

**OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA**

County Government Center
70 West Hedding Street
East Wing, 9th Floor
San José, California 95110-1770

(408) 299-5900
(408) 292-7240 (FAX)



**Tony LoPresti
COUNTY COUNSEL**

**Kavita Narayan
CHIEF ASSISTANT COUNTY COUNSEL**

Robert M. Coelho
Michaela L. Lewis
Steve Mitra
Elizabeth G. Pianca
Douglas M. Press
Relic Sun
Gita C. Suraj
ASSISTANT COUNTY COUNSEL

October 20, 2025



Juliana F. Gmur
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: Comment on Draft Expedited Parameters and Guidelines
Criminal Procedure: Discrimination, 24-TC-02
Statutes 2022, Chapter 739, Section 5 (AB 256); Penal Code Section 745,
subd. (j)(3)
County of Los Angeles, Claimant

Dear Director Gmur:

The County of Santa Clara ("County") files the following comment to the Commission on State Mandates ("Commission") in response to its Draft Expedited Parameters and Guidelines in test claim 24-TC-02 ("Test Claim"), concerning discrimination in criminal procedure.

On September 29, 2025, the Commission issued its decision ("Decision") approving the Test Claim and finding that Penal Code sections 745(j)(3) and 1473(f), as amended by the Racial Justice Act for All ("Test Claim Statute"),¹ imposed a reimbursable state-mandated program within the meaning of article XIII B, section 6 of

¹ Stats. 2022, ch. 739 (AB 256). Subdivision (f) of Penal Code section 1473 was later relettered as subdivision (e).

Letter to: Commission on State Mandates
Re: Comment on Draft Expedited Parameters and Guidelines, 24-TC-02
Date: October 20, 2025
Page 2 of 6

the California Constitution and Government Code section 17514, beginning July 1, 2023, by requiring counties to perform the following new state-mandated activity:

Commencing January 1, 2024, provide counsel to represent indigent habeas corpus petitioners whose criminal judgments have been entered before January 1, 2021, and are currently serving a sentence in state prison or county jail or committed to the Division of Juvenile Justice, on their petition alleging a violation of the [Racial Justice Act] under Penal Code section 745(a), when appointed by the court.

(Decision at p. 5.)

DISCUSSION

Following the Decision, the Draft Expedited Parameters and Guidelines limit reimbursement to activities undertaken only when counsel is appointed by the court. (See Draft Expedited Parameters & Guidelines, at p. 1.) Under Government Code 17557(a), the proposed parameters and guidelines may also include “proposed reimbursable activities that are *reasonably necessary* for the performance of the state-mandated program.” (Italics added.) To properly reflect all activities reasonably necessary to implement the new state-mandated activity, the County respectfully requests that the Commission revise the proposed parameters and guidelines to clarify that the costs associated with the following activities are also reimbursable: (1) the costs associated with investigating the Racial Justice Act claim and preparing the petition prior to, and irrespective of, official appointment as habeas counsel; and (2) the costs of requesting court transcripts, as well as prison records from the California Department of Corrections and Rehabilitation (CDCR).

1. The costs associated with investigating a Racial Justice Act claim and preparing the petition prior to, and irrespective of, official appointment as habeas counsel are reasonably necessary to implement the new state-mandated activity.

Penal Code section 1473(f) (later relettered as subdivision (e)) mandates that courts must appoint counsel if the petitioner cannot afford counsel and the petition alleges facts that would establish a Racial Justice Act violation under Penal Code section 745(a). After a court appoints a public defender or other County defense counsel agency as counsel for a petitioner under Penal Code section 987.2,² the

² In *Bemore v. Superior Court* (2025) 108 Cal.App.5th 1125, 1148, the Fourth District Court of Appeal concluded that Penal Code section 987.2 is the exclusive mechanism for the selection and assignment of counsel for indigent litigants in superior court in noncapital habeas proceedings alleging Racial Justice Act claims. Section 987.2 requires courts to appoint the primary public defender, except upon a finding of good cause if the primary public defender is unavailable. (*Id.* at pp. 1152–1153.)

Letter to: Commission on State Mandates
Re: Comment on Draft Expedited Parameters and Guidelines, 24-TC-02
Date: October 20, 2025
Page 3 of 6

diligent representation of the petitioner might involve a thorough investigation of the Racial Justice Act claim, including hiring experts and investigators, reviewing records, and interviewing potential witnesses. Under the Draft Expedited Parameters and Guidelines, such activities are reimbursable.

Habeas corpus petitions alleging Racial Justice Act claims may also be initiated by the public defender's office or other County defense agency. Although defense counsel are not responsible for investigating all possible bases for collateral attack on a judgment, they have "an ethical obligation to advise their client of the course to follow to obtain relief, *or to take other appropriate action*" if they learn of facts that would support a petition for habeas corpus. (See *In re Clark* (1993) 5 Cal.4th 750, 784 fn. 20 [italics added], abrogated by statute on other grounds as recognized by *In re Whalen* (2025) 111 Cal.App.5th 1195.) Accordingly, defense counsel who become aware of a potential Racial Justice Act claim—for example, through their prior representation of a client at trial or their knowledge of bias in local policing, prosecution, and sentencing practices—must either advise their client of the course to follow to obtain relief or take other appropriate action. Either way, they would, at a minimum, look into or screen the potential Racial Justice Act claim. As recognized in the following guidance found among the resources provided to panel appellate attorneys by the Sixth District Appellate Program:

Whichever way you choose to go, you need to investigate the possible basis of collateral relief. It is difficult to advise the client what course s/he could take without knowing all the facts. Your investigation might show there is no issue which could result in a reversal. On the other hand, your investigation might uncover facts which are essential to advising your client what course to take or to taking other appropriate action.^[3]

Moreover, merely advising their client of the course to follow may be insufficient to satisfy their ethical obligations if the client is incapable—for example, because of mental health issues or developmental disabilities—of pursuing such relief without the assistance of counsel. It could also result in delay in filing the petition, risking its denial as untimely for failure of the petitioner to seek habeas relief without substantial delay.⁴ These concerns are pertinent here where the clients are incarcerated. As recognized in

³ Paul Couenhoven, Investigation and Presentation of Habeas Claims in the State Appellate Court, at p.2, available at <https://sdap.org/wp-content/uploads/downloads/research/habeas/calhcp.pdf>.

⁴ See *Walker v. Martin* (2011) 562 U.S. 307, 312 (holding that a prisoner must seek habeas relief in California without substantial delay as measures from the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim), abrogated on other grounds by Penal Code section 1509(c), which set a one year filing deadline for habeas petitions in capital cases.

Letter to: Commission on State Mandates
Re: Comment on Draft Expedited Parameters and Guidelines, 24-TC-02
Date: October 20, 2025
Page 4 of 6

the following guidance found among the resources provided to panel appellate attorneys by the Sixth District Appellate Program:

In most cases merely advising your client what course to take is to guarantee that nothing will come of the potential issue. Our clients are generally incapable of adequately preparing a habeas petition and adequately supporting them with declarations and other documents. This is particularly true of the increasing numbers of clients for whom English is not their primary language. If you advise your client how to investigate a potential habeas claim and how to present that claim by preparing a habeas petition, suspecting that your client is incapable of doing the job correctly, it's difficult to say you have fulfilled your ethical obligation.

Therefore, in almost every case your ethical obligation will be to “take other appropriate action.” This means that if after investigation you determine there are possible bases for collateral relief, you should prepare a habeas petition and support it with a declaration or other documents.^[5]

Accordingly, to satisfy their ethical obligations, defense counsel may be required to investigate and even prepare and file a habeas petition alleging facts establishing a Racial Justice Act violation under Penal Code section 745(a) prior to appointment by the court. Notably, the obligation to investigate applies *even if ultimately defense counsel does not file a petition or the court does not appoint habeas counsel*. The investigation may include, for example, reviewing transcripts and other records, hiring experts to conduct statistical and other analyses, and deploying investigators to identify and interview potential witnesses to the biased interactions or policing practices.⁶ The Draft Expedited Parameters and Guidelines should be revised to clarify that these investigative activities are reimbursable.

Moreover, this clarification would be consistent with the Legislature's stated intent in enacting the Racial Justice Act to (1) “eliminate racial bias from California's criminal justice system because racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under Article VI of the California Constitution, and violates the laws and Constitution of

⁵ Paul Couenhoven, Investigation and Presentation of Habeas Claims in the State Appellate Court, at p.2, available at <https://sdap.org/wp-content/uploads/downloads/research/habeas/calhcp.pdf>.

⁶ See, e.g., *Bemore v. Superior Court*, *supra*, 108 Cal.App.5th at pp. 1141–1142, 1145 (recognizing that counsel's investigation of the petitioner's Racial Justice Act claim included “review of transcripts and case materials” and interviewing and preparing declarations for witnesses who were present when petitioner's trial counsel made racist remarks about petitioner and for counsel who admitted to making racist remarks).

Letter to: Commission on State Mandates
Re: Comment on Draft Expedited Parameters and Guidelines, 24-TC-02
Date: October 20, 2025
Page 5 of 6

the State of California” and (2) “reject the conclusion that racial disparities within our criminal justice are inevitable, and to actively work to eradicate them.”⁷

Because the investigative activities that need to occur prior to, and irrespective of, appointment by the court as habeas counsel are equally reasonable and necessary to the diligent representation of a petitioner as those activities conducted after appointment, the parameters and guidelines should be revised to clarify that they are reimbursable activities.

2. The costs associated with requesting court transcripts and CDCR records are reasonably necessary to implement the new state-mandated activity.

The costs of requesting court transcripts and CDCR records are also reasonably necessary to implement the new state-mandated activity. CDCR records may include all records related to the defendant’s sentencing, including but not limited to sentencing transcripts, court filings, sentencing reports filed by probation departments, and abstracts of judgment. Public defenders request court transcripts and prison records to search for evidence of Racial Justice Act claims including, for example, any biased statements made by the parties. Any costs imposed on them by the courts or CDCR to obtain these records should be reimbursed.

CONCLUSION

The County urges the Commission to revise its Draft Expedited Parameters and Guidelines to clarify that the following activities are reasonably necessary to implement the new state-mandated activity: (1) the costs associated with investigating the Racial Justice Act claim and preparing the petition prior to, and irrespective of, official appointment as habeas counsel; and (2) the costs of requesting court transcripts, as well as CDCR records.

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⁷ Stats. 2020, ch. 317, § 2(i) (AB 2542).

Letter to: Commission on State Mandates

Re: Comment on Draft Expedited Parameters and Guidelines, 24-TC-02

Date: October 20, 2025

Page 6 of 6

I certify by my signature below, under penalty of perjury, that the foregoing is true and correct to the best of my personal knowledge, information, or belief.

Very truly yours,

October 20, 2025

TONY LOPRESTI

County Counsel



STEVE MITRA

Assistant County Counsel

ANDREW GOTTLIEB

Lead Deputy County Counsel

TARA FONSECA

Deputy County Counsel

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On October 22, 2025, I served the:

- **Current Mailing List dated October 16, 2025**
- **City and County of San Francisco Office of the District Attorney's Comments on the Draft Expedited Parameters and Guidelines filed October 20, 2025**
- **Contra Costa County Office of the District Attorney's Comments on the Draft Expedited Parameters and Guidelines filed October 20, 2025**
- **Controller's Comments on the Draft Expedited Parameters and Guidelines filed October 20, 2025**
- **County of Marin Office of the County Counsel's Comments on the Draft Expedited Parameters and Guidelines filed October 20, 2025**
- **County of Santa Clara Office of the County Counsel's Comments on the Draft Expedited Parameters and Guidelines filed October 20, 2025**
- **County of Sonoma Office of the District Attorney's Comments on the Draft Expedited Parameters and Guidelines filed October 20, 2025**
- **Sacramento County Office of the District Attorney's Comments on the Draft Expedited Parameters and Guidelines filed October 20, 2025**
- **Stanislaus County Office of the District Attorney's Comments on the Draft Expedited Parameters and Guidelines filed October 20, 2025**

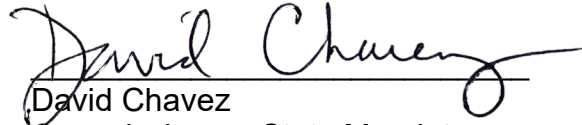
Criminal Procedure: Discrimination, 24-TC-02

Statutes 2022, Chapter 739, Sections 2 and 3.5 (AB 256); Penal Code Sections 745 and 1473, effective January 1, 2023

County of Los Angeles, Claimant

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 22, 2025 at Sacramento, California.

A handwritten signature in black ink, reading "David Chavez", with a horizontal line extending from the end of the signature.

David Chavez
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 10/16/25

Claim Number: 24-TC-02

Matter: Criminal Procedure: Discrimination

Claimant: County of Los Angeles

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

Adaoha Agu, *County of San Diego Auditor & Controller Department*

Projects, Revenue and Grants Accounting, 5530 Overland Avenue, Ste. 410 , MS:O-53, San Diego, CA 92123

Phone: (858) 694-2129

Adaoha.Agu@sdcounty.ca.gov

Scott Allen, *Director of Operations, Orange County District Attorney's Office*

300 North Flower Street, Santa Ana, CA 92703

Phone: (949) 898-0417

scott.allen@ocdapa.org

Rachelle Anema, *Assistant Auditor-Controller, County of Los Angeles*

Accounting Division, 500 W. Temple Street, Los Angeles, CA 90012

Phone: (213) 974-8321

RANEMA@auditor.lacounty.gov

Lili Apgar, *Specialist, State Controller's Office*

Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA 95816

Phone: (916) 324-0254

lapgar@sco.ca.gov

Socorro Aquino, *State Controller's Office*

Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 322-7522

SAquino@sco.ca.gov

Aaron Avery, *Legislative Representative, California Special Districts Association*

1112 I Street Bridge, Suite 200, Sacramento, CA 95814

Phone: (916) 442-7887

Aarona@csda.net

David Bass, Vice Mayor, *City of Rocklin*
3970 Rocklin Road, Rocklin, CA 95677
Phone: (916) 663-8504
David.Bass@rocklin.ca.us

Ginni Bella Navarre, Deputy Legislative Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8342
Ginni.Bella@lao.ca.gov

Guy Burdick, Consultant, *MGT Consulting*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 833-7775
gburdick@mgtconsulting.com

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

Rica Mae Cabigas, Chief Accountant, *Auditor-Controller*
Accounting Division, 500 West Temple Street, Los Angeles, CA 90012
Phone: (213) 974-8309
rcabigas@auditor.lacounty.gov

Evelyn Calderon-Yee, Bureau Chief, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740,
Sacramento, CA 95816
Phone: (916) 324-5919
ECalderonYee@sco.ca.gov

Julissa Ceja Cardenas, *California State Association of Counties*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
jcejacardenas@counties.org

Kate Chatfield, *California Public Defenders Association*
10324 Placer Lane, Sacramento, CA 95827
Phone: (916) 362-1686
katechatfield@cpda.org

Annette Chinn, *Cost Recovery Systems, Inc.*
705-2 East Bidwell Street, #294, Folsom, CA 95630
Phone: (916) 939-7901
achinnrcs@aol.com

Carolyn Chu, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8326
Carolyn.Chu@lao.ca.gov

Adam Cripps, Interim Finance Manager, *Town of Apple Valley*
14955 Dale Evans Parkway, Apple Valley, CA 92307
Phone: (760) 240-7000
acripps@applevalley.org

Elena D'Agustino, Public Defender, *County of Solano*
Office of the Public Defender, 675 Texas Street, Suite 3500, Fairfield, CA 94533

Phone: (707) 784-6700
edagustino@solanocounty.gov

Thomas Deak, Senior Deputy, *County of San Diego*
Office of County Counsel, 1600 Pacific Highway, Room 355, San Diego, CA 92101
Phone: (619) 531-4810
Thomas.Deak@sdcounty.ca.gov

Laura Dougherty, Attorney, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
Laura.Dougherty@csm.ca.gov

Kevin Fisher, Assistant City Attorney, *City of San Jose*
Environmental Services, 200 East Santa Clara Street, 16th Floor, San Jose, CA 95113
Phone: (408) 535-1987
kevin.fisher@sanjoseca.gov

Tim Flanagan, Office Coordinator, *Solano County*
Register of Voters, 678 Texas Street, Suite 2600, Fairfield, CA 94533
Phone: (707) 784-3359
Elections@solanocounty.com

Justin Garrett, Acting Chief Policy Officer, *California State Association of Counties (CSAC)*
1100 K Street, Ste 101, Sacramento, CA 95814
Phone: (916) 327-7500
jgarrett@counties.org

Juliana Gmur, Executive Director, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
juliana.gmur@csm.ca.gov

Chris Hill, Principal Program Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, 8th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Hill@dof.ca.gov

Tiffany Hoang, Associate Accounting Analyst, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-1127
THoang@sco.ca.gov

Ken Howell, Senior Management Auditor, *State Controller's Office*
Audits, Compliance Audits Bureau, 3301 C Street, Suite 725A, Sacramento, CA 95816
Phone: (916) 323-2368
KHowell@sco.ca.gov

Jason Jennings, Director, *Maximus Consulting*
Financial Services, 808 Moorefield Park Drive, Suite 205, Richmond, VA 23236
Phone: (804) 323-3535
SB90@maximus.com

Angelo Joseph, Supervisor, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816

Phone: (916) 323-0706

AJoseph@sco.ca.gov

Anne Kato, Acting Chief, *State Controller's Office*

Local Government Programs and Services Division, 3301 C Street, Suite 740, Sacramento, CA 95816

Phone: (916) 322-9891

akato@sco.ca.gov

Anita Kerezsi, *AK & Company*

2425 Golden Hill Road, Suite 106, Paso Robles, CA 93446

Phone: (805) 239-7994

akcompanysb90@gmail.com

Joanne Kessler, Fiscal Specialist, *City of Newport Beach*

Revenue Division, 100 Civic Center Drive , Newport Beach, CA 90266

Phone: (949) 644-3199

jkessler@newportbeachca.gov

Lisa Kurokawa, Bureau Chief for Audits, *State Controller's Office*

Compliance Audits Bureau, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 327-3138

lkurokawa@sco.ca.gov

Government Law Intake, *Department of Justice*

Attorney General's Office, 1300 I Street, Suite 125, PO Box 944255, Sacramento, CA 94244-2550

Phone: (916) 210-6046

governmentlawintake@doj.ca.gov

Eric Lawyer, Legislative Advocate, *California State Association of Counties (CSAC)*

Government Finance and Administration, 1100 K Street, Suite 101, Sacramento, CA 95814

Phone: (916) 650-8112

elawyer@counties.org

Kim-Anh Le, Deputy Controller, *County of San Mateo*

555 County Center, 4th Floor, Redwood City, CA 94063

Phone: (650) 599-1104

kle@smcgov.org

Fernando Lemus, Principal Accountant - Auditor, *County of Los Angeles*

Claimant Representative

Auditor-Controller's Office, 500 West Temple Street, Room 603, Los Angeles, CA 90012

Phone: (213) 974-0324

flemus@auditor.lacounty.gov

Erika Li, Chief Deputy Director, *Department of Finance*

915 L Street, 10th Floor, Sacramento, CA 95814

Phone: (916) 445-3274

erika.li@dof.ca.gov

Kenneth Louie, Chief Counsel , *Department of Finance*

1021 O. Street, Suite 3110, Sacramento, CA 95814

Phone: (916) 322-0971

Kenny.Louie@dof.ca.gov

Everett Luc, Accounting Administrator I, Specialist, *State Controller's Office*

3301 C Street, Suite 740, Sacramento, CA 95816

Phone: (916) 323-0766
ELuc@sco.ca.gov

Jill Magee, Program Analyst, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
Jill.Magee@csm.ca.gov

Darryl Mar, Manager, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
DMar@sco.ca.gov

Graciela Martinez, President, *California Public Defenders Association*
10324 Placer Lane, Sacramento, CA 95827
Phone: (916) 362-1686
gmartinez@pubdef.lacounty.gov

Michelle Mendoza, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403
Phone: (949) 440-0845
michellemendoza@maximus.com

Marilyn Munoz, Senior Staff Counsel, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-8918
Marilyn.Munoz@dof.ca.gov

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Patricia Pacot, Accountant Auditor I, *County of Colusa*
Office of Auditor-Controller, 546 Jay Street, Suite #202, Colusa, CA 95932
Phone: (530) 458-0424
ppacot@countyofcolusa.org

Arthur Palkowitz, *Law Offices of Arthur M. Palkowitz*
12807 Calle de la Siena, San Diego, CA 92130
Phone: (858) 259-1055
law@artpalk.onmicrosoft.com

Kirsten Pangilinan, Specialist, *State Controller's Office*
Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 322-2446
KPangilinan@sco.ca.gov

Trevor Power, Accounting Manager, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3085
tpower@newportbeachca.gov

Jonathan Quan, Associate Accountant, *County of San Diego*
Projects, Revenue, and Grants Accounting, 5530 Overland Ave, Suite 410, San Diego, CA 92123
Phone: 6198768518
Jonathan.Quan@sdcounty.ca.gov

Roberta Raper, Director of Finance, *City of West Sacramento*

1110 West Capitol Ave, West Sacramento, CA 95691

Phone: (916) 617-4509

robertar@cityofwestsacramento.org

Jonathon Raven, Executive Assistant, *California District Attorneys Association (CDA)*

2495 Natomas Park Drive, Suite 575, Sacramento, CA 95833

Phone: (916) 443-2017

jraven@cdaa.org

Jessica Sankus, Senior Legislative Analyst, *California State Association of Counties (CSAC)*

Government Finance and Administration, 1100 K Street, Suite 101, Sacramento, CA 95814

Phone: (916) 327-7500

jsankus@counties.org

Cindy Sconce, Director, *Government Consulting Partners*

5016 Brower Court, Granite Bay, CA 95746

Phone: (916) 276-8807

cindysconcecp@gmail.com

Camille Shelton, Chief Legal Counsel, *Commission on State Mandates*

980 9th Street, Suite 300, Sacramento, CA 95814

Phone: (916) 323-3562

camille.shelton@csm.ca.gov

Carla Shelton, Senior Legal Analyst, *Commission on State Mandates*

980 9th Street, Suite 300, Sacramento, CA 95814

Phone: (916) 323-3562

carla.shelton@csm.ca.gov

Paul Steenhausen, Principal Fiscal and Policy Analyst, *Legislative Analyst's Office*

925 L Street, Suite 1000, , Sacramento, CA 95814

Phone: (916) 319-8303

Paul.Steenhausen@lao.ca.gov

Kim Stone, Legislation, *California District Attorneys Association*

2495 Natomas Park Drive, Suite 575, Sacramento, CA 95833

Phone: (916) 443-2017

kim@stoneadvocacy.com

Jolene Tollenaar, *MGT Consulting Group*

2251 Harvard Street, Suite 134, Sacramento, CA 95815

Phone: (916) 243-8913

jolenetollenaar@gmail.com

Gregory Totten, Chief Executive Officer, *California District Attorneys Association*

2495 Natomas Park Drive, Suite 575, Sacramento, CA 95833

Phone: (916) 443-2017

gtotten@cdaa.org

Jessica Uzarski, Consultant, *Senate Budget and Fiscal Review Committee*

1020 N Street, Room 502, Sacramento, CA 95814

Phone: (916) 651-4103

Jessica.Uzarski@sen.ca.gov

Oscar Valdez, Auditor-Controller, *County of Los Angeles***Claimant Contact**

Auditor-Controller's Office, 500 West Temple Street, Room 525, Los Angeles, CA 90012

Phone: (213) 974-8302
ovaldez@auditor.lacounty.gov

Alejandra Villalobos, Management Services Manager, *County of San Bernardino*
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415
Phone: (909) 382-3191
alejandra.villalobos@sbcountyatc.gov

Renee Wellhouse, *David Wellhouse & Associates, Inc.*
3609 Bradshaw Road, H-382, Sacramento, CA 95927
Phone: (916) 797-4883
dwa-renee@surewest.net

Adam Whelen, Director of Public Works, *City of Anderson*
1887 Howard St., Anderson, CA 96007
Phone: (530) 378-6640
awhelen@ci.anderson.ca.us

R. Matthew Wise, Supervising Deputy Attorney General, *Department of Justice*
Attorney General's Office, 1300 I Street, Suite 125, PO Box 944255, Sacramento, CA 94244-2550
Phone: (916) 210-6046
Matthew.Wise@doj.ca.gov

Arthur Wylene, General Counsel, *Rural County Representatives of California (RCRC)*
1215 K Street, Suite 1650, Sacramento, CA 95814
Phone: (916) 447-4806
awylene@rcrcnet.org

Elisa Wynne, Staff Director, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
elisa.wynne@sen.ca.gov

Kaily Yap, Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Kaily.Yap@dof.ca.gov

Siew-Chin Yeong, Director of Public Works, *City of Pleasanton*
3333 Busch Road, Pleasanton, CA 94566
Phone: (925) 931-5506
syeong@cityofpleasantonca.gov

Morgan Zamora, Prison Advocacy Coordinator, *Ella Baker Center for Human Rights*
1419 34th Avenue, Suite 202, Oakland, CA 94601
Phone: (510) 428-3940
morgan@ellabakercenter.org

Helmholt Zinser-Watkins, Associate Governmental Program Analyst, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 700,
Sacramento, CA 95816
Phone: (916) 324-7876
HZinser-watkins@sco.ca.gov