.Rptr. 389]

[court order requiring parent to relocate or lose custody violates right to intrastate travel]; *People v. Bauer, supra*, 211 Cal.App.3d at p. 944 [requiring defendant to obtain official approval of choice of residence as a condition of probation impinges on right to intrastate travel].)

The right to intrastate travel in this state is protected without regard to federal decisions on the issue, because the rights guaranteed by the California Constitution " 'are not dependent upon those guaranteed by the United ***1127** States Constitution.' " (*In re White, supra*, 97 Cal.App.3d at p. 148.) Nonetheless, I would approve the holding in *White*, concluding that the United States Constitution ensures the right to intrastate, as well as interstate, travel.

Although the United States Supreme Court has not expressly addressed the right to intrastate travel, it has strongly suggested that such a broad reading of the right to travel is appropriate. Thus in *Kolender v. Lawson* (1983) 461 U.S. 352, 358 [75 L.Ed.2d 903, 909-910, 103 S.Ct. 1855], the court emphasized that a law prohibiting wandering the streets at night without identification implicated "consideration of the constitutional right to freedom of movement." (See also *Papachristou v. City of Jacksonville, supra*, 405 U.S. at p. 164 [31 L.Ed.2d at pp. 116-117] [" 'wandering or strolling' " are "historically part of the amenities of life as we have known them"].)

The Circuit Courts of Appeal have repeatedly concluded that the right encompasses intrastate travel. (See, e.g., *Spencer v. Casavilla* (2d Cir. 1990) 903 F.2d 171, 174; *Lutz v. City of York, PA.* (3d Cir. 1990) 899 F.2d 255, 268 ["the right to move freely about one's neighborhood or town ... is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history' "]; *King v. New Rochelle Municipal Housing Authority* (2d Cir. 1971) 442 F.2d 646, 648-649 [right to travel includes intrastate travel].) As the Second Circuit recognized in *King*, "It would be meaningless to describe the right to travel *between* states as a fundamental precept of personal liberty and not acknowledge a correlative constitutional right to travel *within* a state." (442 F.2d at p. 648, fn. omitted, italics added.)

c. *Impact of the Ordinance*

The majority conclude that the ordinance does not inevitably conflict with the right to travel because it "has no impact, incidental or otherwise, on the right to travel *except* insofar as a person, homeless or not, might be discouraged from traveling to Santa Ana because camping on public property is banned." (Maj. opn., *ante*, p. 1102, italics added.) But homeless persons are not simply "discouraged" from traveling to Santa Ana. They are effectively *prevented* from doing so, because the ordinance forbids them to sleep or store their personal belongings in any public area in the City. By criminalizing their unavoidable but innocuous conduct of sleeping and storing their personal effects, the ordinance has an immediate impact on the right of the homeless to enter or remain in Santa Ana. [FN19]

FN19 Even a provision that penalized travel "indirectly" would not be immune from strict constitutional scrutiny. As the Supreme Court stressed in *Dunn v. Blumstein, supra*, 405 U.S. at page 341 [31 L.Ed.2d at pp. 283-284]: " ' "Constitutional rights would be of little value if they could be ... indirectly denied." ' " In *Dunn*, the court invalidated a one-year residential requirement for voting in Tennessee, although there was no evidence that it in fact deterred-or was intended to deter-travel.

I therefore disagree with the majority's assertion that the effect of the ordinance on the homeless is merely "incidental." Criminalizing the harmless act of sleeping in a public place-when the vast majority of homeless ***1128** persons in Santa Ana have no legal alternative other than to "get out of town by sundown"-forbids a "necessity of life" and thereby effectively penalizes migration. (See *Memorial Hospital v. Maricopa County, supra*, 415 U.S. at pp. 258-259 [39 L.Ed.2d at pp. 314-316] [laws penalize travel when they deny a person a "necessity of life" such as nonemergency medical care for indigents at the county's expense].) Arresting or citing the homeless for sleeping in public also burdens their freedom of movement, because they must either forgo sleep or leave the City altogether to avoid criminal penalty. Moreover, as discussed above, the primary purpose for enforcing the ordinance against the homeless was to drive them out of public areas. [FN20]

FN20 The majority's reliance on cases involving only incidental and nondiscriminatory zoning and taxing provisions is therefore

misplaced. (See maj. opn., *ante*, p. 1101; *R.H. Macy & Co. v. Contra Costa County* (1990) 226 Cal.App.3d 352, 367-369 [276 Cal.Rptr. 530] [unequal taxation under Proposition 13 had an "inconsequential" effect on interstate mobility and did not result in invidious discrimination, either directly or indirectly]; *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 602-603 [135 Cal.Rptr. 41, 557 P.2d 473] [zoning ordinance barring residential construction only incidentally burdened right to travel]; but see *id.* at p. 623 (dis. opn. of Mosk, J.) ["total exclusion of people from a community is both immoral and illegal"].)

The indirect effects of the ordinance may prove even more invidious. As one amicus curiae, a former mayor, points out, ordinances like Santa Ana's encourage an unhealthy and ultimately futile competition among cities to impose comparable restrictions in order to avoid becoming a refuge for homeless persons driven out by other cities. The case at bar provides a striking example of this domino effect: in response to the Santa Ana ordinance, surrounding communities quickly enacted similar measures to protect themselves from an influx of Santa Ana's homeless. [FN21] To carry this effect to its logical conclusion, if all communities followed suit the homeless could effectively be excluded from the entire State of California.

FN21 Fullerton, Long Beach, and Orange, for example, have passed anticamping ordinances. The City Attorney of Fullerton explained: "We're trying to protect ourselves so that when Santa Ana throws out their 1,300, they don't all come over here." (Schaffer, *Tent Cities: Laws Aim to Break Camp*, Orange County Register (June 7, 1992) pp. 1, 8.) Another amicus curiae, a former mayor of Laguna Beach, similarly observed in a letter to this court: "To the extent that Santa Ana officials 'succeed' [in excluding the homeless], the homeless poor migrate to other nearby cities in search of streets and other public places where they can sleep. Laguna Beach, already 'home' to many poor and homeless individuals, may have to take on yet more of a social support burden."

In striking down a California law that aimed to exclude the indigent of an earlier era, the Supreme Court observed: "in the words of Mr. Justice Cardozo: 'The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the ***1129** peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.' [Citation.] [¶] ... [¶] ... [I]n not inconsiderable measure the relief of the needy has become the common responsibility and concern of the whole nation." (*Edwards v. State of California*, *supra*, 314 U.S. at pp. 173-174 [86 L.Ed.2d 124].) The same principle requires us to invalidate the Santa Ana ordinance.

d. *Strict Scrutiny*

Because the ordinance impairs the right to travel of plaintiffs and other homeless persons, it is subject to strict scrutiny. (See *Dunn v. Blumstein*, *supra*, 405 U.S. at pp. 339-342 [31 L.Ed.2d at pp. 282-284]; *Shapiro v. Thompson*, *supra*, 394 U.S. at p. 634 [22 L.Ed.2d at p. 615]; *Serrano v. Priest*, *supra*, 18 Cal.3d at p. 761; *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 276, fn. 22 [172 Cal.Rptr. 866, 625 P.2d 779, 20 A.L.R.4th 1118].) The applicable test, therefore, is whether the ordinance is narrowly tailored to meet a compelling governmental interest. (See *Plyler v. Doe* (1982) 457 U.S. 202, 216-217 [72 L.Ed.2d 786, 798-799, 102 S.Ct. 2382].)

The ordinance does not survive under that standard. As stated above, its true underlying purpose-to drive the homeless out of Santa Ana-is not a legitimate governmental interest. But even the more benign, if euphemistic, purpose expressed on the face of the ordinance fails under strict scrutiny.

The ordinance provides: "The public streets and areas within the City [of Santa Ana] should be readily accessible and available to residents and the public at large. The use of these areas for camping purposes or storage of personal property interferes with the rights of others to use the areas for which they were intended [*sic*]. The purpose of this article is to maintain public streets and areas within the city [of Santa Ana] in a clean and accessible condition." (Ord., § 10-400.)

The interests advanced by the City are, in essence, improving the aesthetic appearance of its public areas and maintaining facilities for general public use.

These concerns are legitimate and, indeed, "substantial." (See *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 296 [82 L.Ed.2d 221, 228-229, 104 S.Ct. 3065] [governmental interest in maintaining park was "substantial"].) But they are certainly not compelling.

Even if the City's asserted purposes were deemed compelling, moreover, the ordinance would nonetheless fail because it is not narrowly tailored to accomplish its objectives. Santa Ana could certainly maintain public areas in ***1130** "a clean and accessible condition" through less restrictive means than citing and arresting homeless persons-under a provision that includes a penalty of six months in jail-for sleeping or storing their personal belongings in public.

As a federal court explained in holding a similar ordinance unconstitutional: "Provision of alternative shelter and services would be the ideal means of accomplishing the same goals. However, in the absence of available shelter space or funds for services, the parks and streets could be cleaned and maintained without arresting the homeless. For example, the City could ask homeless individuals to relocate temporarily to another public area while maintenance crews work on a particular site. It could also establish regular times for each park to be cleaned so that homeless individuals would know not to be in a certain park on a particular day. Instead of arresting homeless individuals for being in the park after hours, the City could allow them to stay in a designated area in exchange for maintaining that area. Similarly, promotion of tourism and business and the development of the downtown area could be accomplished without arresting the homeless for inoffensive conduct." (*Pottinger v. City of Miami, supra*, 810 F.Supp. at p. 1582; see also *Clark v. Community for Creative Non-Violence, supra*, 468 U.S. 288 [ban on sleeping in Lafayette Park, across the street from the White House, was a reasonable time, place, and manner restriction on expression]; *Joyce v. City and County of San Francisco, supra*, 846 F.Supp. 843 [prohibition against sleeping in certain public places at certain times].)

The majority urge that the City has no affirmative constitutional obligation to provide accommodations for the "transient homeless" on or in public property. [FN22] That does not mean, however, that if the City declines to provide shelters for the homeless it may effectively banish them from all public areas. As long as the homeless have no other place where they may legally sleep and store their personal property in Santa Ana, the City cannot constitutionally prevent them from doing so in public places.

> FN22 In referring generically to the "transient homeless," the majority overlook the fact that plaintiffs include long-term residents of Santa Ana who have lost their residences and jobs. In any event, as discussed above, the right to travel applies both to homeless residents of the City who wish to remain and to "transient" homeless persons who wish to enter and abide in the City.

The majority cite with approval a recent district court decision denying preliminary injunctive relief against implementation of the Matrix Program, a San Francisco ordinance addressing the "homeless problem." (*Joyce v. City and County of San Francisco, supra*, 846 F.Supp. 843.) Their reliance on *Joyce* is misplaced because the ordinances are crucially dissimilar. ***1131**

Unlike Santa Ana's ordinance, the Matrix Program did not involve a total ban on sleeping or storing property in public areas. Indeed, San Francisco police officers were instructed that " '[t]he mere lying or sleeping on or in a bedroll in and of itself does not constitute a violation' ...." (*Joyce v. City and County of San Francisco, supra*, 846 F.Supp. at p. 861.) Nor did San Francisco attempt to drive the homeless from the city; instead, it provided counseling and referral to local social service programs and attempted to provide temporary housing for the homeless. (*Id.* at pp. 847-848.) [FN23] The history of Santa Ana's efforts in dealing with the homeless, in sharp contrast, included an official policy of actively *discouraging* existing charitable services for the homeless, including the Salvation Army food program, and a task force directed to drive "vagrants" out of town. In enforcing the ordinance, Santa Ana police officers applied an official policy of citing individuals who were sleeping under blankets. [FN24]

> FN23 Thus under the Matrix Program social workers were dispersed throughout the city in order to contact homeless persons and a "Night Shelter Referral Program ... [was] designed to offer the option of shelter accommodations to those homeless individuals

in violation of code sections pertaining to lodging, camping in public parks and sleeping in public parks during prohibited hours." (*Joyce v. City and County of San Francisco*, *supra*, 846 F.Supp. at p. 848.) San Francisco also estimated that in 1993-1994 it would spend $46.4 million for services to the homeless, of which over $8 million was specifically earmarked to provide housing. (*Ibid.*)

FN24 The majority also approve *People v. Scott* (1993) 20 Cal.App.4th Supp. 5, 13 [26 Cal.Rptr.2d 179], in which the Appellate Department of the Los Angeles Superior Court upheld a West Hollywood anticamping ordinance against a claim that it violated the right to travel of homeless residents. *Scott* offered no case authority to support its conclusory analysis. In any event it is factually distinguishable: there was no claim that the ordinance prohibited sleeping in any public area in West Hollywood and "no evidence [was] presented in this case to support the inference that West Hollywood has used this ordinance to interfere with a person's right to travel or even that it is being enforced in such a way as to drive homeless people out of its community." (*Ibid.*) Nonetheless, I would disapprove *Scott* to the extent that it could be construed to suggest that an ordinance like Santa Ana's, which *is* intended to "drive homeless people out of its community," does not impair the right to travel.

The City is not required, of course, to open *all* its public spaces at *all* hours to the homeless or to tolerate dangerous or unhealthful conduct. For example, it may enforce existing ordinances against such "camping" behavior as the erection of semipermanent structures, outdoor cooking, and public defecation and urination. It may also enforce existing laws against public drunkenness, drug use, vandalism, assault, theft, and similar misconduct. It may not, however, penalize individuals who have committed only the offense of being without shelter. Sleeping outdoors under a blanket is neither dangerous nor unhealthful to anyone other than the homeless persons who do so as a matter of necessity. Similarly, if the City does not choose to provide storage places for the personal property of the homeless, it may not criminalize their discreet "storage" of personal belongings in public areas. ***1132**

As the Court of Appeal aptly concluded, "The camping ordinance is a butcher knife where a scalpel is required.... The city may preclude the erection of structures in public places and it might ban 'camping' in select locations with a properly drafted ordinance, but it may not preclude people who have no place to go from simply living in Santa Ana. And that is what this ordinance is all about."

For all these reasons I would affirm the judgment of the Court of Appeal. ***1133**

Cal. 1995.
Tobe v. City of Santa Ana
9 Cal.4th 1069, 892 P.2d 1145, 40 Cal.Rptr.2d 402, 63 USLW 2676

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TOPANGA ASSOCIATION FOR A SCENIC COMMUNITY, Plaintiff and Appellant,
v.
COUNTY OF LOS ANGELES et al., Defendants and Respondents; JAMES WARREN BASSLER et al., Real Parties in Interest and Respondents

L.A. No. 30139.

Supreme Court of California
May 17, 1974.

SUMMARY

In administrative mandamus proceedings, the trial court refused to disturb a variance granted by a county agency permitting a mobile home park on about 28 acres of an area zoned for light agriculture and single family residences. (Superior Court of Los Angeles County, No. C-7268, Robert A. Wenke, Judge.)

The Supreme Court reversed and remanded the cause to the trial court with directions to issue a writ of mandamus requiring the county board of supervisors to vacate the order awarding a variance. The trial court was also directed to grant any further, appropriate relief. It was expressly held that regardless of the terms of a local zoning ordinance, the governing administrative agency, in adjudicating an application for a variance, must make findings such as will enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise the court of the basis of the agency's action. Also, it was held that as a prerequisite to sustaining a variance, the court must determine that substantial evidence supports the agency's findings and that they support the agency's decision. It was pointed out that Gov. Code, § 65906, outlining the circumstances under which a variance may be properly granted, emphasizes disparities between properties, rather than the treatment of the subject property's characteristics in the abstract. The court noted that the agency's report focussed almost exclusively on the qualities of the subject property and failed to provide comparative information on the surrounding properties, with the result that the agency's summary of "factual data," on which its decision apparently rested, did not include facts sufficient to satisfy the Government Code provision.

In Bank. (Opinion by Tobriner, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Zoning and Planning § 4--Variances--Findings.

Regardless of whether the local zoning ordinance commands that the variance board set forth findings, that body must render findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis of the board's action.

(2) Zoning and Planning § 4--Variances--Judicial Review.

Before sustaining a zoning variance, a reviewing court must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision. And in making these determinations, the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision.

(3) Zoning and Planning § 4--Variances--Administrative Mandamus.

Code Civ. Proc., § 1094.5, governing judicial review of administrative agencies' adjudicatory decisions by mandamus, applies to the review of zoning variances awarded by bodies such as the Los Angeles County Regional Planning Commission.

(4) Administrative Law § 139--Administrative Mandamus--Court's Duties.

Code Civ. Proc., § 1094.5, relating to administrative mandamus, contemplates that, at a minimum, the reviewing court must determine both whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision.

(5) Administrative Law § 143--Administrative Man-

damus--Record of Administrative Proceeding.

Implicit in Code Civ. Proc., § 1094.5, relating to administrative mandamus, is a requirement that the administrative agency which renders the challenged decision set forth findings to bridge the analytic gap between the raw evidence and the ultimate decision or order.

[See **Cal.Jur.2d,** Zoning, § 209; **Am.Jur.,** Zoning (1st ed § 225).]

(6) Zoning and Planning § 4--Findings--Contents.

Although a zoning variance board's findings need not be stated with the formality required in judicial proceedings, they must expose the board's mode of analysis to an extent sufficient to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action. (Not approving the language in *Kappadahl v. Alcan Pacific Co.* (1963) 222 Cal.App.2d 626, 639 [35 Cal.Rptr. 354]; *Ames v. City of Pasadena* (1959) 167 Cal.App.2d 510, 516 [334 P.2d 653], which endorses the practice of setting forth findings solely in the language of the applicable legislation.)

(7) Zoning and Planning § 4--Granting of Variance as Quasi-judicial Administrative Function.

Although the adoption of zoning regulations is a legislative function, the granting of variances is a quasi-judicial, administrative function.

(8) Zoning and Planning § 6(1)--Contractual Nature of Zoning Scheme.

A zoning scheme is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted. The rationale is that such mutual restriction can enhance total community welfare.

(9) Zoning and Planning § 4--Variances--Need for Compliance With All Legislative Requirements.

Inasmuch as a zoning variance may be sustained only if all applicable legislative requirements have been satisfied, the question whether a particular variance which had been granted by a county agency conformed to the criteria set forth in an applicable county ordinance became immaterial in the Supreme Court's administrative mandamus review of the variance once that court had concluded that the criteria set forth in Gov. Code, § 65906, for the granting of a variance had not been met.

(10) Zoning and Planning § 4--Variances--Statutory Criteria.

Gov. Code, § 65906, setting forth criteria for the granting of a zoning variance, emphasizes disparities between properties, not treatment of the subject property's characteristics in the abstract, and contemplates that, at best, only a small fraction of any one zone can qualify for a variance.

(11) Zoning and Planning § 4--Variances--Applicant's Burdens.

Speculation about land neighboring on land for which a zoning variance is sought will not support the award of a variance. The party seeking the variance must shoulder the burden of demonstrating to the applicable agency that the subject property satisfies the requirements for the variance sought. Neither the agency nor the reviewing court may assume without evidentiary basis that the character of neighboring property is different from that of the property for which the variance is sought.

(12) Zoning and Planning § 4--Limitations on Granting of Variances.

Radical alteration of the nature of an entire zone is a proper subject for legislation but not for piecemeal adjudication by an administrative agency through the granting of variances for large parcels.

(13) Zoning and Planning § 4--Prohibition of Variance Granting "Special Privilege."

In the absence of an affirmative showing that a particular parcel in a certain zone differed substantially and in relevant aspects from other parcels therein, a variance granted with respect to that parcel amounted to the kind of "special privilege" explicitly prohibited by Gov. Code, § 65906, establishing criteria for granting variances.

COUNSEL

Amdur, Bryson, Caplan & Morton and David L. Caplan for Plaintiff and Appellant.

John D. Maharg, County Counsel, Joe Ben Hudgens, John W. Whitsett and David H. Breier, Deputy County Counsel, for Defendants and Respondents.

Arnold J. Provisor for Real Parties in Interest.

TOBRINER, J.

We examine, in this case, aspects of the functions served by administrative agencies in the granting of zoning variances and of courts in reviewing these proceedings by means of administrative mandamus. We ***510** conclude that variance boards like the ones involved in the present case must render findings to support their ultimate rulings. We also conclude that when called upon to scrutinize a grant of a variance, a reviewing court must determine whether substantial evidence supports the findings of the administrative board and whether the findings support the board's action. [FN1] We determine in the present case that the last of these requisites has not been fulfilled.

FN1 We recently held in *Strumsky v. San Diego County Employees Retirement Association* (1974) 11 Cal.3d 28 [112 Cal.Rptr. 805, 520 P.2d 29], that if the order or decision of a local administrative agency substantially affects a "fundamental vested right," a court to which a petition for a writ of mandamus has been addressed upon the ground that the evidence does not support the findings must exercise its independent judgment in reviewing the evidence and must find abuse of discretion if the weight of the evidence fails to support the findings. Petitioner does not suggest, nor do we find, that the present case touches upon any fundamental vested right. (See generally *Bixby v. Pierno* (1971) 4 Cal.3d 130, 144-147 [93 Cal.Rptr. 234, 481 P.2d 242]; *Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90, 103 [280 P.2d 1].)

The parties in this action dispute the future of approximately 28 acres in Topanga Canyon located in the Santa Barbara Mountains region of Los Angeles County. A county ordinance zones the property for light agriculture and single family residences; [FN2] it also prescribes a one-acre minimum lot size. Upon recommendation of its zoning board and despite the opposition of appellant-petitioner - an incorporated nonprofit organization composed of taxpayers and owners of real property in the canyon - the Los Angeles County Regional Planning Commission granted to the Topanga Canyon Investment Company a variance to establish a 93-space mobile home park on this acreage. [FN3] Petitioner appealed without success to the county board of supervisors, thereby exhausting its administrative remedies. Petitioner then sought relief by means of administrative mandamus, again unsuccessfully, in Los Angeles County Superior Court and the Court of Appeal for the Second District.

FN2 Los Angeles County Zoning Ordinance No. 7276.

FN3 Originally the real party in interest, the Topanga Canyon Investment Company has been replaced by a group of successoral real parties in interest. We focus our analysis on the building plans of the original real party in interest since it was upon the basis of these plans that the zoning authorities granted the variance challenged by petitioner.

In reviewing the denial of mandamus below, we first consider the proper role of agency and reviewing court with respect to the grant of variances. We then apply the proper standard of review to the facts of the case in order to determine whether we should sustain the action of the Los Angeles County Regional Planning Commission. ***511**

1. *An administrative grant of a variance must be accompanied by administrative findings. A court reviewing that grant must determine whether substantial evidence supports the findings and whether the findings support the conclusion that all applicable legislative requirements for a variance have been satisfied.*

A comprehensive zoning plan could affect owners of some parcels unfairly if no means were provided to permit flexibility. Accordingly, in an effort to achieve substantial parity and perhaps also in order to insulate zoning schemes from constitutional attack, [FN4] our Legislature laid a foundation for the granting of variances. Enacted in 1965, section 65906 of the Government Code establishes criteria for these grants; it provides: "Variances from the terms of the zoning ordinance shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification [¶] Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limi-

tations upon other properties in the vicinity and zone in which such property is situated." [FN5]

FN4 1 Appendix to Journal of the Senate (1970 Reg. Sess.) Final Report of the Joint Committee on Open Space Land (1970) pages 94-95; Bowden, *Article XVIII - Opening the Door to Open Space Control* (1970) 1 Pacific L.J. 461, 506. See *Metcalf v. County of Los Angeles* (1944) 24 Cal.2d 267, 270-271 [148 P.2d 645]; Gaylord, *Zoning: Variances, Exceptions and Conditional Use Permits in California* (1958) 5 U.C.L.A. L.Rev. 179; Comment, *The General Welfare, Welfare Economics, and Zoning Variances* (1965) 38 So.Cal.L.Rev. 548, 573. See generally Note, *Administrative Discretion in Zoning* (1969) 82 Harv.L.Rev. 668, 671. The primary constitutional concern is that as applied to a particular land parcel, a zoning regulation might constitute a compensable "taking" of property.

FN5 A third paragraph added to section 65906 declares: "A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property." This paragraph serves to preclude "use" variances, but apparently does not prohibit so-called "bulk" variances, those which prescribe setbacks, building heights, and the like. The paragraph became effective on November 23, 1970, 19 days after the Los Angeles County Regional Planning Commission granted the variance here at issue. Petitioner does not contend that the paragraph is applicable to the present case.

Applicable to all zoning jurisdictions except chartered cities (Gov. Code, § 65803), section 65906 may be supplemented by harmonious local legislation. [FN6] We note that Los Angeles County has enacted an ordinance which, ***512** if harmonious with section 65906, would govern the Topanga Canyon property here under consideration. Los Angeles County's Zoning Ordinance No. 1494, section 522, provides: [FN7] "An exception [variance] may ... be granted where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance, and in the granting of such exception the spirit of the ordinance will be observed, public safety secured, and substantial justice done."

FN6 Government Code section 65800 declares that the code chapter of which section 65906 is a part is intended to provide minimum limitations within which counties and cities can exercise maximum control over local zoning matters. Article XI, section 11 of the California Constitution declares that "[a]ny county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

FN7 This section recently was repealed but was in force when the zoning agencies rendered their decisions in the present case. For purposes of more succinct presentation, we refer in text to the section in the present tense.

Both state and local laws thus were designed to establish requirements which had to be satisfied before the Topanga Canyon Investment Company should have been granted its variance. Although the cases have held that substantial evidence must support the award of a variance in order to insure that such legislative requirements have been satisfied [FN8] (see, e.g., *Siller v. Board of Supervisors* (1962) 58 Cal.2d 479, 482 [25 Cal.Rptr. 73, 375 P.2d 41]; *Bradbeer v. England* (1951) 104 Cal.App.2d 704, 707 [232 P.2d 308]), they have failed to clarify whether the administrative agency must always set forth findings and have not illuminated the proper relationship between the evidence, findings, and ultimate agency action. [FN9]

FN8 The rule stated finds its source in authorities holding that all adjudicatory determinations of local agencies are entitled to no more than substantial evidence review. As indicated above (fn. 1, *ante*) those authorities no longer state the law with respect to adjudicatory determinations of such agencies which affect fundamental vested rights. Since no such right is involved in this case, however, the substantial evidence standard remains applicable. We note by way of caution, however, that merely because a case is said to involve a "variance" does not necessarily dictate a conclusion that no funda-

mental vested right is involved. The term "variance" is sometimes used, for example, to refer to permits for nonconforming uses which predate a zoning scheme. (See Hagman, Larson, & Martin, Cal. Zoning Practice (Cont. Ed. Bar) pp. 383-384.)

FN9 For descriptions of the history of judicial action in this state with respect to zoning variance grants, see Bowden, *Article XVIII - Opening the Door to Open Space Control* (1970) 1 Pacific L.J. 461, 507-509; 1 Appendix to Journal of the Senate (1970 Reg. Sess.) Final Report of the Joint Committee on Open Space Land (1970) pages 95-98; Hagman, Larson,& Martin, Cal. Zoning Practice, *supra*, pages 287-291.

One of the first decisions to emphasize the importance of judicial scrutiny of the record in order to determine whether substantial evidence supported administrative findings that the property in question met the legislative variance requirements was that penned by Justice Molinari in ***513** *Cow Hollow Improvement Club v. Board of Permit Appeals* (1966) 245 Cal. App.2d 160 [53 Cal.Rptr. 610]. Less than one year later, we followed the approach of that case in *Broadway, Laguna etc. Assn.* v. *Board of Permit Appeals* (1967) 66 Cal.2d 767 [59 Cal.Rptr. 146, 427 P.2d 810], and ordered that a zoning board's grant of a variance be set aside because the party seeking the variance had failed to adduce sufficient evidence to support administrative findings that the evidence satisfied the requisites for a variance set forth in the same San Francisco ordinance.

Understandably, however, the impact of these opinions remained uncertain. The San Francisco ordinance applicable in *Cow Hollow* and *Broadway* explicitly required the zoning board to specify its subsidiary findings and ultimate conclusions; this circumstance raised the question whether a court should require findings and examine their sufficiency in a case in which the applicable local legislation did not explicitly command the administrative body to set forth findings. Indeed language in *Broadway* intimated that such a case was distinguishable. (*Broadway, Laguna etc. Assn.* v. *Board of Permit Appeals, supra*, at pp. 772-773. See also *Stoddard v. Edelman* (1970) 4 Cal.App.3d 544, 549 [84 Cal.Rptr. 443]. Cf. *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 270 [104 Cal.Rptr. 761, 502 P.2d 1049].) Further, neither *Cow Hollow* nor *Broadway* confronted Government Code section 65906, since both cases concerned a chartered city. [FN10] There thus also remained uncertainty with respect to cases involving zoning jurisdictions other than chartered cities.

FN10 See page 511, *ante*.

Nevertheless, in an opinion subsequent to *Broadway; Hamilton* v. *Board of Supervisors* (1969) 269 Cal.App.2d 64 [75 Cal.Rptr. 106], a Court of Appeal set aside the grant of a variance by a planning commission under circumstances different from those in *Broadway* and *Cow Hollow*. The zoning jurisdiction involved in that controversy was a county, not a chartered city, and the court's opinion did not suggest that any applicable ordinance required administrative findings. Deeming Government Code section 65906 "concededly controlling," (*Hamilton v. Board of Supervisors, supra*, at p. 67), the court undertook the task of squaring the findings announced by the commission with the commission's grant of the variance and concluded that the findings were insufficient to sustain the variance.

(1) Consistent with the reasoning underlying these cases, we hold that ***514** regardless of whether the local ordinance commands that the variance board set forth findings, [FN11] that body must render findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action. (2) We hold further that a reviewing court, before sustaining the grant of a variance, must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision. In making these determinations, the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision.

FN11 We note the apparent applicability of section 639 of the Los Angeles County Zoning Ordinance which was in effect at the time respondent granted the variance. That section provided: "After a hearing by a zoning board the said zoning board shall report to the commission its findings and recommend the action which it concludes the

commission should take." As explained in text, however, we rest our ruling upon Code of Civil Procedure section 1094.5.

Our analysis begins with consideration of Code of Civil Procedure section 1094.5, the state's administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. (3) Without doubt, this provision applies to the review of variances awarded by bodies such as the Los Angeles County zoning agencies that participated in the present case. [FN12] (4) Section 1094.5 clearly contemplates that at minimum, the reviewing court must determine both whether substantial evidence supports the administrative ***515** agency's findings and whether the findings support the agency's decision. Subdivision (b) of section 1094.5 prescribes that when petitioned for a writ of mandamus, a court's inquiry should extend, among other issues, to whether "there was any prejudicial abuse of discretion." Subdivision (b) then defines "abuse of discretion" to include instances in which the administrative order or decision "is not supported by the findings, *or* the findings are not supported by the evidence." (Italics added.) Subdivision (c) declares that "*in all ... cases*" (italics added) other than those in which the reviewing court is authorized by law to judge the evidence independently, [FN13] "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (See *Zakessian v. City of Sausalito* (1972) 28 Cal.App.3d 794, 798 [105 Cal.Rptr. 105].)

FN12 *Allen v. Humboldt County Board of Supervisors* (1963) 220 Cal.App.2d 877, 882 [34 Cal.Rptr. 232]. See also *Siller* v. *Board of Supervisors* (1962) 58 Cal.2d 479, 481 [25 Cal.Rptr. 73, 375 P.2d 41]. The California Judicial Council's report reflects a clear desire that section 1094.5 apply to all agencies, regardless of whether they are subject to the Administrative Procedure Act and regardless of their state or local character. (See Judicial Council of Cal., 10th Biennial Rep. (1944) pp. 26, 45. See also *Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90, 101 [280 P.2d 1]; Deering, Cal. Administrative Mandamus (1966) p. 7.) "In the absence of compelling language in [a] statute to the contrary, it will be assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the council in its report." (*Hohreiter* v. *Garrison* (1947) 81 Cal.App.2d 384, 397 [184 P.2d 323].)

Section 1094.5 makes administrative mandamus available for review of "any final administrative order or decision made as the result of a proceeding in which *by law* a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer." (Italics added.) Government Code section 65901 satisfies these requisites with respect to variances granted by jurisdictions other than chartered cities such as Los Angeles County's zoning agencies. Section 65901 provides, in part: "The board of zoning adjustment or zoning administrator shall hear and decide applications for conditional uses or other permits when the zoning ordinance provides therefor and establishes criteria for determining such matters, and applications for variances from the terms of the zoning ordinance."

FN13 See footnote 1, *supra*.

(5) We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. If the Legislature had desired otherwise, it could have declared as a possible basis for issuing mandamus the absence of substantial evidence to support the administrative agency's action. By focusing, instead, upon the relationships between evidence and findings and between findings and ultimate action, the Legislature sought to direct the reviewing court's attention to the analytic route the administrative agency traveled from evidence to action. In so doing, we believe that the Legislature must have contemplated that the agency would reveal this route. Reference, in section 1094.5, to the reviewing court's duty to compare the evidence and ultimate decision to "*the* findings" (italics added) we believe leaves no room for the conclusion that the Legislature would have been content to have a reviewing court speculate as to the administrative agency's basis for

decision.

Our ruling in this regard finds support in persuasive policy considerations. (See generally 2 Davis, Administrative Law Treatise (1958) § 16.05, pp. 444-449; Forkosch, A Treatise on Administrative Law (1956) § 253, pp. 458-464.) According to Professor Kenneth Culp Davis, the requirement that administrative agencies set forth findings to support their adjudicatory decisions stems primarily from judge-made law (see, e.g., *Zieky v. Town Plan and Zon. Com'n of Town of Bloomfield* (1963) 151 Conn. 265 [196 A.2d 758]; *Stoll v. Gulf Oil Corp.* (1958) 79 Ohio L.Abs. 145 [155 N.E.2d 83]), and is "remarkably uniform in both federal and state ***516** courts." As stated by the United States Supreme Court, the "accepted ideal ... is that 'the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.' (*S.E.C. v. Chenery Corp.* (1943) 318 U.S. 80, 94.)" (2 Davis, *supra*, § 16.01, pp. 435-436. See also *Saginaw Broadcasting Co. v. Federal C. Com'n* (1938) 96 F.2d 554, 559 [68 App.D.C. 282].)

Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. (See 2 Cooper, State Administrative Law (1965) pp. 467-468; Feller, *Prospectus for the Further Study of Federal Administrative Law* (1938) 47 Yale L.J. 647, 666. Cf. Comment, *Judicial Control Over Zoning Boards of Appeal: Suggestions for Reform* (1965) 12 U.C.L.A. L.Rev. 937, 952.) [FN14] In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. (See *California Motor Transport Co. v. Public Utilities Com.* (1963) 59 Cal.2d 270, 274 [28 Cal.Rptr. 868, 379 P.2d 324]; *Swars v. Council of City of Vallejo* (1949) 33 Cal.2d 867, 871 [206 P.2d 355].)

FN14 Although at first blush, judicial enforcement of a findings requirement would appear to constrict the role of administrative agencies, in reality, the effect could be to the contrary. Because, notes Judge Bazelon, it provides a framework for principled decision-making, a findings requirement serves to "diminish the importance of judicial review by enhancing the integrity of the administrative process." (*Environmental Defense Fund, Inc. v. Ruckelshaus* (D.C.Cir. 1971) 439 F.2d 584, 598.) By exposing the administrative agency's mode of analysis, findings help to constrict and define the scope of the judicial function. "We must know what [an administrative] decision means," observed Mr. Justice Cardozo, "before the duty becomes ours to say whether it is right or wrong." (*United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (1935) 294 U.S. 499, 511 [79 L.Ed. 1023, 1032, 55 S.Ct. 462].)

Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. [FN15] (6)**(See fn. 16.)** [FN16] Moreover, ***517** properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. (See *In re Sturm* (1974) *ante*, pp. 258, 267 [113 Cal.Rptr. 361, 521 P.2d 97]; *Swars v. Council of City of Vallejo, supra*, at p. 871.) They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable.

FN15 "Given express findings, the court can determine whether the findings are supported by substantial evidence, and whether the findings warrant the decision of the board. If no findings are made, and if the court elects not to remand, its clumsy alternative is to read the record, speculate upon the portions which probably were believed by the board, guess at the conclusions drawn from credited portions, construct a basis for decision, and try to determine whether a decision thus arrived at should be sustained. In the process, the court is required to do much that is assigned to the board. ..." (3 Anderson, American Law of Zoning (1968) § 16.41, p. 242.)

FN16 Although a variance board's findings "need not be stated with the formality re-

quired in judicial proceedings" (*Swars v. Council of City of Vallejo, supra*, at p. 872), they nevertheless must expose the board's mode of analysis to an extent sufficient to serve the purposes stated herein. We do not approve of the language in *Kappadahl v. Alcan Pacific Co.* (1963) 222 Cal.App.2d 626, 639 [35 Cal.Rptr. 354], and *Ames v. City of Pasadena* (1959) 167 Cal.App.2d 510, 516 [334 P.2d 653], which endorses the practice of setting forth findings solely in the language of the applicable legislation.

By setting forth a reasonable requirement for findings and clarifying the standard of judicial review, we believe we promote the achievement of the intended scheme of land use control. Vigorous and meaningful judicial review facilitates, among other factors, the intended division of decision-making labor. (7) Whereas the adoption of zoning regulations is a legislative function (Gov. Code, § 65850), the granting of variances is a quasi-judicial, administrative one. (See *Johnston v. Board of Supervisors* (1947) 31 Cal.2d 66, 74 [187 P.2d 686]; *Kappadahl v. Alcan Pacific Co.* (1963) 222 Cal.App.2d 626, 634 [35 Cal.Rptr. 354].) If the judiciary were to review grants of variances superficially, administrative boards could subvert this intended decision-making structure. (See 1 Appendix to Sen. J. (1970 Reg. Sess.) Final Rep. of the Joint Committee on Open Space Land (1970) pp. 102-103.) They could "[amend] ... the zoning code in the guise of a variance" (*Cow Hollow Improvement Club v. Board of Permit Appeals, supra*, at p. 181), and render meaningless, applicable state and local legislation prescribing variance requirements.

Moreover, courts must meaningfully review grants of variances in order to protect the interests of those who hold rights in property nearby the parcel for which a variance is sought. (8) A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare. (See, e.g., 1 Appendix to Sen. J. (1970 Reg. Sess.) Final Rep. of the Joint Committee on Open Space Land (1970) p. 91; Bowden, *Article XXVIII - Opening the Door to Open Space Control* (1970) 1 Pacific L.J. 461, 501.) If the interest of ***518** these parties in preventing unjustified variance awards for neighboring land is not sufficiently protected, the consequence will be subversion of the critical reciprocity upon which zoning regulation rests.

Abdication by the judiciary of its responsibility to examine variance board decision-making when called upon to do so could very well lead to such subversion. [FN17] Significantly, many zoning boards employ adjudicatory procedures that may be characterized as casual. (See Comment, *Judicial Control over Zoning Boards of Appeal: Suggestions for Reform* (1965) 12 U.C.L.A. L.Rev. 937, 950. Cf. *Bradbeer v. England* (1951) 104 Cal.App.2d 704, 710 [232 P.2d 308].) The availability of careful judicial review may help conduce these boards to insure that all parties have an opportunity fully to present their evidence and arguments. Further, although we emphasize that we have no reason to believe that such a circumstance exists in the case at bar, the membership of some zoning boards may be inadequately insulated from the interests whose advocates most frequently seek variances. (See e.g., 1 Appendix to Sen. J. (1970 Reg. Sess.) Final Rep. of the Joint Committee on Open Space Land (1970) p. 100.) Vigorous judicial review thus can serve to mitigate the effects of insufficiently independent decision-making.

FN17 See generally Comment, *Zoning: Variance Administration in Alameda County* (1962) 50 Cal.L.Rev. 101, 107 and footnote 42. See also Note, *Administrative Discretion in Zoning* (1969) 82 Harv.L.Rev. 668, 672 and sources cited therein.

2. *The planning commission's summary of "factual data" - its apparent "findings" - does not include facts sufficient to satisfy the variance requirements of Government Code section 65906.*

As we have mentioned, at least two sets of legislative criteria appear applicable to the variance awarded: Government Code section 65906 and Los Angeles County Zoning Ordinance No. 1494, section 522. (9) The variance can be sustained only if *all* applicable legislative requirements have been satisfied. Since we conclude that the requirements of section 65906 have not been met, the question whether the variance conforms with the criteria set forth in Los Angeles County Zoning Ordinance No. 1494, section 522 becomes immaterial. [FN18] ***519**

FN18 We focus on the statewide require-

ments because they are of more general application. If we were to decide that the criteria of section 65906 had been satisfied, we would then be called upon to determine whether the requirements set forth in the county ordinance are consistent with those in section 65906 and, if so, whether these local criteria also had been satisfied.

The local criteria need be squared with the state criteria since the section 65906 requirements prevail over any inconsistent requirements in the county ordinance. The stated purpose of title 7, chapter 4, of the Government Code, which includes section 65906, is to provide limitations - albeit minimal ones - on the adoption and administration of zoning laws, ordinances, and regulations by counties and nonchartered cities. (See fn. 6, *ante*.) Section 65802 of the code declares that "[n]o provisions of [the Government Code], other than the provisions of [chapter 4], and no provisions of any other code or statute shall restrict or limit the procedures provided in [chapter 4] by which the legislative body of any county or city enacts, amends, administers, or provides for the administration of any zoning law, ordinance, rule or regulation." The clear implication is that chapter 4 does restrict or limit these procedures. (See also Cal. Const., art. XI, § 11.)

If local ordinances were allowed to set a lesser standard for the grant of variances than those provided in section 65906, a county or city could escape the prohibition against granting use variances added to section 65906 in 1970 (see fn. 5, *ante*) merely by enacting an ordinance which would permit the grant of use variances. Clearly the Legislature did not intend that cities and counties to which the provisions of chapter 4 apply should have such unfettered discretion.

We summarize the principal factual data contained in the Los Angeles County Regional Planning Commission's report, which data the commission apparently relied on to award the variance. [FN19] The acreage upon which the original real party in interest [FN20] sought to establish a mobile home park consists of 28 acres; it is a hilly and in places steep parcel of land. At the time the variance was granted, the property contained one single-family residence. Except for a contiguous area immediately to the southeast which included an old and flood-damaged subdivision and a few commercial structures, the surrounding properties were devoted exclusively to scattered single-family residences.

FN19 We confine our analysis to the relationship between the commission's fact summary and its ultimate decision; we do not consider the testimonial evidence directly. To sustain the grant of the variance of course would require that we conclude that substantial evidence supports the findings and that the findings support the variance award. Since we decide below, however, that the commission's fact summary does not include sufficient data to satisfy the section 65906 requirements, we need not take the further step of comparing the transcript to the fact summary. Our basis for so proceeding lies in Code of Civil Procedure section 1094.5, which defines "abuse of discretion," one of several possible grounds for issuance of a writ of mandamus, to include instances in which "the order or decision [of the administrative agency] is not supported by the findings, *or* the findings are not supported by the evidence." (Italics added.)

FN20 See footnote 3, *ante*.

The proposed mobile home park would leave 30 percent of the acreage in its natural state. An additional 25 percent would be landscaped and terraced to blend in with the natural surroundings. Save in places where a wall would be incompatible with the terrain, the plan contemplated enclosure of the park with a wall; it further called for rechanneling a portion of Topanga Canyon Creek and anticipated that the developers would be required to dedicate an 80-foot-wide strip of the property for a proposed realignment of Topanga Creek Boulevard. ***520**

The development apparently would partially satisfy a growing demand for new, low cost housing in the area. Additionally, the project might serve to attract further investment to the region and could provide a much needed fire break. Several data indicate

that construction on the property of single-family residences in conformance with the zoning classification would generate significantly smaller profits than would development of the mobile home park. Single-family structures apparently would necessitate costly grading, and the proposed highway realignment would require a fill 78 feet high, thereby rendering the property unattractive for conventional residential development. Moreover, the acreage is said not to be considered attractive to parties interested in single-family residences due, in the words of the report's summary of the testimony, to "the nature of the inhabitants" in the vicinity and also because of local flood problems.

These data, we conclude, do not constitute a sufficient showing to satisfy the section 65906 variance requirements. That section permits variances "*only* when, because of *special* circumstances applicable to the property, ... the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification." (Italics added.) (10) This language emphasizes *disparities* between properties, not treatment of the subject property's characteristics in the abstract. (See *Minney v. City of Azusa* (1958) 164 Cal.App.2d 12, 31 [330 P.2d 255]; cf. *In re Michener's Appeal* (1955) 382 Pa. 401 [115 A.2d 367, 371]; *Beirn v. Morris* (1954) 14 N.J. 529 [103 A.2d 361, 364]; Note, *Administrative Discretion in Zoning* (1969) 82 Harv. L.Rev. 668, 671-672.) It also contemplates that at best, only a small fraction of any one zone can qualify for a variance. (See generally 3 Anderson, American Law of Zoning (1968) § 14.69, pp. 62-65.)

The data contained in the planning commission's report focus almost exclusively on the qualities of the property for which the variance was sought. In the absence of comparative information about surrounding properties, these data lack legal significance. Thus knowledge that the property has rugged features tells us nothing about whether the original real party in interest faced difficulties different from those confronted on neighboring land. [FN21] Its assurances that it would landscape and terrace parts of the property and leave others in their natural state are all well and good, but they bear not at all on the critical issue whether a variance ***521** was necessary to bring the original real party in interest into substantial parity with other parties holding property interests in the zone. (See *Hamilton v. Board of Supervisors, supra*, at p. 66.)

> FN21 Indeed, the General Plan for Topanga Canyon suggests that the subject property is not uniquely surfaced; it states that the entire area is characterized by "mountainous terrain, steep slopes and deep canyons interspersed with limited areas of relatively flat or rolling land."

The claim that the development would probably serve various community needs may be highly desirable, but it too does not bear on the issue at hand. Likewise, without more, the data suggesting that development of the property in conformance with the general zoning classification could require substantial expenditures are not relevant to the issue whether the variance was properly granted. Even assuming for the sake of argument that if confined to the subject parcel and no more than a few others in the zone, such a burden could support a variance under section 65906, for all we know from the record, conforming development of other property in the area would entail a similar burden. Were that the case, a frontal attack on the present ordinance or a legislative proceeding to determine whether the area should be rezoned might be proper, but a variance would not. (1 Appendix to Sen. J. (1970 Reg. Sess.) Final Rep. of the Joint Committee on Open Space Land (1970) p. 95; Bowden, *Article XVIII - Opening the Door to Open Space Control* (1970) 1 Pacific L.J. 461, 506.)

Although they dispute that section 65906 requires a showing that the characteristics of the subject property are exceptional, the current real parties in interest would nevertheless have us speculate that the property is unlike neighboring parcels. They point out that the plot has rugged terrain and three stream beds [FN22] and that the Topanga Creek Boulevard realignment would bisect the property. (11) Speculation about neighboring land, however, will not support the award of a variance. The party seeking the variance must shoulder the burden of demonstrating before the zoning agency that the subject property satisfies the requirements therefor. (*Tustin Heights Association v. Board of Supervisors* (1959) 170 Cal.App.2d 619, 627 [339 P.2d 914].) Thus neither an administrative agency nor a reviewing court may assume without evidentiary basis that the character of neighboring property is different from that of the land for which the variance is sought. [FN23] ***522**

FN22 Interestingly, since the witnesses who testified in favor of the variance never mentioned the stream beds, the original real party in interest apparently did not regard the beds as disadvantageous. Rather, a witness who opposed the variance offhandedly mentioned the beds as illustrative of the scenic beauty of the area. The trial court seized upon this testimony and used it in justifying the variance award.

FN23 In fact, other parcels in the zone may well have the features that the successoral real parties in interest speculate are confined to the subject property. Rugged terrain apparently is ubiquitous in the area (see fn. 21, *ante*), and because the stream beds and highway must enter and exit the subject property somewhere, they may all traverse one or more neighboring parcels. Further, for all we know from the commission's findings, stream beds may traverse most parcels in the canyon.

(12) Moreover, the grant of a variance for nonconforming development of a 28-acre parcel in the instant case is suspect. Although we do not categorically preclude a tract of that size from eligibility for a variance, we note that in the absence of unusual circumstances, so large a parcel may not be sufficiently unrepresentative of the realty in a zone to merit special treatment. By granting variances for tracts of this size, a variance board begins radically to alter the nature of the entire zone. Such change is a proper subject for legislation, not piecemeal administrative adjudication. (See *Sinclair Pipe Line Co.* v. *Village of Richton Park* (1960) 19 Ill.2d 370 [167 N.E.2d 406]; *Appeal of the Catholic Cemeteries Association* (1954) 379 Pa. 516 [109 A.2d 537]; *Civil City of Indianapolis v. Ostrom R. & Construction Co.* (1931) 95 Ind.App. 376 [176 N.E. 246].) (13) Since there has been no affirmative showing that the subject property differs substantially and in relevant aspects from other parcels in the zone, we conclude that the variance granted amounts to the kind of "special privilege" explicitly prohibited by Government Code section 65906.

We submit, in summary, that this case illumines two important legal principles. First, by requiring that administrative findings must support a variance, we emphasize the need for orderly legal process and the desirability of forcing administrative agencies to express their grounds for decision so that reviewing courts can intelligently examine the validity of administrative action. Second, by abrogating an unsupported exception to a zoning plan, we conduce orderly and planned utilization of the environment.

We reverse the judgment and remand the cause to the superior court with directions to issue a writ of mandamus requiring the Los Angeles Board of Supervisors to vacate its order awarding a variance. We also direct the superior court to grant any further relief that should prove appropriate.

Wright, C. J., McComb, J., Mosk, J., Burke, J., Sullivan, J., and Clark, J., concurred. ***523**

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Topanga Assn. for a Scenic Community v. County of Los Angeles
11 Cal.3d 506, 522 P.2d 12, 113 Cal.Rptr. 836

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92 Cal.App.3d 586, 155 Cal.Rptr. 63
(Cite as: 92 Cal.App.3d 586, 155 Cal.Rptr. 63)

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Court of Appeal, Fifth District, California.
WINDIGO MILLS, etc., Petitioner and Respondent,
v.
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, Respondent and Appellant.

No. 5 Civ. 4002.
May 1, 1979.
As Modified on Denial of Rehearing May 24, 1979.
Hearing Denied July 12, 1979.

Appeal was taken from judgment of the Superior Court, Kings County, Robert R. Rosson, J., granting writ of administrative mandate ordering the Unemployment Insurance Board to set aside a decision that certain employees who had participated in a strike were eligible to receive unemployment insurance benefits. The Court of Appeal, Franson, J., held that: (1) trial court in administrative mandamus proceeding is authorized to receive relevant evidence of events which transpired after the date of the agency's decision; (2) use of affidavits as direct evidence at administrative mandamus hearing in the superior court is authorized, subject to rules governing right of cross-examination and prohibition against double hearsay; (3) certain declarations should not have been admitted in superior court hearing where there was no showing that the testimony could not have been presented at the administrative hearing; (4) certain declaration should not have been admitted where it contained double hearsay; (5) erroneous admission of declarations did not require reversal where there was substantial evidence in the administrative record apart from the declarations to support the judgment; (6) fact that new workers were hired on a permanent basis did not mean that striking workers had been permanently discharged so as to be entitled to benefits, where there were always jobs available due to dramatic increase in employer's business during the strike, and (7) portions of trial court's order were improper.

Affirmed in part, stricken in part, and remanded with directions.

West Headnotes

[1] Mandamus 250 187.9(7)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k187 Appeal and Error
250k187.9 Review
250k187.9(7) k. Harmless Error. Most Cited Cases

Though certain declarations were erroneously admitted in **administrative** mandamus proceeding to review determination of eligibility for unemployment insurance benefits, error did **not** require reversal where there was substantial **evidence** in the **administrative** record apart from the declarations to **support** the judgment, and it was **not** reasonably probable that trial court would have reached different result absent the "new" **evidence** erroneously admitted since effect was merely cumulative. West's Ann.Const. art. 6, § 13.

[2] Mandamus 250 172

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k172 k. Scope of Inquiry and Powers of Court. Most Cited Cases

Judicial review of **agency** action by **administrative** mandamus proceeding extends only to whether the **administrative agency** has proceeded without, or an excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion, but abuse of discretion is established if respondent has **not** proceeded in the manner provided by law, the decision is **not supported** by the **findings**, or the **findings** are **not supported** by the **evidence**. West's Ann.Code Civ.Proc. § **1094**. 5(b, e).

[3] Administrative Law and Procedure 15A 458.1

15A **Administrative** Law and Procedure
15AIV Powers and Proceedings of **Administrative Agencies**, Officers and Agents
15AIV(D) Hearings and Adjudications

92 Cal.App.3d 586, 155 Cal.Rptr. 63
(Cite as: 92 Cal.App.3d 586, 155 Cal.Rptr. 63)

15Ak458 **Evidence**
15Ak458.1 k. In General. Most Cited Cases
(Formerly 15Ak458)

Administrative Law and Procedure 15A 746

15A **Administrative** Law and Procedure
15AV Judicial Review of **Administrative** Decisions
15AV(D) Scope of Review in General
15Ak744 Trial De Novo
15Ak746 k. **Evidence**. Most Cited Cases

Public policy requires a litigant to produce all existing **evidence** on his behalf in **administrative** hearing, and only where record is augmented within the strict limits set forth in statute is **evidence** on the main issues ever received in superior court. West's Ann.Code Civ.Proc. §§ **1094**. **5**, **1094**. **5**(e).

[4] Mandamus 250 168(3)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k168 **Evidence**
250k168(3) k. Admissibility of **Evidence**. Most Cited Cases

In unemployment compensation case, reason given for failure of certain officers of the employer to testify at **administrative** hearing, that their presence was required at the plant because of strike, was insufficient to justify admission of their declarations in superior court in **administrative** mandamus proceeding, absent showing why their testimony could **not** have been presented at **administrative** hearing by way of affidavits.

[5] Mandamus 250 173

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k173 k. Conduct of Hearing or Trial. Most Cited Cases

Independent judgment review under **administrative** mandamus statute is a limited trial de novo where, to save the time and expense required to remand the case for **agency** for reconsideration in light of new **evidence**, superior court is authorized to consider the new **evidence** in reviewing the **administrative** decisions if it chooses to do so. West's Ann.Code Civ.Proc. § **1094**. **5**(e); West's Ann.Const. art. 3, § 1 et seq.; art. 6, § 1.

[6] Mandamus 250 168(3)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k168 **Evidence**
250k168(3) k. Admissibility of **Evidence**. Most Cited Cases

Under statute granting superior court in **administrative** mandamus proceeding discretion to receive relevant **evidence** which, in the exercise of reasonable diligence, could **not** have been produced at the **administrative** hearing, superior court is authorized to receive relevant **evidence** of events which transpired after the date of the **agency's** decision, though the better practice might be to remand the action for **agency** redetermination in the light of the new **evidence**, particularly where the **evidence** would have been crucial to the **administrative** decision. West's Ann.Code Civ.Proc. § **1094**. **5**(e).

[7] Evidence 157 266

157 **Evidence**
157VIII Declarations
157VIII(A) Nature, Form, and Incidents in General
157k266 k. Nature and Grounds for Admission in General. Most Cited Cases

General rule in civil actions is that, absent statutory authorization, stipulation of the parties, or a waiver by failure to object, an affidavit or a declaration under penalty of perjury is **not** competent **evidence**; it is **hearsay** because it is prepared without the opportunity to cross-examine the affiant. West's Ann.Code Civ.Proc. §§ 2003, 2009, 2015.5; West's Ann.Evid.Code, §§ 300, 1200.

[8] Administrative Law and Procedure 15A 462

15A **Administrative** Law and Procedure

15AIV Powers and Proceedings of **Administrative Agencies**, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak458 **Evidence**
15Ak462 k. Weight and Sufficiency. Most Cited Cases

For **agencies** under the **Administrative** Procedure Act, affidavits may serve as direct **evidence** if no request to cross-examine is made. West's Ann.Gov.Code, §§ 11500 et seq., 11514.

[9] Unemployment Compensation 392T 387

392T Unemployment Compensation
392TVIII Proceedings
392TVIII(F) **Evidence** in General
392Tk381 Admissibility
392Tk387 k. Affidavits. Most Cited Cases
(Formerly 356Ak576)

Under regulations governing hearings in unemployment compensation cases, affidavits by persons as to facts within their personal knowledge would qualify as competent **evidence** provided the opposing party's right to cross-examine is fully protected. West's Ann.Unempl.Ins.Code, § 1952.

[10] Mandamus 250 168(3)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k168 **Evidence**
250k168(3) k. Admissibility of **Evidence**. Most Cited Cases

In **administrative** mandamus proceeding, there is no reason why **evidence** relevant to the **agency** decision should **not** be admitted in superior court under the same rules as those governing the admissibility of **evidence** at the **administrative** hearing. West's Ann.Code Civ.Proc. § **1094. 5**(e).

[11] Affidavits 21 18

21 Affidavits
21k18 k. Use in **Evidence**. Most Cited Cases

Evidence 157 266

157 **Evidence**
157VIII Declarations
157VIII(A) Nature, Form, and Incidents in General
157k266 k. Nature and Grounds for Admission in General. Most Cited Cases

Evidence 157 318(7)

157 **Evidence**
157IX **Hearsay**
157k315 Statements by Persons Other Than Parties or Witnesses
157k318 Writings
157k318(7) k. Certificates and Affidavits. Most Cited Cases

Statute governing **administrative** mandamus proceedings constitutes statutory authority for the use of affidavits as direct **evidence** at hearings in the superior court, subject to the rules governing the right of cross-examination and to the prohibition against double **hearsay**, and trial court in **administrative** mandamus proceeding may admit declarations into **evidence** over a general **hearsay** objection.

[12] Evidence 157 266

157 **Evidence**
157VIII Declarations
157VIII(A) Nature, Form, and Incidents in General
157k266 k. Nature and Grounds for Admission in General. Most Cited Cases

In **administrative** mandamus proceeding **challenging** determination of eligibility for unemployment insurance benefits, declaration by supervisor in unemployment insurance section to effect that certain people had reported that they had applied for work with employer while labor dispute was pending was properly excluded as inadmissible double hearsay. West's Ann.Evid.Code, § 1200.

[13] Mandamus 250 172

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k172 k. Scope of Inquiry and Powers of

Court. Most Cited Cases

Trial court properly weighed the evidence at administrative mandamus hearing to review determination of eligibility for unemployment insurance benefits. West's Ann.Code Civ.Proc. § 1094.5(e).

[14] Mandamus 250 187.9(6)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k187 Appeal and Error
250k187.9 Review
250k187.9(6) k. Questions of Fact. Most Cited Cases

Scope of appellate review of administrative mandamus proceedings is limited to determination of whether the trial court's decision is supported by substantial evidence, and its judgment will be upheld if there is any credible evidence in support of the superior court findings; any contrary evidence must be disregarded. West's Ann.Code Civ.Proc. § 1094.5.

[15] Unemployment Compensation 392T 373

392T Unemployment Compensation
392TVIII Proceedings
392TVIII(F) Evidence in General
392Tk372 Burden of Proof
392Tk373 k. In General. Most Cited Cases
(Formerly 356Ak562.5)

Applicant for unemployment insurance benefits has the burden of establishing eligibility.

[16] Unemployment Compensation 392T 435

392T Unemployment Compensation
392TVIII Proceedings
392TVIII(G) Weight and Sufficiency of Evidence
392Tk435 k. Labor or Trade Disputes. Most Cited Cases
(Formerly 356Ak589)

There was substantial evidence in administrative record to support finding that striking employees could have returned to work if they had wanted to cross picket line, with result that they were ineligible for unemployment insurance benefits. West's Ann.Unempl.Ins.Code, § 1262.

[17] Unemployment Compensation 392T 158(1)

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(D) Labor or Trade Disputes
392Tk155 Suspension or Termination of Employment by Employer
392Tk158 Employees Involved in Labor Dispute
392Tk158(1) k. In General. Most Cited Cases
(Formerly 356Ak432)

Even if there were insufficient openings for all strikers to return to work, this would not compel finding that all claimants were eligible for unemployment insurance benefits. West's Ann.Unempl.Ins.Code, § 1262.

[18] Unemployment Compensation 392T 158(2)

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(D) Labor or Trade Disputes
392Tk155 Suspension or Termination of Employment by Employer
392Tk158 Employees Involved in Labor Dispute
392Tk158(2) k. Replacement of Employees. Most Cited Cases
(Formerly 356Ak431)

That new workers had been hired on a permanent basis did not mean that striking workers had been permanently discharged so as to be entitled to unemployment insurance benefits where there were always jobs available due to dramatic increase in employer's business during the strike. West's Ann.Unempl.Ins.Code, § 1262.

[19] Unemployment Compensation 392T 494

392T Unemployment Compensation
392TIX Judicial Review

392Tk494 k. Determination in General. Most Cited Cases
(Formerly 356Ak677.1, 356Ak677)

Order of trial court directing Unemployment Insurance Board to set aside decision that certain employees were eligible to receive unemployment insurance benefits was invalid insofar as it purported to require the denial of future benefits to the claimants. West's Ann.Unempl.Ins.Code, § 1338.

[20] Unemployment Compensation 392T 494

392T Unemployment Compensation
392TIX Judicial Review
392Tk494 k. Determination in General. Most Cited Cases
(Formerly 356Ak677.1, 356Ak677)

Within order directing the Unemployment Insurance Board to set aside decision that certain employees were eligible to receive unemployment insurance benefits, portion stating that employer's reserve account should not be charged with payments made to such claimants was unnecessary since statute itself provides for that result, and such portion of order was improper because the agency charged with administering reserve accounts at the time the order was made was not a party before the court. West's Ann.Unempl.Ins.Code, § 1338.

***590 **66** Evelle J. Younger and George Deukmejian, Attys. Gen., Sacramento, for respondent and appellant.

Low, Stone & Wolfe, Jerome B. Smith, Joseph Stone, Los Angeles, for petitioner and respondent.

Pacific Legal Foundation, Ronald A. Zumbrun, John H. Findley, Sandra M. Robertson, Sacramento, for amicus curiae on behalf of petitioner and respondent.

***591** OPINION

FRANSON, Associate Justice.

STATEMENT OF THE CASE

This appeal is from a judgment granting a writ of administrative mandate pursuant to Code of Civil Procedure section 1094.5. By the writ the trial court ordered appellant, the California Unemployment Insurance Board (hereinafter Board), to set aside its decision that certain employees who had participated in a strike against respondent Windigo Mills (hereinafter Windigo) were eligible to receive unemployment insurance benefits.

The employees' applications for unemployment benefits were originally denied by the Employment Development Department on the ground that the claimants were ineligible for such benefits under California Unemployment Insurance Code section 1262.[FN1] The claimants appealed this decision to the Board and a hearing was held before an administrative law judge (hereinafter ALJ). The ALJ ruled that section 1262 did not preclude the claimants from receiving benefits. The ALJ determined that the striking employees had been permanently replaced by their employer; hence, the strike was no longer the cause of their unemployment.

FN1. Section 1262 provides:

"An individual is not eligible for unemployment compensation benefits, and no such benefit shall be payable to him, if he left his work because of a trade dispute. Such individual shall remain ineligible for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed."

Windigo filed an appeal from that decision with the Board. It asserted that the ALJ erred in finding that the striking employees had been permanently replaced. According to Windigo, the evidence established that jobs had been kept open for the striking employees and the labor dispute was the only reason why the claimants did not return to work; therefore, section 1262 should preclude the striking employees from receiving benefits. This contention was rejected by the Board, which affirmed the ALJ's decision favorable to the claimants (except as to one claimant whose eligibility is not important to this appeal).

****67** Windigo then filed a petition for a writ of administrative mandate in the superior court pursuant to Code of Civil Procedure section 1094.5 ***592** seeking to have the Board's decision set aside. The petition was accompanied by a number of exhibits, including several declarations by Windigo officers and executives. An alternative writ was issued, and the

matter was set for hearing.

When the Board filed its return to the alternative writ, it objected to Windigo's filing of the above declarations. The Board requested the court to strike the declarations as improper attempts to introduce evidence which was not a part of the administrative record. The Board alleged that the new evidence was inadmissible because Windigo had failed to make the required showing that either the new evidence could not have been produced at the administrative hearing in the exercise of reasonable diligence, or that it was improperly excluded by the ALJ (Code Civ.Proc., s 1094.5, subd. (e)). [FN2] The Board later voiced an objection to the declarations on the ground that they constituted inadmissible hearsay, worked a denial of the right to cross-examine, and contained opinions and conclusions rather than facts within the declarants' personal knowledge. Responding to the Board's objection, Windigo filed additional declarations explaining why the matters contained in the previous declarations were not introduced at the administrative hearing. The superior court overruled the Board's objections and denied the motion to strike the declarations with the exception of the declaration by Robert Hastey.

> FN2. Code of Civil Procedure section 1094.5, subdivision (e) provides in pertinent part:
>
> "Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment . . . remanding the case to be reconsidered in the light of such evidence; or, In cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case." (Emphasis added.)

The Board thereafter filed a counter-declaration by an employee of the Hanford office of the Employment Development Department to the effect that certain employees had reported to the Hanford office that they had applied for work at Windigo after the strike had begun. This declaration was offered to rebut Windigo's assertions that none of the claimants had been refused reinstatement to their jobs when they sought to abandon the strike and return to work. Windigo subsequently moved to strike the declaration submitted by the Board on the ground that it was based solely on hearsay. The motion was granted.

***593** The superior court announced that after reviewing the evidence it had concluded that the Board's decision was not supported by the weight of the evidence. Specifically, there was insufficient evidence to support the Board's finding that the claimants' employment had been terminated by Windigo.

Windigo thereafter submitted a proposed judgment. The Board objected to the judgment on the ground that it purported to affect matters which were not in issue before the Board. The trial court overruled the Board's objections and signed the judgment. The Board filed a timely notice of appeal.

THE EVIDENCE

Windigo is a California corporation which manufactures carpet yarn. On February 2, 1976, most of Windigo's employees (some 186 persons who worked as machine operators), who were members of United Rubber Workers Union Local 703, engaged in a strike. The president of the company, Ms. Beatrice Fritz, sent a letter to the striking employees in an attempt to convince them to return to work. That letter stated in part:

"We are now calling you back to work on February 16, 1976. If you do not return to work by February 16, the company, under the National Labor Relations Act, ****68** Has the right to permanently replace you." (Emphasis added.)

Although several employees did return to work, the majority of the employees remained on strike. Soon thereafter, Windigo began hiring new employees. As new workers were hired, the plant gradually resumed fulltime operations. By mid-April (approximately two months after the strike commenced), the plant was in operation seven days a week and three shifts per day; at that time Windigo had approximately 130 workers. By the time of the administrative hearing on July 21, 1976, Windigo had approximately 195 workers employed.

[1] The main point of controversy at the administrative hearing was whether the hiring of the new

employees by Windigo constituted permanent replacement of the strikers, such as to terminate their employment with Windigo and make them eligible for unemployment benefits. At a prior superior court hearing, Ms. Fritz had described the new employees as "permanent replacements for the strikers"; however, she also stated that not all of the strikers had been replaced. Windigo's officers testified that the company still had positions available at the time of the administrative hearing which could be filled by striking union ***594** members who wanted to return to work. Ms. Fritz stated that at the time of the hearing, Windigo had sufficient orders to put 60 more machine operators to work. She explained that there had been a large increase in the demand for Windigo's product.

The evidence at the administrative hearing also established that although the striking employees were told by a union representative that they had been permanently replaced, several employees went to the plant to see if they could return to work; they were permitted to resume working and were reinstated with full seniority. Several employees who returned to work submitted declarations reciting that to their knowledge no strikers were turned away when they asked to return to work. There was no **evidence** to rebut Windigo's contention that any striker who wished to return to work was promptly reinstated.

THE ADMISSIBILITY OF NEW **EVIDENCE** AT THE **ADMINISTRATIVE** MANDAMUS HEARING

Appellant **challenges** the superior court's ruling admitting Windigo's declarations into **evidence** on two basic grounds. First, it is argued that Windigo failed to lay a proper foundation for such **evidence** by showing that it was relevant **evidence** which, in the exercise of reasonable diligence, could **not** have been produced or was improperly excluded at the **administrative** hearing. (Code Civ.Proc., s **1094**. **5**, subd. (e).) Appellant asserts that the new **evidence** could either have been produced at the **administrative** hearing by due diligence or was of events which occurred after the date of the hearing and should have been excluded as irrelevant under the limited judicial review permitted by section **1094**. **5**. Second, appellant argues that the receipt of the declarations into **evidence** over objection violated the evidentiary rules governing civil trials since the declarations constituted inadmissible **hearsay**. For the reasons to be explained, we hold that the trial court in an **administrative** mandamus proceeding may admit declarations into **evidence** over a general **hearsay** objection, and such declarations are **not** made inadmissible by their reference to post-hearing events; however, in this case certain of the declarations and portions of others should have been excluded either because Windigo failed to lay the foundation required by section **1094**. **5**, subdivision (e) or because they contained conclusions **not** based on personal knowledge. Although certain declarations were erroneously admitted, we further conclude that the error does **not** require a reversal ***** since there is substantial **evidence** in the **administrative** record apart from the declarations to **support** the judgment, and it is **not** reasonably probable that the trial court would have reached a different result absent the "new" **evidence** since its effect was merely cumulative (Cal.Const., art. VI, s 13).

[2][3] The declaration battle at the superior court hearing indicates that the trial court and Windigo did **not** fully comprehend the limited nature of the judicial review****** provided by section **1094**. **5**. The inquiry in such a review extends only to whether the **administrative agency** has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion (s **1094**. **5**, subd. (b)). (Abuse of discretion is established if the respondent has **not** proceeded in the manner provided by law, the decision is **not supported** by the **findings**, or the **findings** are **not supported** by the **evidence** (Ibid.)). "It is **not** contemplated by the code provision that there should be a trial de novo before the court reviewing the **administrative agency's** action even under the independent review test." (Hadley v. City of Ontario (1974) 43 Cal.App.3d 121, 127, 117 Cal.Rptr. 513, 517; see generally, Netterville, Judicial Review: The "Independent Judgment" Anomaly (1956) 44 Cal.L.Rev. 262.) Public policy requires a litigant to produce all existing evidence on his behalf at the administrative hearing (see Akopiantz v. Board of Medical Examiners (1961) 190 Cal.App.2d 81, 93, 11 Cal.Rptr. 810). Only where the record is augmented within the strict limits set forth in the statute is evidence on the main issues ever received in the superior court (Deering, Cal. Administrative Mandamus (Cont.Ed.Bar 1966) p. 86).

[4] In the present case, Windigo filed supplemental declarations explaining why its officers, the original declarants, were unable to testify at the administrative hearing. The reason given was that the

officers' presence was required at the plant because of the strike. Such a reason is patently insufficient since there is no showing why their testimony could not have been presented at the administrative hearing by way of affidavit. Thus, the trial court clearly erred in admitting the declaration of Robert Fritz. The court also erred in admitting the declaration of Beatrice Fritz insofar as it contained reference to facts or events which were in existence at the date of the administrative hearing; there was no showing as to why Ms. Fritz could not have testified to these facts before the ALJ or why she could not have presented this testimony by affidavit to the Board.[FN3]

> FN3. The trial court also erred in not entering a specific finding on each objection as it related to a particular declaration. Furthermore, the court did not specify whether the declarations were admissible as evidence improperly excluded at the administrative hearing or as evidence which could not have been produced below in the exercise of due diligence. Failure to adequately focus on the individual declarations renders appellate review exceedingly difficult.

596** [5] In keeping with the principle of limited judicial review of agency decisions, appellant asks us to restrict the newly discovered evidence principle articulated in section 1094.5, subdivision (e) to evidence that was in existence at the date of the administrative hearing so that it would have been produced at the hearing if the petitioner had known of its existence. Appellant seeks to draw an analogy from the general rule of appellate review of trial court decisions that error cannot be predicated upon matters occurring after the trial court has rendered its judgment. The appeal reviews the correctness of the judgment or order as of the time of its rendition; leaving later developments to be handled in subsequent litigation. (See People's Home Sav. Bank v. Sadler (1905) 1 Cal.App. 189, 192, 81 P. 1029; 6 Witkin, Cal.Procedure (2d ed. 1971) Appeal, s 220, p. 4210-4211.) However, judicial review of administrative agency decisions is not the same as normal appellate review. Mandamus review of agency decisions is grounded on the fact that the agency does not have full judicial power in the constitutional sense; such power is vested only in the courts of record (Cal.Const., art. VI, s 1; see art. III; Bixby v. Pierno (1971) 4 Cal.3d 130, 141-144, 93 Cal.Rptr. 234, 481 P.2d 242). For this reason, the independent judgment review under section 1094.5 has been described as a limited trial de novo where, to save the time and expense required to remand the case to the agency for reconsideration in light of the new evidence, the superior court is authorized to consider the new evidence in reviewing the administrative decisions if it chooses to do so. This accords with the traditional rule that mandamus, unlike certiorari, is an equitable proceeding designed to achieve justice*70** where no other remedy is available. (Dare v. Bd. Of Medical Examiners (1943) 21 Cal.2d 790, 796-801, 136 P.2d 304.) "(A)dministrative mandamus did not thereby acquire a separate and distinct legal personality. It is not a remedy removed from the general law of mandamus or exempted from the latter's established principles, requirements and limitations." (Grant v. Board of Medical Examiners (1965) 232 Cal.App.2d 820, 826, 43 Cal.Rptr. 270, 274.)

[6] When the Legislature granted the superior court the discretion to receive "relevant **evidence** which, in the exercise of reasonable diligence, could **not** have been produced or which was improperly excluded at the (**administrative**) hearing," it reasonably may be inferred that it meant to authorize the receipt of ***597 evidence** of events which took place after the **administrative** hearing. Mobile Oil Corp. v. Superior Court (1976) 59 Cal.App.3d 293, 130 Cal.Rptr. 814 (hrg. den.) **supports** this view. There, the trial court had entered an order limiting the oil company's right of discovery in an **administrative** mandamus action to acts occurring Before the date of the **administrative** hearing. The Court of Appeal issued a writ of prohibition striking the portion of the order limiting discovery to prior events, holding that "(**e)vidence** of acts, data, reports and other **evidence** within the limits of section **1094. 5**, subdivision (d) (now subd. (e)) is admissible regardless of whether it deals with events which occur before or after the date of the (**administrative**) hearing." (Id., at p. 306, 130 Cal.Rptr. at p. 824; see also Deering, Cal. **Administrative** Mandamus, Supra, pp. 218-223.) We conclude that the superior court is authorized under section **1094. 5**, subdivision (e) to receive relevant **evidence** of events which transpired after the date of the **agency's** decision.[FN4]

> FN4. This does **not** mean that the trial court should admit such **evidence** in all cases. In keeping with the principle that the **adminis-**

> **trative agency** should have the first opportunity to decide the case on the basis of all of the **evidence**, the better practice might be to remand the action for **agency** redetermination in the light of the new **evidence**, particularly where the **evidence** would have been crucial to the **administrative** decision.

[7] We turn now to the propriety of the use of affidavits in the mandamus action. The general rule in civil actions is that absent statutory authorization, stipulation of the parties, or a waiver by failure to object, an affidavit (Code Civ.Proc., s 2003) or a declaration under penalty of perjury (Code Civ.Proc., s 2015.5) is not competent evidence; it is hearsay because it is prepared without the opportunity to cross-examine the affiant. (Evid.Code, ss 300, 1200; see Code Civ.Proc., s 2009; Witkin, Cal.Evidence (2d ed. 1966) s 628, p. 588.) If all the evidentiary rules governing civil trials applied at a section **1094. 5** hearing, Windigo's declarations should **not** have been admitted.

[8][9] On the other hand, the presentation of **evidence** by affidavit is common practice at **administrative** hearings. For **agencies** under the **Administrative** Procedure Act (Gov.Code, ss 11500 et seq.), affidavits may serve as direct **evidence** if no request to cross-examine is made. (Gov.Code, s 11514; see **Administrative Agency** Practice (Cont.Ed.Bar 1970) s 2.84, pp. 119-120.) Although the Board is **not** governed by the APA, the Unemployment Insurance Code provides in pertinent part: "The Appeals Board and its representatives and referees are **not** bound by common law ***598** or statutory rules of **evidence** or by technical or formal rules of procedure but may conduct the hearings and appeals in such manner as to ascertain the substantial rights of the parties. . . . " (Unemp.Ins.Code, s 1952.) The regulations adopted by the Employment Development Department provide "(a)ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions." (Tit. 22, Cal.Admin.Code, Appeals Board, s 5038, subd. (c).) Under this standard, affidavits by persons as to facts within their personal knowledge would qualify as competent evidence provided****71** the opposing party's right to cross-examine is fully protected.

[10][11] Code of Civil Procedure section 1094.5, subdivision (e) authorizes the court to admit such evidence as is relevant and which, in the exercise of reasonable diligence, "could not have been produced or which was improperly excluded at the (administrative) hearing." The words "such evidence" reasonably may be construed to mean the type of evidence that could have been produced at the administrative hearing but for the agency's wrongful exclusion or the petitioner's inability to produce it by due diligence. If an affidavit should be wrongly excluded at the administrative hearing, it would be admissible in the superior court. Similarly, if by the exercise of due diligence a party was unable to present evidence at the administrative hearing which could have been admitted by way of affidavit, he should be permitted to introduce the same evidence in the superior court by affidavit. In short, we see no reason why evidence relevant to the agency decision should not be admitted in the superior court under the same rules as those governing the admissibility of evidence at the administrative hearing. We conclude therefore that Code of Civil Procedure section 1094.5, subdivision (e) constitutes statutory authority for the use of affidavits as direct evidence at administrative mandamus hearings in the superior court, subject of course, to the rules governing the right of cross-examination and to the prohibition

[12] We now examine the declaration offered by the Board in response to the Windigo declarations. The Board filed a declaration by Kermit Nichols, a supervisor in the unemployment insurance section of the ***599** Hanford office of the Employment Development Department, to the effect that he had reviewed the files on the Windigo trade dispute to determine whether any of the claimants had reported to his office that they had applied for work at Windigo after the date the trade dispute began. He then stated, "The following people reported that they had applied for work at Windigo Mills . . . " thus implying they had tried to return to their job while the dispute was pending. Although Windigo acknowledged the Board's right to present evidence by affidavit, it objected on the specific ground that Nichols' declaration contained inadmissible double hearsay in that it was based on statements made to him by third parties. Such objection was valid, and the trial court properly excluded the declaration (Evid.Code, s 1200).

92 Cal.App.3d 586, 155 Cal.Rptr. 63
(Cite as: 92 Cal.App.3d 586, 155 Cal.Rptr. 63)

THE ADMINISTRATIVE RECORD SUPPORTS THE JUDGMENT

[13] Appellant concedes that the standard for judicial review of decisions of the Unemployment Insurance Appeals Board is the independent judgment standard rather than the substantial evidence test, citing Kilpatrick's Bakeries, Inc. v. Unemployment Ins. Appeals Bd. (1978) 77 Cal.App.3d 539, 143 Cal.Rptr. 664 (hrg. den.). Thus, the trial court properly weighed the evidence at the administrative hearing.[FN5]

FN5. We are aware of the decision in Interstate Brands v. Unemployment Insurance Appeals Bd. (1979) 90 Cal.App.3d 85, 153 Cal.Rptr. 166, decided March 5, 1979, holding that on review of the appeals board's grant of unemployment insurance benefits to employees, the employer's interest in his unemployment insurance account is Not a vested fundamental right entitling the employer to independent judicial review. No petition for review was filed in that case. Although the question is close, we believe the analysis in Kilpatrick's Bakeries, Inc. v. Unemployment Ins. Appeals Bd., supra, is more persuasive. In Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 112 Cal.Rptr. 805, 520 P.2d 29, the court expanded the scope of the judiciary's substantive power under the independent judgment test by holding that the right to a service-connected death allowance a purely economic interest affected a fundamental vested right (see Travis, Scope of "Independent Judgment" Review (1975) 63 Cal.L.Rev. 27).

[14] The scope of our appellate review, however, is limited to a determination of whether the trial court's decision is supported by substantial evidence. The judgment will be upheld if there is any credible evidence in support of the superior court findings; any contrary evidence must be disregarded. (Moran v. Board of Medical Examiners (1948) 32 Cal.2d 301, 196 P.2d 20; see also Deering, Cal.Administrative Mandamus, Supra, s 15.25, pp. 280-281.)

[15] Of primary importance in the present case is the rule that an applicant for unemployment insurance benefits has the burden of establishing eligibility. (Loew's Inc. v. California Emp. etc. Com. (1946) 76 Cal.App.2d 231, 238, 172 P.2d 938; Jacobs v. California Unemployment Ins. Appeals Bd. (1972) 25 Cal.App.3d 1035, 1039, fn. 7, 102 Cal.Rptr. 364.)

***600** In Ruberoid Co. v. California Unemployment Ins. Appeals Board (1963) 59 Cal.2d 73, 27 Cal.Rptr. 878, 378 P.2d 102, the Supreme Court explained the effect of Unemployment Insurance Code section 1262 (see fn. 1, Supra) as follows:

"(T)he disqualification of the section must rest upon two elements: the worker ****72** must voluntarily leave or remain away from his employment because of a trade dispute. . . . (T)he first prerequisite involves a volitional test and the second, a causational test." (Id., at p. 77, 27 Cal.Rptr. at p. 881, 378 P.2d at p. 105.)

Whether the employees voluntarily remain away from work because of the labor dispute is a determination that must be made in the context of particular facts (Isobe v. Unemployment Ins. Appeals Bd. (1974) 12 Cal.3d 584, 589, 116 Cal.Rptr. 376, 526 P.2d 528).

[16][17][18] In the present case, it is undisputed that the claimants voluntarily left work because of a labor dispute. The only question is whether they remained away from work voluntarily because of the dispute. Evidence to support the trial court's determination that this was the case is as follows: Ms. Fritz testified that there were openings for the strikers despite the hiring of the new employees. She testified that due to increased demand, the plant had openings in every job classification, including 60 openings for machine operators. The evidence before the ALJ also demonstrated that a number of striking employees who had requested to return to work had been reinstated with full benefits. Importantly, there was no evidence suggesting that any employee who wanted to work had been refused a job. Moreover, even if there were insufficient openings for All the strikers, this would not compel the trial court to find all of the claimants eligible. In Isobe v. Unemployment Ins. Appeals Bd., supra, 12 Cal.3d 584, 116 Cal.Rptr. 376, 526 P.2d 528, only 85 percent of the strikers' jobs remained open. Some of the strikers had been permanently replaced, yet the court held that since the majority of the jobs were still open, the workers who did not return to fill the openings were ineligible for benefits (Id., at pp. 589-590, fn. 7, 116 Cal.Rptr. 376,

526 P.2d 528). That the new workers were hired on a permanent basis does not mean that the striking workers had been permanently discharged where, as in the instant case, there were always jobs available due to the dramatic increase in the employer's business during the strike period.

In Thomas v. California Emp. Stab. Com. (1952) 39 Cal.2d 501, 247 P.2d 561, it is suggested that unless there is an Unequivocal act By the employer discharging the strikers, the claimants must demonstrate willingness to return to work in order to be eligible for unemployment benefits. In that case the employer had sent out termination notices yet the employees were held ineligible to receive benefits because there was ***601** no evidence that the notices had anything to do with the claimants' decision to remain out of work. None of the claimants had testified that he would have returned to work if he had not been discharged or that he would have been willing to cross the picket line (Id., at pp. 505-506, 247 P.2d 561). The employer's action of sending out the termination notices was not viewed as sufficient to break the causal connection between the labor dispute and the claimants' unemployment, because the employer equivocated as to whether the employees were terminated. During the period that the termination notices were issued, the employer was also sending out requests to the employees to return to work. (See, conc. opn., Traynor, J., 39 Cal.2d at pp. 507-508.) Since there was no unequivocal discharge of the employees, the majority in Thomas found it significant that the employees had not demonstrated their willingness to return to work.

The evidence in the present case does not establish that the employer acted unequivocally to terminate the strikers. Although the employer did hire some permanent workers to replace strikers and keep the plant operating, this does not compel a result that all of the strikers were terminated thereby becoming eligible for benefits (see Rice Lake Creamery Co. v. Industrial Commission (1961) 15 Wis.2d 177, 112 N.W.2d 202, holding that permanent replacement of strikers does not terminate the employment status of the strikers as a matter of law).

Appellant contends that Ruberoid, supra, compels a finding that the claimants in the present case had been permanently discharged and thus were entitled to benefits. ****73** In Ruberoid the employer had sent a letter to its striking employees stating that " '(u)nless you report . . . for work . . . , You will be permanently replaced' " (emphasis added, 59 Cal.2d at p. 75, fn. 1, 27 Cal.Rptr. at pp. 879-80, 378 P.2d at pp. 103-104). In Ruberoid the employer also sent the strikers notice that they had been permanently replaced and enclosed a check for their pro rata vacation pay to the date of the strike. Also, in Ruberoid, upon applying for work, eight of the strikers were not rehired (59 Cal.2d at p. 76, 27 Cal.Rptr. 878, 378 P.2d 102). In the present case, Ms. Fritz' letter to the strikers merely informed them that Windigo "had the right" to permanently replace them if they did not return to work. The evidence shows that all strikers who requested the right to return to work were immediately hired and all seniority privileges were reinstated.

We hold there is substantial evidence in the administrative record to support the trial court's implied finding that the striking employees could have returned to work if they had wanted to cross the picket line; therefore, there is adequate support for the trial court's decision that the ***602** claimants were ineligible for unemployment benefits under the provisions of section 1262.

THE JUDGMENT AND ORDERS ISSUED BY THE TRIAL COURT

Appellant's final contention is that the trial court erred by including in its judgment certain orders concerning the charging of unemployment benefits to Windigo's reserve account. The portions of the judgment objected to are as follows:

"IT IS FURTHER ORDERED that Petitioner's Unemployment Insurance Reserve Account shall not be charged with the payments illegally made to the striking employees listed in Exhibit 'A' hereto, that Petitioner's Unemployment Insurance Contributions shall not be increased by reason of the payments illegally made to the striking employees and that an increase in Petitioner's rate of contribution which has already occurred because of the illegal charge to Petitioner's Reserve Account shall be and is hereby reversed. Petitioner's rate of contribution shall be recomputed in accordance with the terms of this Judgment;

"IT IS FURTHER ORDERED that if the Petitioner's Unemployment Insurance Reserve Account has been charged with all or any of the payments made

to the striking employees listed in Exhibit 'A' hereto, such entries shall be reversed and Petitioner's Unemployment Insurance Reserve Account should be credited with the amounts erroneously charged.

"IT IS FURTHER ORDERED that any further claims for Unemployment Insurance Benefits by any employee of Petitioner who became unemployed by result of the aforementioned trade dispute be denied or if they are not denied, payments to such claimants shall be made from the Employment Development Department Balancing Account and not from Petitioner's Reserve Account."

[19][20] Appellant contends that the above orders were improper because they were not within the trial court's jurisdiction and because certain portions of the above order were in violation of Unemployment Insurance Code section 1338. That section provides that:

"If the Appeals Board issues a decision allowing benefits the benefits shall be paid regardless of any further action taken by the director, the Appeals Board, or any other administrative agency, and regardless of any appeal or mandamus, or ***603** other proceeding in the courts. If the decision of the Appeals Board is finally reversed or set aside, no employer's account shall be charged with the benefits paid pursuant to this section."

In light of the first sentence of that section, the trial court's order was invalid insofar as it purported to require the denial of future benefits to the claimants. The second sentence of section 1338 indicates that the other portions of the trial court's order which stated that Windigo's reserve account should not be charged with the payments ****74** made to claimants were unnecessary; the statute itself provides for that result.

Appellant also correctly argues that the trial court's order regarding the reserve account was improper because the agency charged with administering reserve accounts at the time the order was made (the Department of Benefit Payments) was not a party before the court.

The judgment ordering issuance of a writ of mandate to set aside the decision of the Board is affirmed; however, the other portions of the judgment are improper and should be stricken. The matter is remanded to the trial court with directions to enter a new judgment in accordance with the views expressed herein.

GEORGE A. BROWN, P. J., and BEST (Sitting under assignment by the Chairperson of the Judicial Council), J., concur.
Hearing denied; BIRD, C.J., dissenting.

Cal.App., 1979.
Windigo Mills v. Unemployment Ins. Appeals Bd.
92 Cal.App.3d 586, 155 Cal.Rptr. 63

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